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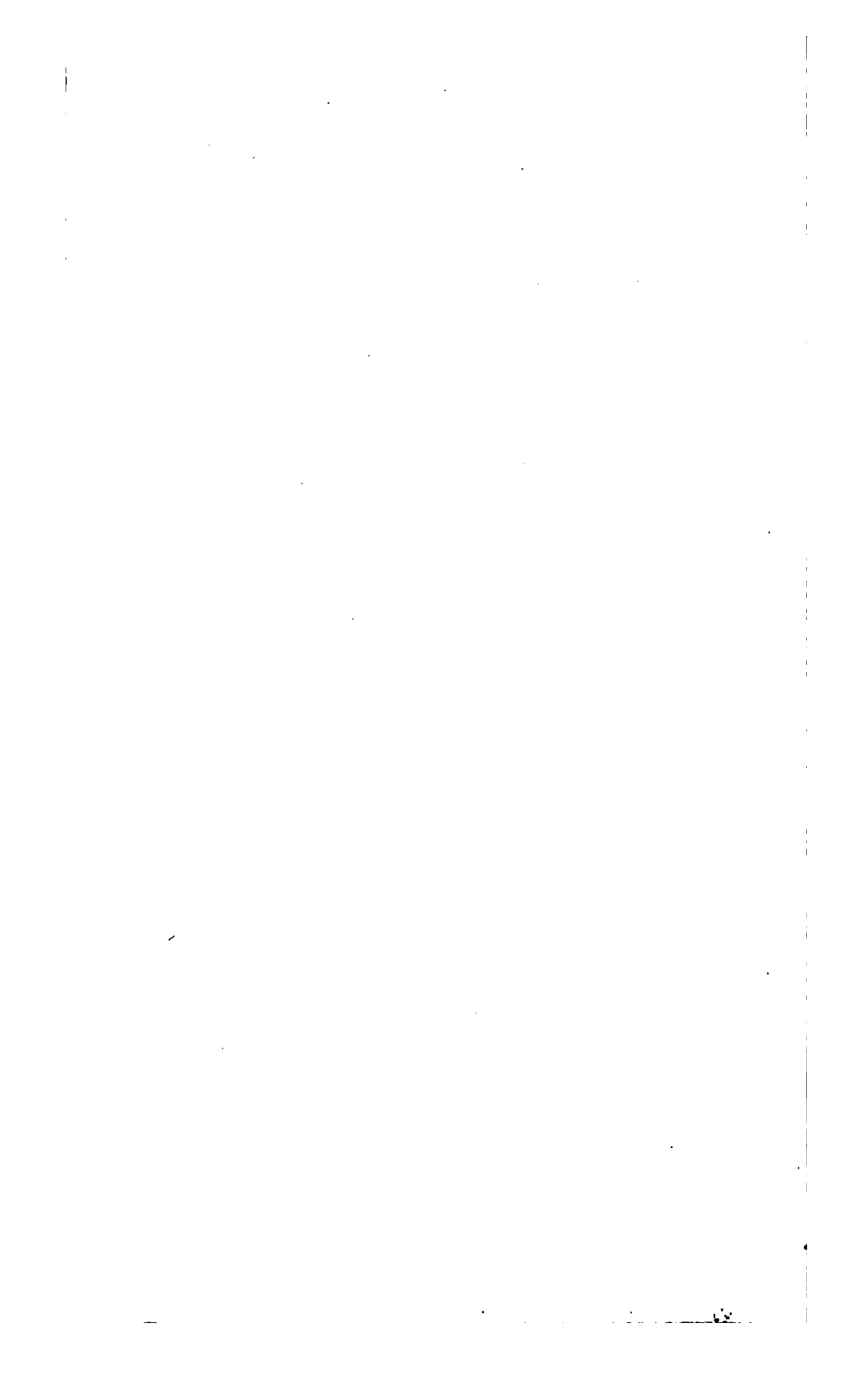
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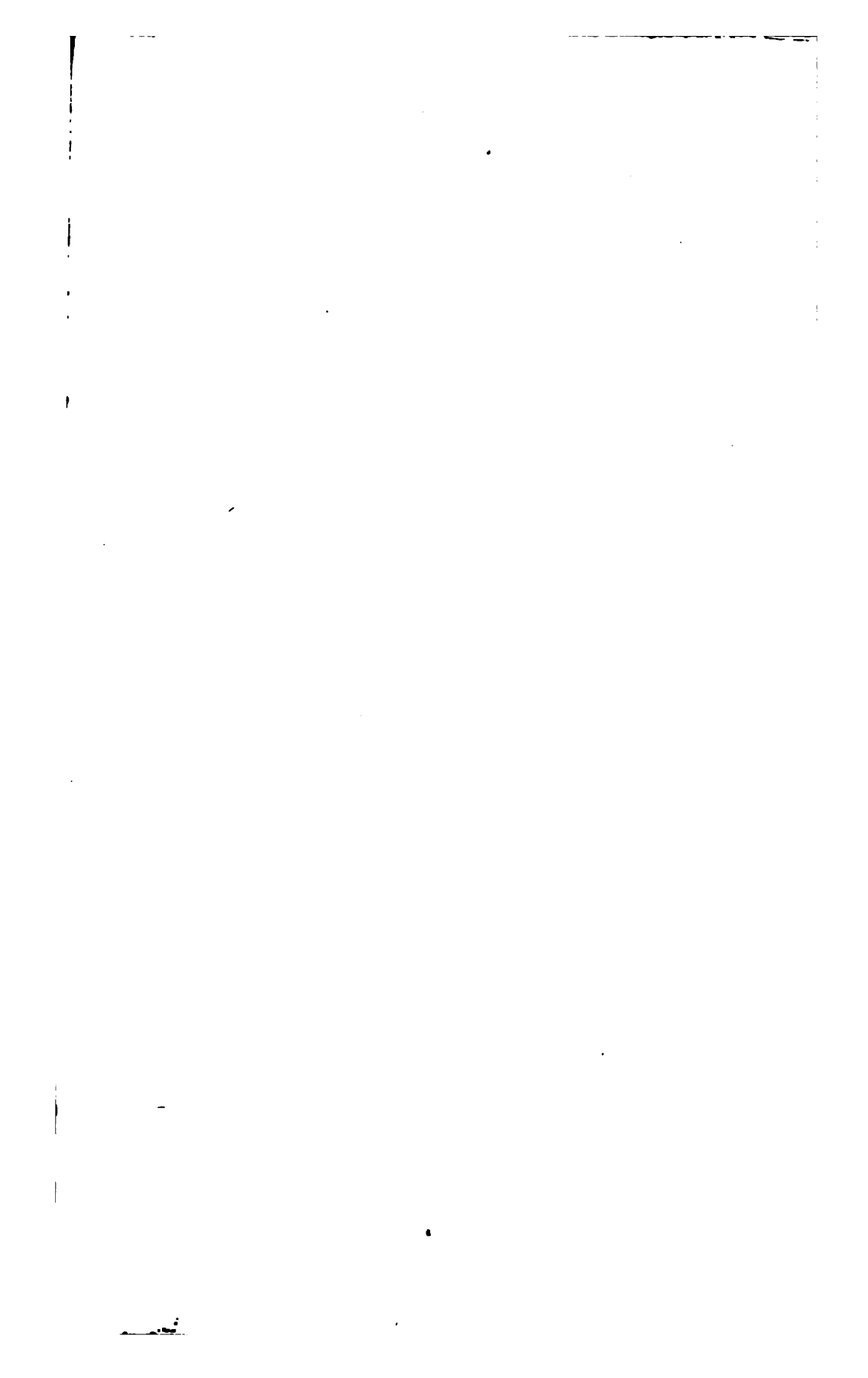
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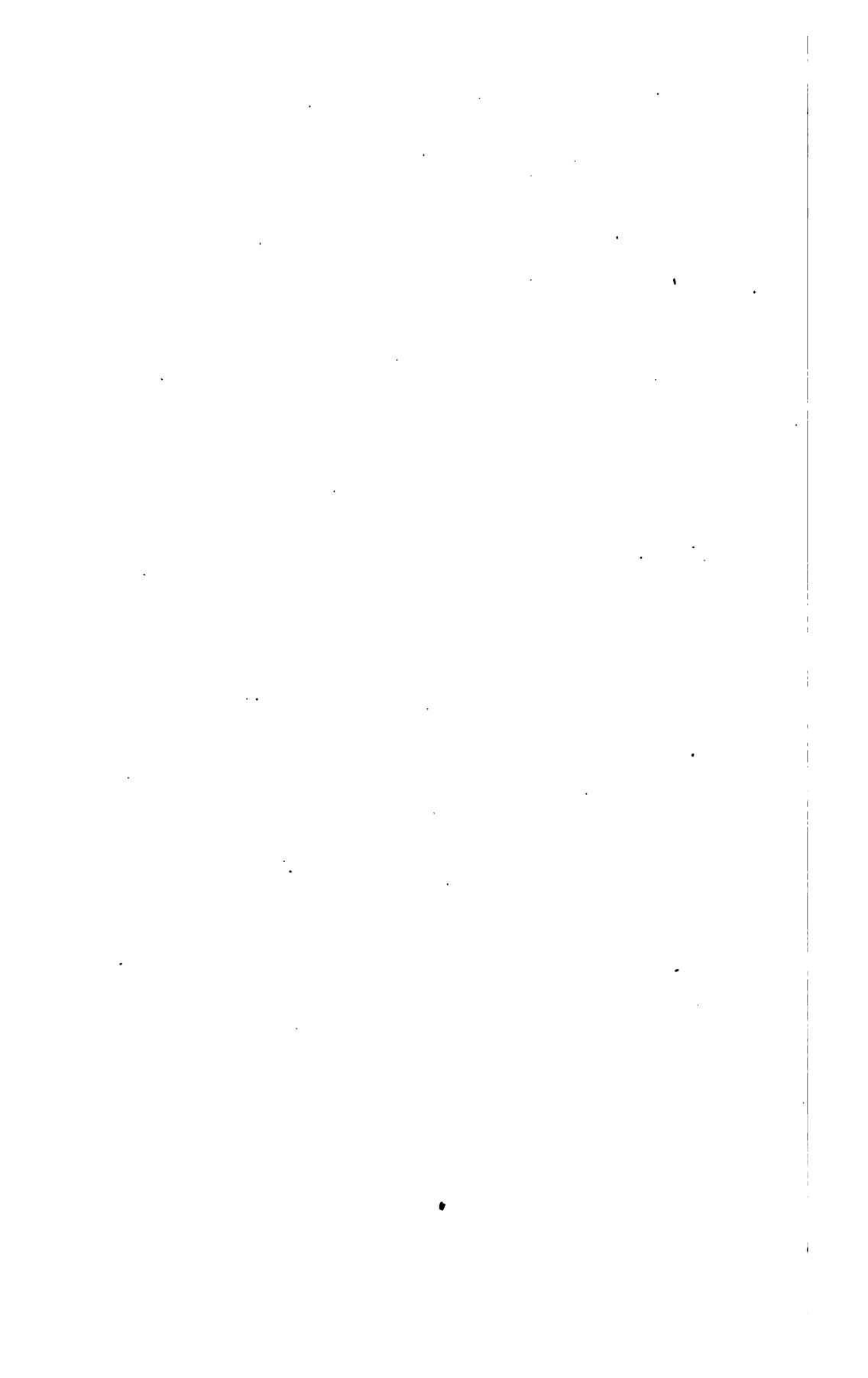
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A
D I G E S T
OF THE
CASES DECIDED AND REPORTED
IN THE
SUPERIOR COURT OF THE CITY OF NEW YORK,
THE
VICE CHANCELLOR'S COURT,
THE
SUPREME COURT OF JUDICATURE,
THE
COURT OF CHANCERY,
AND THE
COURT FOR THE CORRECTION OF ERRORS,
OF THE
STATE OF NEW YORK; .
FROM 1822 TO OCT. 1836;
WITH
TABLES OF THE NAMES OF THE CASES,
AND OF
TITLES AND REFERENCES:
BEING A SUPPLEMENT TO JOHNSON'S DIGEST.

PHILADELPHIA:
PUBLISHED BY E. F. BACKUS.
1838.

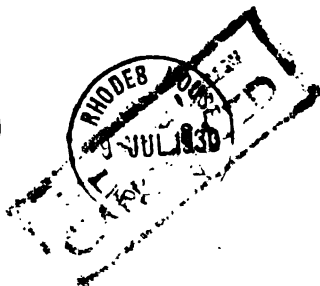
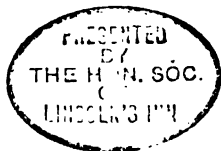
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- S. C. Same Case.
- S. P. Same Point.
- C. P. Court of Common Pleas.
- Ch. Chancellor.
- Ch. J. Chief Justice.
- J. Justice.
- Reg. Gen. General Rules and Orders.

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FROM 1823 TO 1836.

NATHAN SANDFORD,	.	.	appointed	.	.	January 27, 1823
SAMUEL JONES,	
REUBEN HYDE WALWORTH,	April 19, 1828

VICE-CHANCELLOR.

WILLIAM T. McCOWN,	.	.	appointed	.	.	May 9, 1831
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JUDGES OF THE SUPREME COURT.

Chief Justices.

JOHN SAVAGE,	.	.	appointed	.	.	January 29, 1823
SAMUEL NELSON,	.	.	.	.	.	September, 1836

Puisne Judges.

JACOB SUTHERLAND,	.	.	appointed	.	.	January 29, 1823
JOHN WOODWORTH,	.	.	.	.	.	February 6, 1823
WILLIAM L. MARCY,	.	.	.	.	.	January 21, 1829
SAMUEL NELSON,	.	.	.	.	.	February 2, 1831
GREENE C. BRONSON,	.	.	.	.	.	January 6, 1836
ESEK COWEN,	.	.	.	.	.	February, 1837

ATTORNEYS-GENERAL.

SAMUEL A. TALCOTT,	.	.	appointed	.	.	1823
GREENE C. BRONSON,	.	.	.	.	.	January 28, 1829
SAMUEL BEARDSLEY,	.	.	.	.	.	1836

JUDGES OF THE SUPERIOR COURT OF THE CITY OF NEW YORK.

SAMUEL JONES,	.	.	Chief Justice, appointed	.	.	April, 1828
JOSIAH OGDEN HOFFMAN,	}	Justices,	.	.	.	1828
THOMAS J. OAKLEY,	}		.	.	.	

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&c.

ABSCONDING AND ABSENT DEBTORS.

- (a) *By whom proceedings may be had under the act*; (b) *Against whom*; (c) *Trustees, their powers and commissions*; (d) *Supersedeas*; (e) *Who can claim dividends under the estate*; (f) *Who may act as commissioners*; (g) *Proof requisite to support proceedings under the act*; (h) *Payment of surplus to the debtor*,

- (a) *By whom proceedings may be had under the act.*

1. A foreign creditor is entitled to an attachment under the absconding debtor act. (1 R. S. 157.) *Ex parte Caldwell*, 5 Cow. 293.

2. A foreign creditor cannot proceed here under the absent and absconding debtor act (1 R. S. 157.) against a debtor residing abroad; the debt not being contracted within this state. *Ex parte Schroeder*, 6 Cow. 603.

- (b) *Against whom.*

3. The estate of debtors, who are abroad, is liable to an attachment, whether their absence from this state is permanent or temporary, voluntary or involuntary. The question in such a case is, where is the actual residence? and not where is the domicile? *In re Thompson*, 1 Wend. 43.

4. An attachment does not lie against an administrator for a demand against his intestate, under the act against absconding, concealed, and non-resident debtors. *In the matter of Hurd*, 9 Wend. 465.

5. The want of jurisdiction may be objected, even after the appointment of trustees. *Ibid.*

- (c) *Trustees, their powers and commissions.*

6. Where the demand of a creditor who sues out an attachment against an absconding debtor is unliquidated, it is competent to the trustees to assess the damages of the creditor in like manner as a jury would do in an action of covenant. *In the matter of Negus*, 7 Wend. 499.

7. The decisions of trustees under the absconding debtor act, in determining the amounts due to the several creditors, will be reviewed by the Supreme Court; if the trustees err in the application of a principle of law, the court will correct the error; but if they err on a question of fact or opinion, as in the assessment of unliquidated damages, their decision will not be set aside, unless clearly against the weight of evidence. *Ibid.*

8. Where in the assessment of damages for

the breach of a covenant, the trustees allowed a sum to a larger amount than would have been allowed by the court, yet as the court could not say that the damages were extravagant, they refused to set aside the decision of the trustees. *Ibid.*

9. Trustees under the act authorizing proceedings against absconding, concealed, and non-resident debtors, are entitled to their commissions on such sum as, on compromise, is paid by the debtor to the attaching creditor, although such money did not come to the hands of the trustees. *In the matter of Bunch*, 12 Wend. 280.

10. Such trustees are also entitled to costs in the prosecution by them of a *certiorari*, although the decision of the commissioner be confirmed by the court above. *Ibid.*

11. Trustees appointed under the absconding, concealed, and non-resident debtor act, are entitled to redeem the lands of the debtor, of whose estate they have charge. *Phyfe v. Riley*, 15 Wend. 248.

12. The appointment of trustees is conclusive evidence of the regularity of the previous proceedings, and that the officers issuing the attachment had jurisdiction in the matter. *Ibid.*

- (d) *Supersedeas.*

13. *Supersedeas* will be granted to an attachment under the act relative to absent and absconding debtors, if the process issued imprudently. Whether the judge who issues this process ought to receive affidavits of the debtor's departure or concealment, taken before another officer, *quære?* *Ex parte Chipman*, 1 Wend. 66.

14. This court will not entertain a motion in respect to the regularity of the proceedings of a commissioner under the act concerning absent, concealed, or absconding debtors, until after report made by the commissioner: the jurisdiction of the court to review the proceedings is acquired only by report made, or *certiorari* returned. *In the matter of Gilbert*, 7 Wend. 490.

15. Where persons proceeded against as absconding or concealed debtors satisfactorily show that they had not absconded or were not concealed, a *supersedeas* will be granted with costs, although the creditor had reason to believe that the debtors had absconded or were concealed. *In the matter of Warner, et al.* 3 Wend. 424.

16. A *supersedeas* to an attachment under the absconding, concealed, and absent debtor

act, will be granted on showing a settlement between the attaching creditor and the debtor, although trustees have been appointed; the rights of the trustees, however, will be protected, and time will be given to other creditors to come in. *In the matter of Bunch*, 9 Wend. 4. 473.

(e) *Who can claim dividends of the estate.*

17. 1. After the second dividend under the absconding debtor act, (1 R. S. 57.) no creditor can be received to prove his debt. *In the matter of Depyster*, 5 Cow. 266. 2. To entitle a creditor to a dividend, he must have been such at the time of the first publication of the proceedings under the act, pursuant to the second section. *Ibid.* 5 Cow. 266.

(f) *Who may act as commissioners.*

18. The judges of the Superior Court of the city of New York have a right to act individually on applications to them under the act for relief against absconding and absent debtors; but when they so officiate, they act as commissioners of the Supreme Court, and their proceedings must be returned to the latter Court. *In the matter of Fitch*, 2 Wend. 298.

(g) *Proof requisite to support proceedings under the act.*

19. To support proceedings under this act, proof by witnesses that they believe that the debtor resides out of the state is sufficient. But there must be evidence that the defendant is indebted within the state, either by showing that the contract was made here, or that the creditors resided here. *In the matter of Fitch*, 2 Wend. 298.

20. In proceedings under an attachment against an absconding or absent debtor, proof that the debtor has departed, or is concealed within the state, necessarily implies that the defendant is indebted within the state. *In the matter of Warner and Phelps*, 3 Wend. 425.

21. In an application for an attachment against the estate of an absent debtor, the nature of the indebtedness must be shown. *In the matter of Gilbert*, 7 Wend. 490.

(h) *Payment of surplus to the debtor.*

22. The estate of an absent debtor, which was attached under the act, having proved more than sufficient to pay all his debts, and a residue of real property remaining unsold, the trustees were desired to convey that property without selling it to the debtor, and were discharged of the trust. *Orr v. Post*, Hopk. Chancery, 10. [See COURTS OF JUSTICES OF THE PEACE.]

ACADEMIES.

1. The trustees of academies being empowered by statute to appoint and remove teachers at pleasure, cannot make any contract to abridge the right of removal in themselves or their successors. *Auburn Academy v. Strong*, 1 Hopk. 278

2. But the Court of Chancery has no power of visitation, and can take cognizance of the case only upon some ground of its proper jurisdiction, such as its power to cause contracts to be delivered up and cancelled. *Ibid.*

ACCORD AND SATISFACTION.

1. A parol accord and satisfaction (e. g. an agreement to receive, and an acceptance of, a deed of land) of the condition of a penal bond after the day of payment is a good bar to an action on such bond, since the statute, (1 R. S. 518. s. 6.) *Strong v. Holmes*, 7 Cow. 224.

2. The condition of a penal bond is the true amount due upon it as well after as before the day of payment. *Ibid.*

3. Accord and satisfaction of the condition is therefore valid either before or after the day of payment. *Ibid.*

4. The time of accord and satisfaction stated in a notice of special matter is not material, and may be departed from in evidence. *Ibid.*

5. An accord and satisfaction by one of several joint obligors is valid. *Ibid.*

6. Whether a plea of accord and satisfaction of a writ of error is good. *Quare*, per Leppencer Senator. *Clowes v. Dickenson*, 8 Cow. 328.

7. The acceptance in full satisfaction by a creditor of the note of a third person, for the whole amount due on a previous note given by his debtor, is an extinguishment of the original consideration; and such acceptance may be plead in bar to a recovery on the original note. *Booth v. Smith*, 3 Wend. 66.

8. The acceptance by a creditor of a dividend under a voluntary assignment made by a debtor, without the concurrence of his creditor, and without an agreement on the part of the creditor to accept the assignment in satisfaction of his debt, is not a bar to an action for the balance of the debt; no agreement in such case is obligatory, unless it assumes the form of a technical release. *Allen v. Roosevelt*, 14 Wend. 100.

9. When a creditor, on compromise with his debtor, accepts the note of a third person for a sum less than the debt due to him in full payment of such debt, the transfer and acceptance of such note may be pleaded as an accord and satisfaction in bar of an action for the recovery of any portion of the debt beyond the sum secured by the note. *Kellogg v. Richards*, 14 Wend. 116.

10. Where, upon such a compromise being made, the creditor endorsed upon a note he held against his debtor that he had received the note of a third person as a compromise for the full payment of the note of his debtor, and afterwards brought an action against his debtor, and offered to prove that at the time of the compromise the debtor verbally agreed to make a further payment in addition to the note transferred, so as in the whole to pay one dollar on the pound; it was held, that such evidence was inadmissible, as varying the written contract between the parties, and that the rule allowing evidence to explain or vary a receipt did not apply to a transaction like this, but was limited

and confined to a technical receipt in the strict sense of that term. *Ibid.*

11. Although a creditor who has signed a composition deed, and released his debtor from all demands, cannot in general sustain an action against such debtor for any demand arising or contract existing at the time of such composition; still, where such debtor had fraudulently released a judgment assigned by him to his creditor long previous to such composition, and the creditor signed the composition deed in ignorance of the fraud committed upon him, it was held, that notwithstanding the composition and release, an action lay at the suit of the creditor for a breach of the covenants contained in the assignment. *Russell v. Rogers*, 15 Wend. 351.

ACTIONS IN GENERAL.

- I. Election of actions.
- II. When a cause of action may be said to have accrued.
- III. Actions local or transitory.
- IV. Commencement of actions.

I. Election of actions.

1. Where an injury done to another by negligence is both direct or immediate, and consequential, the party injured has an election to bring case or trespass. *M'Allister v. Hammond*, 6 Cow. 342.

2. Thus, where the defendant so carelessly drove his horse and gig, as to run against the plaintiff in the street and knock her down, whereby she was injured and became permanently lame; *held*, that case was a proper action. *Ibid.*

3. An account for goods sold, all due, is an entire demand, incapable of being split up for the purpose of bringing separate suits; and accordingly where a creditor split an account into two parts, brought a suit for one part and was defeated, and subsequently brought a second suit for the residue of his account, on a plea of former suit, it was held, that the plea should be sustained, and that the plaintiff was not entitled to recover. *Guernsey v. Carver*, 8 Wend. 492.

4. Where a party has demands against another, resting in account for property sold, for work done, and for rents due to him, and brings a suit, and on the trial of the cause withdraws from the consideration of the jury some of the items of his account, whilst he submits others of the same character, and subsequently sues to recover the items withdrawn, he will not be permitted to sustain his action; the debtor cannot thus be vexed, by having the claim split up into separate suits. *Stevens v. Lockwood*, 13 Wend. 644.

II. When a cause of action may be said to have accrued.

5. On a promise to take the assignment of a judgment when obtained, and pay the amount

thereof, an action will not lie until after a tender of such assignment. *Payne v. Lansing*, 2 Wend. 525.

III. Actions local or transitory.

6. To an action of debt on a judgment obtained against the defendant, "in the term of February, 1827," in the Supreme Court "then holden at the Capitol in the City of Albany," the defendant pleaded in abatement to the jurisdiction of this Court, that the "cause of action, if any, accrued to the plaintiff in the County of Albany," &c. Upon demurrer to this plea, it was held, that if the plea were correct in point of principle, (upon the ground that the action of debt on judgment is a local action,) it was nevertheless insufficient, because it did not show that the record of the judgment was filed in Albany. *Kelly v. Mullany*, 2 Hall, 205.

IV. Commencement of actions.

7. The issuing the writ is the commencement of the suit. *Ross v. Luther*, 4 Cow. 158.

8. Where the plaintiff's attorney delivered a *capias ad respondendum* to an agent or messenger, with directions to deliver it to the coroner on his ascertaining that a prisoner was off the gaol liberties, *held* that the writ was not issued, and the suit therefore not commenced, on the agent or messenger determining to deliver it accordingly, and going in search of the coroner, but only by the actual delivery of the writ to the coroner.

9. When a suit against two defendants is intended to be commenced by the filing and service of a declaration, and a copy of the declaration is served upon only one of the defendants, the plaintiff has no right to enter a *nolle prosequi* as to the other, and to amend by converting his declaration into a declaration against the defendant alone who had appeared, although the suit be on a joint and several promissory note. *Bank of Auburn v. Knapp*, 9 Wend. 433.

10. A suit cannot be commenced by original writ except when no other process can be used. *Hayward v. Hoyt*, 9 Wend. 483.

11. A *capias*, such as is issued in actions non-bailable, may issue, notwithstanding the statute prohibiting arrests and imprisonment on civil process in actions upon contract.

12. Actions for the recovery of debt or damages must be commenced either, 1. By *capias* against individuals not privileged. 2. By summons against corporations; and 3. By the filing and service of declaration.

13. In a suit commenced by the filing and service of a declaration, the service, to be regular, must be personal on the defendant. *Van Patten v. Volk*, 9 Wend. 497.

14. Where a suit against several defendants is commenced by declaration, the proceedings will not be set aside, although the declaration was not served on all the defendants, if an attorney has appeared and put in a plea for all of them. *Adams v. Gilbert*, 9 Wend. 499.

ACTION ON THE CASE.

- I. *Deceit.*
- II. *Misceasance*; (a) *Misceasance of a public officer*; (b) *Enticing away a wife or apprentice, or seducing a daughter, per quod*; (c) *Other cases of misfeasance.*
- III. *Malicious prosecution.*
- IV. *Negligence.*

I. *Deceit.*

1. An action lies for a false affirmation as to the credit of a third person, by which the plaintiff is induced to sell him goods, and is thereby injured, but not on the ground of a parol promise to endorse for the third person, by which the plaintiff is led to the sale; though the defendant know that such third person is insolvent at the time. *Gallager v. Brunel*, 6 Cow. 346.

2. To warrant an action for a deceitful representation, it must assert a fact or facts existing in the present tense. *Ibid.*

3. A promise to pay, though accompanied at the time with an intention not to perform, is not such a representation as can be made the ground of an action at law. The party should sue on the promise, and if this be void, he has no remedy.

4. An action on the case will lie for the assertion of a falsehood, with a fraudulent intent as to a present or existing fact, where a direct, positive, and material injury results from such assertion. *Benton v. Pratt*, 2 Wend. 385.

5. Where a contract would have been fulfilled but for the false and fraudulent representation of a third person, an action will lie against such person, although the contract could not have been enforced. *Ibid.*

6. Where a person wrote to his friend residing in a commercial town, in these words—"Mr. Baker is going to your place to buy goods; he has been a merchant some years at Aurora, Erie county; has bought his goods at Buffalo, Utica, and elsewhere, heretofore; any assistance you can give him by way of buying would be thankfully acknowledged, he being an acquaintance of mine," &c. The friend, in consequence of the letter, recommended Baker as worthy of credit, who obtained goods by means of such recommendation, and the vendor of the goods, by the fraud and insolvency of Baker, was prevented from obtaining payment for his goods—it was held, that the writer of the letter was subject to an action for the *false recommendation* of Baker, on the ground of the *suppression of the facts* that the writer of the letter then held three judgments against Baker, under which his property was subsequently sold, and the knowledge possessed by him that Baker was in embarrassed circumstances, and must fail. And it was further held, that the writer of the letter was liable for the recommendations given by his friend, the object of the letter manifestly being to enable the person to whom it was addressed to aid Baker in procuring credit, and that all necessary information ought therefore to have been given, so that he might have judged whether Baker could safely be trusted. *Allen v. Addington*, 7 Wend. 1.

7. An action on the case lies for a *false recommendation* as to the credit of a person, by which another sustains damage, if it be made with intent to deceive and defraud the other—the information, however, must be communicated to, be relied on by, and cause damage to the party injured. *Ibid.*

8. False representation consists as well in the suppression of truth as in the assertion of falsehood; and the action lies in either case if the intention to deceive exists and causes such suppression. *Ibid.*

9. It is not necessary to maintain the action, that the person making the false affirmation is to be benefited by the fraud, nor that the intention should exist to defraud the plaintiff in particular. A *false representation* with a *fraudulent intent* is enough to sustain the action; where it appears that the party injured relied on and was deceived by it. *Ibid.*

10. A communication thus made to a clerk or agent of a merchant is the same as if made to the principal. *Ibid.*

11. Case lies in the name of the principal for a false representation made to the agent, whether he be a factor, commission merchant, or clerk. *Raymond v. Howland*, 12 Wend. 176.

12. Where sperm oil is adulterated by an admixture of whale oil, and sold as pure oil, the purchaser may recover from the vendor the difference in the value; and if individuals experienced in the oil trade, and in the use of the oleometer, after testing the oil by that instrument, declare it to be adulterated, a jury is bound to find a verdict for the plaintiff. *Vanvalkenburgh v. Everton*, 13 Wend. 76.

13. An action on the case for a false affirmation lies where a certificate is given to an individual that he is an honest, industrious, reputable, and otherwise good citizen, of good morals and habits, and that in the opinion of the person giving the certificate, the individual recommended would honourably endeavour faithfully to perform every engagement he should make in any matter of business or credit, and the person recommended, on the strength of such certificate, obtains goods on credit, on its being shown that the certificate was false, and that known to the person giving it. *Williams v. Wood*, 14 Wend. 126.

14. Evidence that the person recommended was insolvent and worthless when the certificate was given, is admissible in such a case.

15. A defendant in such a case is not at liberty to show that the certificate was given for a specific purpose, *e. g.* to enable the person recommended to buy a garden spot at a particular place, and thus rebut the intent to enable him to obtain goods at another place.

16. In cases of this kind it is not necessary to show an intent to defraud any particular individual; any one defrauded may sustain an action for a false representation.

17. The defendant might have shown that he believed the representations made, and was himself the dupe of the artifices of the person obtaining the certificate.

18. Whether it was proper for the judge in charging the jury to say that the insolvency and death of the person recommended was

sufficient evidence that the debt contracted by him had not been paid, *quære*; but the judge having added that the jury must be satisfied, from all the testimony, that the debt had not been paid, the Court refused to grant a new trial. *Ibid*.

II. Misfeasance.

(a) Misfeasance of a public officer.

19. A county treasurer refusing to pay money without cause is liable to an action. *Boyce v. Russel*, 2 Cow. 444.

20. An action will not lie for official misconduct in a judicial officer, though of special and limited jurisdiction, and though such misconduct be corrupt and malicious, if a statute declare his own record to be conclusive evidence in all Courts of the facts therein contained. *Cunningham v. Bucklin*, 8 Cow. 178.

21. Semb. at common law, a judge of a Court of Record is never accountable in a civil action for misconduct as such judge, though he act corruptly. *Ibid*.

22. But commissioners to grant discharges under the insolvent act do not come within the rule, not being, as such, judges of a Court of Record. Their exemption depends on the statute. *Ibid*.

23. In an action for a false return, though the return be untrue on its face, yet the officer making it is not liable in damages, if the facts of the case, truly stated, would have produced the same result to the party complaining as the return made. *Ford ad. Smith*, 1 Wend. 48.

24. At common law, the only remedy against an officer for an escape is by action on the case. The statute gives the action of debt only where the escape is from imprisonment on an execution issued from a Court of Record. A Justice's Court is not a Court of Record, and for an escape from imprisonment on a justice's execution, the remedy is case. *Brown v. Gemung*, 1 Wend. 115.

25. An action for a false return will not lie against a sheriff for returning an execution *nulla bona*, where the property of a firm is levied on by virtue of an execution against one of its members, and previous to a sale, an execution against the firm comes to the hands of the sheriff, under which the property levied on by virtue of the first execution is sold and exhausted. *Dunkham v. Murdock*, 2 Wend. 553.

26. A sheriff who levies on goods, and returns *nulla bona*, assumes the responsibility of proving property out of the defendant in the execution, and *prima facie* evidence of the falsity of the return is sufficient to put the sheriff upon proof of its correctness. *Magne v. Seymour*, 5 Wend. 309.

27. In an action against a justice for a false return on an appeal from a judgment rendered by him, in consequence of which the appeal is quashed, to entitle the plaintiff to sustain his action, he must show that had such appeal not been quashed, the judgment entered by the justice would have been reversed. *Millard v. Jenkins*, 9 Wend. 298.

28. Where a verdict in a Justice's Court was rendered near midnight of the nineteenth day

of the month, and the justice on the next day entered judgment as of the twentieth, and the party against whom the judgment was given appealed, reciting in his appeal bond the judgment as rendered on the twentieth, and the justice subsequently in his return to the Common Pleas stated the circumstances, and that the judgment was rendered on the nineteenth, in consequence of which the appeal was quashed, it was held, that no action lay against the justice for a false return; nor for fraudulently misleading the party, there being no evidence of a fraudulent intent. *Ibid*.

29. In an action against a sheriff for a false return of a *steri facias*, the return may be alleged to have been made on the return-day of the process, although the process was returned long after the day of the return. *Michaels v. Shaw*, 12 Wend. 587.

30. The cause of action, however, does not accrue until the execution has been actually returned and made matter of record, and then its return has relation to the return-day of the writ. *Ibid*.

31. A justice of the peace, who grants an adjournment to a plaintiff not entitled to it, and subsequently renders judgment, and issues execution, on which the property of the defendant is sold, cannot be sued as a trespasser. *Horton v. Auchmoody*, 7 Wend. 200.

32. Where a justice acts without acquiring jurisdiction, he is a trespasser; but having jurisdiction, an error in judgment does not subject him to an action; he is entitled to the protection afforded to a judge of a Court of Record. *Ib*.

(b) Enticing away a wife or apprentice, or seducing a daughter, per quod.

32*. Courts will not set aside verdicts in this, and the like actions, for excessive damages, unless they are so very excessive as to warrant an inference of prejudice, partiality, passion, or corruption in the jury. *Sargeant v. —*, 5 Cow. 106.

33. Affidavits of juries may be received to show that they adopted a principle in estimating damages not allowed by law; otherwise, as to the personal misconduct of any of the jury. *Ibid*.

34. As where, in case, by the mother, for seducing her daughter, they allowed her a sum for bringing up the daughter's child, the fruit of the illicit connexion. *Ibid*.

35. Damages should not be allowed on this ground. *Ibid*.

36. Where in such an action, the daughter swore that she was gotten with child on the evening of Friday the 13th of June, a time when the defendant was in fact thirty or forty miles distant from her, it appearing by the defendant's affidavit, &c. that he could not know, and had no reason to suppose she would fix on that time; so that he could be able to meet the evidence by proof of an alibi, and accordingly he did not attempt to prove the alibi upon the trial; held, that he should have a new trial, in order to produce evidence to this point; the case not coming within the objection that the evidence was merely to impeach the testimony of a witness; for it would go to disprove the

main fact in question upon the trial; nor was it within the objection of being cumulative. *Ibid.*

37. Where a widow bound her daughter an apprentice, who was seduced, upon which the indentures were cancelled by consent, and the daughter returned to the mother's house, and lay in there; *held*, that an action on the case lay for the seduction, at the suit of the mother. *Ibid.*

38. In an action on the case, for enticing and harbouring apprentices, it must be shown that the defendant knew that they were apprentices. *Stuart v. Simpson*, 1 Wend. 376.

39. A parent cannot sustain an action for the seduction of his daughter, if she be of age, and not in his actual service at the time of the seduction. *Millar ads. Thompson*, 1 Wend. 447.

40. A father, not having incurred any actual expense, but being liable to a third person for the expenses of the lying in of a daughter, within the age of twenty-one, who has been seduced, may maintain an action on the case for such seduction, although the daughter is a servant *de facto* of another, and the father has permitted her to leave his house, and has relinquished all claim to her services. *Clark v. Fitch*, 2 Wend. 459.

41. Continued attentions to a female for several months, followed by an improper intercourse, is evidence sufficient to warrant the inference of seduction.

42. Where in an action on the case for the seduction of a daughter, brought after pregnancy of the daughter, but before the birth of the child, evidence was received of loss of service, and expenses incurred after the commencement of the suit, the Court refused to set aside the verdict, where the cause of action was clearly established independently of such evidence. *Stiles v. Tylford*, 10 Wend. 338.

(c) *Other cases of misfeasance.*

43. An action on the case for obstructing the execution of meane process cannot be maintained, unless the plaintiff aver and prove that he had a cause of action against the person whose arrest was prevented. *Campbell v. Neely*, 2 Wend. 559.

44. A person hired to drive horses is liable only for negligence, unskillfulness, or wilful misconduct, the burthen of proving which lies on the hirer. *Newton v. Pope*, 1 Cow. 109.

45. An act authorizing one to build a dam on his own land, upon a creek or river which is a public highway, merely protects him from an indictment for a nuisance. If, in doing this, he flow his neighbour's land, he is liable to an action, even though the act provide a summary mode of appraising and paying the damages arising from such a consequence. *Crittenden v. Wilson*, 5 Cow. 165.

46. In an action against one for misconduct, whereby special bail are discharged, it is sufficient in substance, and on general demurrer, to aver that the principal could not be found to satisfy the plaintiff, whereby he lost the debt, without showing that a *ca. sa.* issued and was returned *non est inventus*. *Livingston v. Adams*, 8 Cow. 175.

47. The directors of a moneyed institution are responsible individually and severally, in an action on the case, for improperly obtaining and disposing of the funds or property of the company; but they are not answerable jointly or as directors, unless the act complained of be done by a majority of the board of directors, when, by the act of incorporation of the company, a majority only is competent to the transaction of the business of the company. *Franklin Ins. Co. v. Jenkins*, 3 Wend. 131.

48. Where, in consequence of the want of ordinary care and skill in laying the foundations of a house about to be erected, damage was sustained by the owner of an adjoining house, and the parties thereupon entered into an agreement by which it was stipulated that the works should proceed, that a partition wall should be built for the benefit of both parties, and that the damages and compensation should be passed upon by arbitrators; which submission was revoked previous to an award made, and an action for breach of covenant brought by the person who built the house to recover a compensation for a portion of the wall, in which action the defendant set off his damages; *it was held*, that such damages were a legitimate subject of consideration in the action of covenant, under the agreement between the parties, and having been submitted to and passed upon by a jury, a suit could not subsequently be sustained for a recovery of the same damages. *Skelding v. Whitney*, 3 Wend. 154.

49. The owner of lands adjacent to the shore of a navigable river obtaining from the commissioners of the land office a grant of land under water, on which, after filling it in, he erects a wharf, cannot sustain an action on the case against the agents of the company to whom the legislature have subsequently given the privilege of erecting a mole or pier in the river for the purpose of constructing a basin for the safety and protection of boats, and who construct the mole or pier in such a manner as to impair materially the privileges of the owner of the wharf. The grant by the commissioners did not deprive the legislature of the right of regulating the use of the wharf and of the waters adjacent. *Lansing v. Smith et al.* 4 Wend. 10.

50. A party having received from another a number of hogs to fatten on shares, when they were fattened gave notice to the owner, and required him to attend to the division of the hogs within three or four days, and take away his share; but the owner refusing to attend, the keeper of the hogs made such division himself, and turned the owner's share loose into the street; *it was held*, that the keeper was guilty of a violation of duty by such conduct, and that he was liable to the owner in damages. *Sheldon v. Skinner*, 4 Wend. 525.

51. Where an individual is authorized to erect a dam across a public river upon certain conditions, if the object of the act appears to be the improvement of the navigation of the river, although privileges be granted to him, he is not liable to an action for injuries sustained by others in the construction of the work, if by the act a mode of compensation is provided. *Callings v. Baldwin*, 4 Wend. 667.

52. Where the holder of a note over due, for a valid consideration, agrees not to sue the debtor for a limited time, and in violation of such agreement commences a suit on the note before the expiration of the time agreed on, the remedy of the debtor is to set up such agreement *by way of defence* to the action; he cannot sustain an action on his part for a violation of the agreement. *Pearl v. Wells*, 6 Wend. 291.

53. Case lies against a justice of the peace who corruptly refuses to take the security required to be given on the prosecution of an appeal; his act in relation to such proceeding being of a ministerial, and not of a judicial character. *Tompkins v. Sands*, 8 Wend. 402.

54. For a judicial act no action lies, but for an injury arising from the non-feasance or misfeasance of a ministerial officer, case lies.

55. When an officer is sued for an act in which he is bound to exercise discretion, the action will not lie, unless it appears that the act was done wilfully and maliciously.

56. An action on the case does not lie against a person for erecting a fence on his own land, whereby he obstructs the lights of his neighbour, let the motive of the obstruction be what it may, if the lights be not ancient lights, or his neighbour has not acquired a right by grant, or occupation and acquiescence. *Mahan v. Brown*, 13 Wend. 261.

57. Nor does an action lie for opening a window overlooking the privacy of another; but, on the contrary, although such an act be an encroachment, the continuance thereof for twenty years will ripen into a right, which it seems can be prevented only by building opposite to the offensive window.

58. Where three tenants in common constructed a basin communicating with a public canal, and laid out six lots of the width of thirty-five feet each, facing upon one side of the basin, dividing the lots between them by each taking two, and giving to each proprietor the privilege of erecting warehouses upon his lots, extending the same to the basin; and the grantee of one of the original proprietors built a pier in the basin in front of his lot, on the line between it and the lot of a grantee of another original proprietor, whereby the latter was obstructed in the convenient use of the waters of the basin, in the lading and unlading of canal boats, and in their free passage to and from his wharf; it was held, that the owner of each lot was entitled to the use of the waters of the basin, by laying a canal boat in front of his neighbour's lot, when such neighbour was not occupying the basin in front of his own lot in its appropriate use; and that for a permanent obstruction in such use of the waters of the basin by the erection of a pier, an action on the case might be maintained. *Beach v. Child*, 13 Wend. 343.

59. An action on the case for flowing lands will not lie against a former owner who erected a dam and built a mill, by means of which the injury is done, where it appears that other persons are in possession of the premises, occupying them as their own, and there is no evidence that they hold as the tenants of such former owner. The action must be against the persons in possession. *Blunt v. Atkin*, 15 Wend. 522.

III. Malicious prosecution.

60. To sustain an action for malicious prosecution, the plaintiff must in general prove a want of probable cause. *Morris v. Corson*, 7 Cow. 281.

61. But where the defendant pleaded singly the truth of the facts involved in the prosecution, which was for felony; held, that this was assuming to prove the truth on his own side, and that the plaintiff need not, on the trial in the first instance, show the want of probable cause. *Ibid*.

62. Where a defendant pleads specially, every traversible fact contained in the declaration, and not denied by the plea, is admitted of record; and needs no proof to support it. *Ibid*.

63. Where the defendant obtained a warrant against the plaintiff for theft, who was brought before a justice, but discharged because the parties had settled; held, that this was not such an acquittal as would warrant an action for a malicious prosecution. *M'Cormick v. Sisson*, 7 Cow. 715.

64. In this action, want of probable cause cannot be inferred from a settlement and consequent dismissal of the prosecution, though accompanied with evidence of malice; but want of probable cause must be shown by the plaintiff. It is the gist of the action. *Ibid*.

65. Whether there be probable cause is a mixed question of law and fact. *Ibid*.

66. Where one prosecuted for felony before a justice, and swore to the felony on the examination; and the accused went into his defence, the scope of which was to show that the prosecutor was mistaken in his testimony; and the justice discharged the accused; held, that an action for malicious prosecution would not lie, the testimony of the prosecutor making out probable cause. *Burlingame v. Burlingame*, 8 Cow. 141.

67. An action for a malicious prosecution cannot be sustained unless there has been malice and the want of probable cause. Malice may be implied from the want of probable cause, but the want of probable cause cannot be implied from the most express malice; it must be substantially proved. *Murray v. Long*, 1 Wend. 140.

68. An arrest and holding to bail are not indispensably necessary to the maintenance of an action for a malicious prosecution. *Pangburn v. Bull*, 1 Wend. 345.

69. It is, however, not enough that the declaration contains a general allegation, that a suit was commenced maliciously; the particular grievance must be stated. *Ibid*.

70. The gist of this action is some evil practice or malice in him who sues or prosecutes. *Ibid*.

71. The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it probable, or not probable, are true and existed; is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law. *Ibid*.

72. But though the latter question be submitted to the jury, and they find for the plaintiff, if on a review of the case by the Supreme Court

it should appear, from the facts not disputed at the trial, that there was evidently a want of probable cause, the verdict will not be set aside for the error of the Court below in that respect, because the Supreme Court are called on to pronounce on that question. *Ibid.*

73. In an action for a malicious prosecution, the jury ought to be instructed by the judge as to the law involved in the question of probable cause, that is, as to what constitutes a legal excuse for the defendant; and whether the facts relied on in the defence, on the supposition of their being found true by the jury, made out a probable cause. *Masten v. Deyo*, 9 Wend. 424.

74. In an action for a malicious prosecution, the recovery in a Court of competent jurisdiction in favour of the plaintiff in the suit complained of as malicious, is not conclusive evidence of probable cause. Evidence of the want of probable cause rebuts the inference of the existence of probable cause arising from the fact of a recovery in the suit complained of as malicious. *Burt v. Place*, 4 Wend. 591.

75. The rule requiring the plaintiff in such an action to show that the suit complained of as malicious was decided in his favour, is complied with by showing a judgment in his favour in the Common Pleas, on an appeal from a justice's judgment, although the latter was in favour of the opposite party. *Ibid.*

76. Evidence of the proof adduced on the trial of the suit complained of as malicious, is inadmissible for the purpose of showing probable cause, where the defendant himself was not the witness; the party is bound to produce such witness. *Ibid.*

77. The naked fact of a party commencing two suits in a Justice's Court, after being himself sued by the party whom he prosecutes, and neglecting to appear at the return of the summonses, is not such evidence of a want of probable cause as will sustain an action for a malicious prosecution. *Gorton v. De Angelis*, 6 Wend. 418.

78. Want of probable cause must be shown affirmatively, and will not be inferred from the mere neglect to prosecute a suit commenced. *Ibid.*

79. In an action on the case for a malicious prosecution, in causing the plaintiff to be arrested on a charge for feloniously taking property, it is sufficient evidence of want of probable cause that the party making the complaint knew that the other party claimed, and had at least a prima facie right to the property. *Weaver v. Townsend*, 14 Wend. 192.

80. In an action for a malicious prosecution, it appeared that the defendant presented himself, with several witnesses, before the grand jury which indicted the plaintiff, and gave oral testimony, charging him with having committed the crime of perjury. The district attorney, by direction either of defendant or his counsel, (it did not clearly appear which,) laid a certain affidavit, made by one W., (who was dead,) before the grand jury, who returned it to him with directions that an indictment should be drawn against the plaintiff. The district attorney thereupon drew an indictment, founded upon the affidavit of W. exclusively; and upon that indictment, the plaintiff was eventually tried and acquitted. *Chandler v. Petit*, 2 Hall, 315.

Between the time of the finding of the bill and the trial of the cause, the defendant caused the trial to be put off, upon an affidavit of his own, stating the absence of a material witness; and when the trial came on, his counsel discovered, for the first time, that the perjury alleged in the indictment differed from that charged by the oral proof laid before the grand jury, and that the indictment could not be supported. They therefore abandoned the prosecution, and the plaintiff was acquitted. *Ibid.*

Upon the trial of the action for a malicious prosecution, the judge charged the jury, that if the defendant had no probable cause for his accusation, he could not be excused from the consequences of prosecuting the indictment, even if he were under a misapprehension as to the specific charge contained in it, or ignorant of its contents. *Ibid.*

Held, that this direction was incorrect, although the defendant would be liable for prosecuting the indictment, if aware of its contents, even if it did assign a perjury differing from that charged by himself. *Ibid.*

Held also, that the defendant would be liable, if the affidavit of W. was sent before the grand jury by him, or by his direction; but that he might defend himself by showing that there was probable cause for the charge actually made by him before the grand jury; although that defence would not be a complete one, unless it showed a probable cause for the whole charge. *Ibid.*

IV. Negligence.

81. An action will not lie for leaving maple syrup in an unenclosed wood, whereby the plaintiff's cow, having strayed there, is killed in drinking it. *Bush v. Brainard*, 1 Cow. 78.

82. Otherwise if she be there by the plaintiff's permission. *Ibid.*

83. One cannot recover for an injury even for gross negligence in the lawful use of another's property, unless he is free from culpable negligence on his part. *Ibid.*

84. The endorsement and delivery of a promissory note to a bank, on its request, is a sufficient consideration for an undertaking, on the part of the bank, to charge the endorser by a regular notice of non-payment; and if they neglect to do this, the holder or owner of the note to whom the promise is made may maintain an action against them, and recover damages for the neglect. *Bank of Ulica v. Sneeds*, 3 Cow. 662.

85. A count for such neglect would be good as a count for a misfeasance, the receipt of the note and neglect to perform the undertaking being properly a mismanagement of the business undertaken. The acceptance of the note by the bank may well be considered the first step in the execution of the contract; and no other consideration is necessary. *Ibid.*

86. An order was directed by a merchant at Boston to merchants at Leghorn, for five cases of Leghorn hats, without any directions as to the manner of packing or securing them. The Leghorn merchants, in executing this order, shipped the hats for Boston in a vessel which they knew was to touch at Palermo for a cargo of oranges

ACTIONS (REAL.)

and lemons, and yet neglected to secure the hats in the usual and customary manner; by reason whereof they, being placed in the hold on the boxes of fruit, were much injured, and sold at auction for less than the invoice price; *held*, that the Leghorn merchants, having undertaken to execute the order, were bound to do so in the customary manner, and not having done so, by reason whereof the purchaser sustained an injury, they were liable to him in an action for the damage. *Dickey v. Grant*, 4 Cow. 310.

87. Where one builds a mill dam upon a proper model, and the work is well and substantially done, he is not liable to an action, though it break away, in consequence of which his neighbour's dam and mill below are destroyed. *Livingston v. Adams*, 8 Cow. 175.

88. Negligence should be shown in order to make him liable. *Ibid*.

89. The owner of a steamboat navigating the Hudson, having it in his power to avoid a collision with another vessel, and thus prevent an injury, refusing or neglecting to exercise the power he possesses, is guilty of negligence, and liable to respond in an action on the case, although the vessel damaged has the wind, if the owner of that vessel does all in his power to avoid the collision. *Hawkins v. The Dutchess and Orange Steamboat Co.*, 2 Wend. 453.

90. Where a debtor transferred a note as collateral security for the payment of a sum of money due by him, the amount of such note when paid to be applied towards satisfaction of the creditor's demands, and if not paid, the note to be returned to the debtor; *it was held*, that the debtor might maintain an action on the case, in his own name, against the bank with which the note was deposited for collection, for a breach of duty in neglecting to give notice of non-payment to the endorser, whereby the debt was lost; although the note was left for collection by the creditor, and no mention whatever made of the party who had transferred the note. *Bank of Utica v. M'Kinster*, 11 Wend. 473, S. P. *Ibid*. 9 Wend. 46.

91. *Quære*, if such action would lie by the debtor on a note given to a creditor, until his debt was paid. *Ibid*.

92. It seems that in such case an action lies in the name of any person beneficially interested in having the duty performed which the law under such circumstances casts upon a bank; and that the benefit the bank might receive from the temporary deposit on the payment of the note, without reference to any particular person as a depositor, is a sufficient consideration to charge them with the duty of giving notice to endorsers. *Ibid*.

93. Where A. B. and C. run a line of stage coaches between two different places, and the route was divided between them into sections, the occupant of each section furnishing his own carriages and horses, hiring drivers, and paying the expenses of his own section; and the money received as the fare of passengers, deducting therefrom only the tolls paid at turnpike gates, was divided among the parties in proportion to the number of miles of the route run by each; and an injury happened to a third person through the negligence of the driver of the coach of A.;

it was held, that a joint action on the case, at the suit of the party injured, lay against B. and C. as well as A. *Bostwick v. Champion*, 11 Wend. 571.

94. A bridge, built by a corporate body or by individuals, over a public highway, for their exclusive benefit, must be kept in repair by the parties building it, and if any injury happens to others in consequence of its being out of repair, an action lies. *Heacock v. Sherman*, 14 Wend. 58.

95. If, however, such bridge is useful to the public, and is generally used, the individuals building it are not bound to keep it in repair, unless the necessity for the bridge was originally created by the parties building it. *Ibid*.

96. No person can lay the foundation of an action against another by a wrong on his own part, or by neglect or a breach of his own duty. *Buckle v. The Dry Dock Co.* 2 Hall, 151.

97. The defendants were proprietors of a certain dry dock, with a machine to raise vessels out of the water for the purpose of cleaning and repairing their bottoms. The plaintiffs hired this machine, and placed a vessel upon it under the direction of their own agents and workmen; and in an attempt to burn the tar from off her bottom, the vessel took fire, and was much injured. An action being brought by the plaintiffs against the defendants for negligence on their part as to the manner in which the machine was kept, and for its improper construction in a certain particular, the defendants proved that the injury to the vessel was occasioned by carelessness and neglect on the part of the plaintiffs in the use of the machine. The judge charged the jury, that if the injury were attributable to carelessness, or want of proper precaution on the part of the plaintiff, in the use of the machine, the defendants were not liable; and the jury having returned a verdict for the defendants, a new trial was denied.

See BAILMENT, COMMON CARRIER, CONSTABLE, SHERIFF.

ACTIONS (REAL.)

- (a) *Proclamation and service of the summons*;
(b) *Imperance*; (c) *Default*.

- (a) *Proclamation and service of the summons*.

1. Proclamation of a summons in a real action must be at the church in the town or ward nearest the lands, and be so returned. *Malcom v. Rogers*, 1 Cow. 1.

2. But if not so returned, the sheriff may amend. *Ibid*.

3. A personal service renders proclamation unnecessary. *Ibid*.

4. The manner of service should be clearly expressed in the return, and cannot be aided by intendment. *Ibid*.

5. If the return to a writ of right be defective, an alias summons goes instead of a grand cape. *Malcom v. Gardner*, 1 Cow. 13.

6. In a real action, it is not enough to return proclamation made in the city nearest where the lands lie, but it must appear to have been

made at the church in the ward nearest the land. If there be no church there, this should appear upon the return, to warrant proclamation out of the ward. *Ibid.*

7. *Town* and *ward* signify the same thing for the purpose of proclamation. *Ibid.*

8. *Place*, as used in the statute requiring proclamation, means any small subdivision answering to a town, or being substantially the same. *Ibid.*

9. Form of rule for an alias summons, where the return is defective. *Ibid.*

(b) *Imparlance.*

10. The Court will modify an imparlance in a real action, so as to place it at some day in the same term at which it is granted, instead of the next term, upon motion of the party at whose instance it was granted. *Malcom v. Rogers*, 1 Cow. 136.

11. But the circumstance that the tenant has pleaded a dilatory plea, which is demurred to, will not prevent an imparlance to the next term, if prayed for in order.

(c) *Default.*

12. The Supreme Court are governed by the same rules in relieving against defaults in real as in personal actions. *Burich v. Hoag*, 6 Cow. 398.

13. And default for not pleading will at the same term when taken, the counsel who took it being present in Court, be opened of course. *Ibid.*

ACTION ON STATUTE.

(a) *When it lies*; (b) *Declaration*; (c) *Defence.*

(a) *When it lies.*

1. A suit may be brought by a common informer, for a penalty given by the act to prevent horse racing, incurred previous to the revised statutes going into effect, although such suit be not commenced until after those statutes went into operation. *Myers v. Van Alstyne*, 10 Wend. 97.

(b) *Declaration.*

2. In an action of debt, for the penalty (given by the act for the inspection of flour, &c. intended for exportation) for altering an inspector's brand-mark, the declaration, after setting out the act sufficiently, charged, that the defendant was possessed of one such barrel of flour, which he had caused to be inspected; held, that it was a sufficient averment, especially after verdict, that the flour was intended for exportation. *Smith v. Brown*, 1 Wend. 231.

3. Under the provisions of the revised statutes authorizing the recovery of damages, and also a penalty against witnesses for non-attendance when duly subpoenaed, a count in case and a count in debt may be joined in the same declaration. *Smith v. Merwin*, 15 Wend. 184.

4. It is not necessary in the count in case to refer to the statute, nor in the count in debt to name the subject-matter of the statute under which the action has accrued, as that it had ac-

crued "according to the provisions of the statute concerning witnesses," &c.; it is enough to name the part, chapter, title, article, and section of the statute. *Ibid.*

5. Where there is a misjoinder of counts, the defendant can avail himself of the objection only by demurring to the whole declaration; he cannot plead to one count and demur to the other, although the action be in part penal. *Ibid.*

(c) *Defence.*

6. It is no defence to a party prosecuted for practising physic without being authorized by law, that the medicine he administered was patent medicine, and that he administered it as the assignee of the patentee. *Thompson v. Staats*, 15 Wend. 395.

7. Whether a contract to sell five gallons without license be intended to evade the act, (Seas. 24, ch. 164, s. 7. 1 R. S. 178.) is a proper question for the jury. *Baker v. Richardson*, 1 Cow. 77.

8. How far innocence of intention will excuse the infraction of a penal law. *Ibid.* (note a.)

9. A verdict for the defendant in a penal action will not be set aside by the Court, though it be clearly against evidence. *Ibid.* (note b.)

ADVANCEMENT.

Whether under the provisions of the revised statutes, an advancement made by the testator in his lifetime is to be brought into hotchpot in case of a partial intestacy only. *Quere. Hawley v. James*, 5 Paige, 318.

AGREEMENT.

I. (a) *What constitutes an agreement*; (b) *When an agreement will be construed a conveyance in presenti, or an agreement to convey*; (c) *Construction of particular agreements.*

II. *Consideration*; (a) *What is a sufficient consideration*; (b) *Necessity of.*

III. *What renders an agreement void*; (a) *Disability of parties*; (b) *Illegal consideration*; (c) *Want of consideration*; (d) *Agreement against public policy, or the policy of the law*; (e) *Fraud.*

IV. *Performance*; (a) *What is a good performance*; (b) *Time of performance, and how enlarged or varied*; (c) *When a party will lose his right to enforce a performance.*

V. *Rescinding.*

I. *Agreement.*

(a) *What constitutes an agreement.*

1. A judgment is in no sense a contract or agreement between the parties. *Wyman v. Mitchell*, 1 Cow. 316.

2. Where a joint owner of a cargo of brandy, ordered from France, and supposed to be at sea,

wrote from St. Domingo to B., his co-owner in New York, on the 24th December, proposing that the latter should take the adventure *solely on his own account*; and B., in answer to the proposition, in a letter dated January 17, said that he would delay *coming to a determination* till he again heard from A.; and A., on 7th March, acknowledged the receipt of the answer, saying he had *noted its contents*, and on the 28th of March, by another letter, *confirmed* the offer made in December; and B., after the arrival of the brandy in port, wrote on the 25th March to A., that he had decided to take the adventure to his own account, and credited him with the invoice; *it was held*, that the offer to sell remained open, and that B.'s acceptance of it on the 25th March closed the bargain, notwithstanding that the letters of 25th and 28th March did not reach the places of their direction until after the death of B., which happened on April 10. *Mactier v. Frith*, 6 Wend. 103.

3. From the moment when the minds of the contracting parties meet, signified by overt acts, a contract is obligatory, although such concurrence is not known at the time to both parties.

4. A bargain may be considered as closed, when nothing mutual between the parties remains to be done to give to either a sight to have it carried into effect.

5. A willingness to contract by the party offering is presumed to continue for the *time limited* in the offer, and if the time be not indicated by the offer until it is expressly revoked or countervailed by a contrary presumption.

6. Whether an offer remains open for acceptance at a particular period, is a question of fact to be determined by the circumstances of the case.

7. When there is doubt as to the *continuance* of an offer to contract at the time of acceptance, the subsequent acts of the party making the offer may be resorted to as evidence of the fact.

8. The acceptance of a written offer of a contract of sale consummates the bargain, provided the offer is standing at the time of the acceptance.

9. Whatever amounts to the manifestation of a formed determination to accept an offer of a contract of sale, communicated or put in a proper way to be communicated to the party making the offer, completes the contract. The knowledge, by the party making the offer, of the determination of the party receiving it, is not an ingredient of an acceptance.

10. When an engagement is made by a party to *decide*, on the happening of a certain event, to accept an offer of a contract of sale, the contract is not completed on the happening of the event until the decision be made.

11. Where an offer is made by one joint owner to another to sell his interest in a cargo of merchandise, and previous to the acceptance of the offer three-fourths of the cargo is sold by the party to whom the offer is made, it cannot be objected by him that the thing to which the contract relates had not an actual or potential existence at the time of the contract.

12. When a merchant in Alabama wrote to his factor in New York, and proposed that he

would ship for that place three hundred bales of cotton on their joint account; if the agent should, immediately on the receipt of his letter, give notice of his election to accept the proposition; and the agent, immediately upon the receipt of his principal's letter, replied to the same, accepting the proposition, and requesting his principal to designate and mark the cotton to be shipped on their joint account, and to advise him when the same should be shipped; *it was held*, that as soon as the agent replied to the letter of his principal, accepting the proposition, the contract was complete, and could not be rescinded by either party without the consent of the other. *Brisban v. Boyd and others*, 4 Paige, 17.

13. An offer to purchase was made by letter, and previous to the receipt of the letter by the other party, the party making the offer died insolvent.

14. The party receiving the letter consented to sell on the terms proposed, and sent an answer to that effect, but without any knowledge on his part of the death of the purchaser. *Held*, that he was not bound by such acceptance of the offer, and that the title to the property was not changed. *Frith v. Lawrence*, 1 Paige, 434.

15. To make a valid contract, it is not only necessary that the minds of the contracting parties should meet on the subject of the contract, but that fact must be communicated to each other. *Ibid*.

16. Where an offer to sell is made to a distant correspondent by letter, and he declines the offer, he cannot afterwards assent to it, so as to make it a valid purchase, without a subsequent assent of the other party also. *Ibid*.

17. If he accepts the offer conditionally, the other party is not bound unless he consents to the condition. *Ibid*.

(b) *When an agreement will be construed a conveyance in presenti, or an agreement to convey.*

18. An agreement to purchase a farm and payment of the purchase money give an equitable title to the land, which a Court of Chancery will enforce. *Whitbeck v. Whitbeck*, 9 Cow 266.

19. Although there be words of conveyance *in presenti* in a contract of purchase and sale of lands, still if from the whole instrument it is manifest that further conveyances were contemplated by the parties, it will be considered an agreement to convey, and not a conveyance. *Jackson v. Mancrieff*, 5 Wend. 26.

(c) *Construction of particular agreements.*

20. Where a crew has been shipped for a voyage, and articles executed, fixing the rate of wages, the written agreement made at the port of departure is the only legal evidence of the contract, and a mariner can recover nothing beyond what it specifies. *Johnson v. Dalton*, 1 Cow. 543.

21. Whether an agreement by the master to permit the crew, who are bound by the shipping articles to proceed, to leave the ship at an intermediate port, is valid? *Quære. Ibid*.

29. In the construction of all contracts, the situation of the parties and the subject-matter of the contract are to be considered, in order to determine the meaning of any particular provision. *Wilson v. Truap*, 2 Cow. 195.

This rule applied. *Ibid.*

23. The construction of a written agreement to convey certain described land, cannot be varied by showing the intent of the parties by parol. *Champion v. White*, 5 Cow. 509.

24. Where the covenants, in articles to convey and pay for land, are independent, the vendee cannot show, in an action for the purchase money, that the vendor owed only a part of the land, the title to which he covenanted to convey. *Ibid.*

25. Where, in articles for the sale of land, the vendee covenanted to pay one-sixth of the purchase money in one year, and the residue in five equal annual instalments; and the vendors covenanted, that on payment of the sums of money, and fulfilment of the agreement to be performed by the vendee, they would convey, &c.; held, that these covenants were independent. *Ibid.*

26. The description of the land in the articles was, "all that certain piece or parcel of land in H., being that part of lot 44 owned by them, (the vendors,) that lies south of the Watertown road, bounded easterly, southerly, and westerly by the lines of the lot, as surveyed and established by R. M." Held, that the words, "owned by them," were mere words of description; not of restriction; and would not confine the vendee to what the vendors owned, if this was less than the lines included; but he had a right to the whole, according to the lines mentioned. *Ibid.*

27. H. and others became sureties for B., a deputy sheriff, to A., the sheriff, and then A. promised H. that if he would become security for him, A., as sheriff, he would indemnify H. against his suretyship for B. H. accordingly became surety for A. A. was afterwards sued for B.'s wrongfully taking the goods of one, on a *fi. fa.* against another; and H. and his co-sureties for B., with A.'s knowledge, defended the suit, brought a writ of error, and reversed one judgment against A., defended another suit against A. for the same cause, brought error, but the judgment was affirmed; and all this with A.'s knowledge; in which H. expended moneys in retaining an attorney, and defending the suit, and prosecuting the writ of error in an action by H. against A. on his promise of indemnity; held, that he might recover the moneys thus expended; for A.'s consent to the expenditure might under the circumstances be presumed. *Hale v. Andrus*, 6 Cow. 225.

28. An agreement was to convey "the Hawkins' place containing one hundred acres;" held, that the clause "containing one hundred acres" should be rejected as surplusage; and that the contract covered the whole lot surveyed and set off to Hawkins, and upon which he entered, improving part, under a parol contract of purchase; though it in fact contained one hundred and six acres. *Butterfield v. Cooper*, 6 Cow. 481.

29. A promise to warrant the collection of a note, and pay the promisee all costs on all suits

legally commenced for its collection, cannot be enforced unless a suit be commenced, or a legal excuse for not doing so is shown. *Taylor v. Bullen*, 6 Cow. 624.

30. The commencement of a suit is a condition precedent. *Ibid.*

31. Whether the non-performance or happening of a condition, precedent to a right of action, can be excused, so as to give the right by any thing short of the act of the opposite party? *Quære. Ibid.*

32. On a promise to warrant the collection of a note from the maker, and pay all costs of all suits legally commenced for its collection, the attempt to collect being a condition precedent; it is no excuse for not making the attempt that the maker died intestate before the note fell due, and that no one had taken out letters of administration upon his estate. *Ibid.*

33. D. and K. agreed with H. that the former should carry on the business of preserving fresh provisions; and in consideration of the use of six hundred dollars, advanced by H., made him their only agent for selling the provisions in the city of New York for ten years, agreed that he should be allowed twenty per cent. on all sales, and one-third of the net proceeds, after deducting the per cent., to apply on the amount advanced till it should be liquidated, H. to furnish a repository at his own cost, and be responsible for his sales. Held, that D. and K. had no right to demand the goods delivered to H. under this contract, he having an interest in them, and a right to detain and sell them pursuant to the contract. Held also, that the contract was not usurious. *Hall v. Daggett*, 6 Cow. 653.

34. On an agreement to indemnify against law suits, whether an arbitration is included? *Quære. Packard v. Hill*, 7 Cow. 434.

35. But where an agreement was to indemnify against law suits brought or to be brought, and an arbitration was pending at the time of the agreement; held, that the agreement reached the arbitration. *Ibid.*

36. Where a contract is to deliver Salina salt in barrels, such barrels as are directed by the statute (1 R. S. 249. 3.) are to be understood as intended. *Clark v. Pinney*, 7 Cow. 681.

37. But on the question whether barrels conformable to the contract have been tendered, there need not be positive proof that they conformed to the statute. The jury may infer this from the testimony. *Ibid.*

38. A written contract not sealed may be varied by the parties, on a valid consideration, by parol; and the supplemental agreements may be enforced in connexion with the original one, and the whole as a single agreement. *Baily v. Johnson*, 9 Cow. 115.

39. H. gave a mortgage of his farm to I., after which P. recovered judgment against H., and sold his farm, he (P.) becoming the purchaser, and taking a sheriff's deed. After this H. agreed with P. to pay him his judgment, and take back the farm, and paid P. accordingly; but instead of taking a deed of the farm, agreed with I. and W. (I.'s son) to give his (H.'s) interest for a price agreed on; his father

to convey his interest as mortgagee to his son W., by way of advancement. H. accordingly removed off the farm, and W. removed on to it. The father conveyed his interest to W., who promised H. to pay him the price before agreed on, and P. then conveyed by deed, under hand and seal, acknowledging the payment of \$10 as the consideration, to W., who then refused to pay the price agreed on to H.; *held*, that H. might maintain assumpsit for the price agreed on. *Whitbeck v. Whitbeck*, 9 Cow. 266.

40. Where a landlord distrained the goods of his tenant, and then agreed to accept certain articles of property in payment of his rent, and to leave the same in the possession of the tenant, on his procuring a person to become bound to deliver the property by a certain day, or pay a specified sum, and a surety was accordingly procured; such surety is absolutely bound for the performance of the contract, and not entitled to be considered as a naked bailee. *La Forge v. Rickert*, 5 Wend. 187.

41. If a party contract to deliver portable articles of property on or before a certain day, and no place is specified for the delivery, the law fixes the place of delivery; and parol evidence of an agreement at or about the time of the making of the contract, designating the place of delivery, is inadmissible.

42. A guarantee in these terms, "I warrant this note good," endorsed by a payee upon a note, is a guarantee that the note is collectable, and not that it will be paid on demand; and to charge the guarantor it is necessary to show that payment cannot be enforced against the maker. *Curtis v. Smallman*, 14 Wend. 231.

43. Where a parol agreement was made for the purchase of a lot of land for the sum of \$21.50 per acre, to be paid in seven equal annual payments, and by the agreement the grantor was to have the lot surveyed, and to give a conveyance with warranty on the payment of \$300 by the grantee, and upon his executing to the grantor a bond and mortgage for the residue of the purchase money; and the grantee went into possession under the agreement, and continued in possession eight or nine years, making payments from time to time towards the land, for which the grantor gave receipts, specifying therein that the moneys received were in payment for the land, and that he, the grantor, was to give the grantee a deed therefor: the grantee made a payment of \$333 soon after he went into possession; at the expiration of eight years from the time the agreement was made, the grantor tendered a deed to the grantee, and demanded payment or security for the balance of the purchase money; the defendant refused to accept the deed, alleging that it contained too much land, and that the grantor had included too much interest in the balance he claimed to be due: *it was held*, that neither party could take advantage of the agreement's not being in writing; that it was too late for the defendant to object that the grantor had not caused a survey to be made of the lot, and delivered a deed therefor immediately after the first payment; that the defendant could only have put an end to the contract by tendering the balance due, and demanding a performance of the con-

tract on the part of the grantor; that a tender and demand made after a bill had been filed by the grantor for a specific performance was a nullity. *Knickerbacker v. Harris*, 1 Paige, 209.

44. Where there is a contract for the purchase of land, and the person contracting to sell declines executing the contract upon the ground that he is unable to give a good title, and the purchaser files his bill to compel the defendant to complete the contract or to rescind it; if the defendant is able to give a good title at the time of the decree, the complainant will be compelled to accept it. *Pierce v. Nichols*, 1 Paige, 244.

45. But the defendant will be decreed to pay to the complainant interest upon the purchase money paid by him for the land, from the time a conveyance was demanded by the complainant. *Ibid*.

46. The defendant agreed, by parol, with the plaintiff, that if he could purchase and deliver to him the notes of the New Jersey Manufacturing and Banking Company, and pay a certain sum for discounting them, that he (the defendant) would take of the plaintiff all the notes of that company which he should so purchase, and pay him the amount thereof, deducting the discount. The plaintiff, under this agreement, purchased such notes from time to time, which were taken by the defendant on the stipulated terms, until finally an amount which the plaintiff had on hand being offered to the defendant, he neglected to pay for the same, and on that day the bank failed.

An action being brought for a breach of this contract, *it was held*, that the case presented a sufficient consideration for the agreement, and that the plaintiff had a right to recover, under it, the amount of all such notes as he had received in the regular course of his business, and in which he had a complete right of property at the time the bank stopped payment. *Smith v. Spies*, 2 Hall, 477.

II. Consideration.

(a) What is a sufficient consideration.

47. A debt discharged under the insolvent act is a good consideration for a new promise. *Erwin v. Saunders*, 1 Cow. 242.

48. The delivery to another of property levied upon by a sheriff, or levying it under his control, is a sufficient consideration for a promise to redeliver it to the sheriff; and this whether the promise be written or parol. *Lockwood v. Bull*, 1 Cow. 322.

49. The failure of consideration is no defence to an action on a specialty. *Centre v. Billingshurst*, 1 Cow. 33.

50. The voluntary restoration of that which the law will compel a man to restore is not a sufficient consideration for a contract. *Per Sutherland S. M'Donald v. Nelson*, 2 Cow 139.

51. Agreement of a son that the father shall deduct a certain part from his portion is no sufficient consideration. *Per Sutherland J. Ibid*.

52. To support a promise to pay damages for a breach of a covenant of warranty, there must be proof of an eviction. *Miller v. Watson*, 5 Cow. 195.

53. The sale of an equitable title is at law a good consideration for a promise. *Whitbeck v. Whitbeck*, 9 Cow. 266.

54. The promise to pay for land actually conveyed is valid at law, though by parol. *Ibid.*

55. Where one contracts to perform labour, for which he is to receive a stated compensation, performance, or an ability and readiness to perform, in the manner stipulated, are a condition precedent to the compensation becoming due. *Dutch Church of Albany v. Bradford*, 8 Cow. 457.

56. Where a contract was made to act as minister of the Reformed Dutch Church, for which the particular church was to pay a stated salary, and subsequently a sentence of suspension, and finally of the dissolution of the pastoral connexion between the minister and his church, for a fault of the former, was pronounced by the proper judicatory, and affirmed on appeal; held, that the minister was not entitled to his salary intermediate the sentence of suspension and dissolution. *Ibid.*

57. The payment of part of a debt due is no consideration to support a promise to give further time for the payment of the balance. *Hall and Montross v. Constant*, 2 Hall, 185.

58. In an action for the breach of the defendant's contract to sell and deliver certain goods to the plaintiff, the promise of the latter to accept the goods and pay for them, is a good consideration for the defendant's promise to deliver them. *White v. Demill*, 2 Hall, 405.

(b) *Necessity of.*

59. In a case where the declaration contained a count of payee against maker on a promissory note and the common money counts, and the money was paid in generally, it was held, that the partial failure of the consideration of the note might be given in evidence to reduce the amount of the plaintiff's recovery beyond the sum paid into count. *Spalding v. Vandercook*, 2 Wend. 431.

III. *What renders an agreement void.*

(a) *Disability of parties.*

60. No person can make a valid contract while he is deprived of his reason by intoxication. *Prentice v. Achom*, 2 Paige, 30.

(b) *Illegal consideration.*

61. A promise by the putative father to pay for the board of a woman and her bastard child; the purpose of both parties, express or tacit, being to facilitate a continued state of cohabitation between the promisor and the woman, is void. *Travinger v. M^r Burney*, 5 Cow. 253.

62. But the purpose must be clearly proved; and is not to be inferred from a previous cohabitation between them, with the knowledge of the promisee. This fact is not a sufficient ground for the jury to infer consent to a subsequent cohabitation, in a case where the woman is the daughter of the promisee. It makes nothing towards such an inference, and should not be submitted to the jury. *Ibid.*

63. An attorney received an order for collection in favour of B.; who directed the attorney to retain out of the moneys to be collected, a

debt due to him and another; afterwards, B. assigned the demand to T., to whom the attorney promised to pay the whole demand when collected; held, that the promise was *nudum pactum*, as to the sum which B. agreed he should retain; and that he was bound to pay no more than the balance after deducting that sum. *Taylor v. Bates*, 5 Cow. 376.

64. An agreement to transfer stock of an incorporated company at a future day, the vendee advancing money upon it having no intention to take a transfer, but merely to speculate upon the rise and fall of stocks in market, is not void, as against public policy. *Frost v. Clarkson*, 7 Cow. 24.

65. Such a contract to transfer, at sixty days, one hundred shares of stock in an incorporated company, the vendor owning them at the time, and having a right to transfer them, is good, though he sell out all but forty shares intermediate the contract and time of transfer. The statute (2 R. S. 187. 18.) avoids such a contract only where the vendor does not own the shares at the time of the contract. *Ibid.*

66. The vendee cannot recover, as money had and received, his advance upon such a contract merely on the ground, that at the end of the sixty days, the vendor owned but forty shares; for the sale is not of any one hundred particular shares, but any one hundred shares in the company; and if the vendee is ready to receive a transfer and pay, other one hundred shares may be procured in market. *Ibid.*

67. Otherwise, where a party to whom money is advanced, as the consideration for doing an act, puts it out of his own power to perform, in such case he is liable for money had and received, even without notice or request. *Ibid.*

68. So where he prevents the opposite party from performing. *Ibid.*

69. A fair and *bona fide* purchase of a chose in action, in the ordinary course of trade or business, or for the purpose of securing an antecedent debt, is not unlawful. *Ward v. Van Bokkelen*, 2 Paige, 239.

70. But the purchase of a mere foundation of an action by a party who has no interest in the controversy, with the express object of commencing a suit thereon, and for the purpose of harassing a defendant, or of speculating out of the litigation, is illegal, and a Court of Equity will not sustain a suit in favour of such purchaser. *Ibid.*

(c) *Want of consideration.*

71. Although a promise to pay a sum of money, founded upon the forbearing to prosecute a suit which could not be maintained, is void, for want of consideration; yet the defendant, in order to avail himself of such a defence, must show *conclusively*, that the suit, which was the foundation of the promise, could not have been prosecuted to effect. *Gould v. Armstrong*, 2 Hall, 266.

(d) *Agreement against public policy or the policy of the law.*

72. Where a debt is secured by an instrument of a higher nature, as by deed, or record, a promise to pay it is void. *Miller v. Watson*, 5 Cow. 195.

73. A contract, made as an indemnity against the consequences of an illegal or immoral act, to be done at a future period, is void, on principles of public policy; but a person may indemnify himself by contract against the consequences of an unlawful act *already* done. *Kneeland v. Rogers*, 2 Hall, 579.

(c) *Fraud.*

74. Fraud as to the consideration cannot be set up to avoid an agreement, under seal; but only fraud as to the execution. *Franchet v. Leach*, 5 Cow. 501.

75. A covenant cannot be avoided in a Court of law on the ground of misrepresentation as to the consideration. *Champion v. White*, 5 Cow. 509.

IV. *Performances.*

(a) *What is a good performance.*

76. Where no place is mentioned for the delivery of the deed in articles for the sale of land; though the vendor is bound to seek the vendee and tender a deed, yet the parties may by parol agree on a place of performance, after the execution of the articles; or the vendee may appoint a place; and if the vendor tender at the place, it is well. *Franchet v. Leach*, 5 Cow. 506.

77. Semb. if the vendee tell the vendor, before the day, that he will not perform, no tender is necessary. *Ibid.*

78. Where one agrees to convey land on the payment of money, the vendee must not only tender or pay the money, but he must demand a conveyance, and after waiting a reasonable time for it to be made out, must present himself to receive it. *S. P. Fuller v. Hubbard*, 6 Cow. 13.

79. And where the vendor dies, the same demand must be made of, and time allowed to his heirs, before a suit can be brought against his personal representatives for damages. *Ibid.*

80. And it is no excuse that the heirs be numerous, and dispersed in different parts of the country. *Ibid.*

81. When a party has entered into an agreement to deliver property on demand to another, and he to whom it is to be delivered is at the time of the delivery to do an act on his part beneficial to the first, if the party who is to deliver the property has received *part of the consideration* for his promise, and *refuses to perform*, the other may bring his action for such non-performance, without averring performance, or readiness or offer to perform, on his part; the promises, in such case, being considered *independent*. Thus where A. had received a transfer of the interest of B. in certain real estate, in consideration whereof he entered into an agreement to deliver a carding machine on demand to B., who on delivery thereof agreed to give his note to A. for a certain quantity of wheat, and A. refused to perform his agreement; *it was held*, that B. might maintain an action against him for the non-performance, without averring performance, or a readiness or offer to perform, on his part. *Woodworth v. Curtis*, 7 Wend. 113.

82. Where A. agreed to sell to B. a specific quantity of an article, and to deliver it within a given period, for which B. agreed at a specified price, \$100 in advance, and the residue when the whole quantity should be delivered, and A.

delivered a part only; *it was held*, that A. was not entitled to recover for the portion delivered, unless the delivery of the residue was prevented by the vendee. *Champlin v. Rowley*, 13 Wend. 258.

83. Where a party contracts to sell a quantity of produce, and to deliver it at the purchaser's house within a few days; to entitle the purchaser to sustain an action for the non-delivery, he must at least show a readiness and willingness on his part to receive and pay for the articles at the place appointed. *Cook v. Ferral's Adms.* 13 Wend. 285.

84. Where a loan is to be repaid by an investment in merchandise for the lender, the merchandise must be estimated at its actual cost in specie or other circulating medium, which is a legal tender at the place of payment, and not at its nominal cost in a depreciated or fictitious currency. *Collon v. Dunham*, 2 Paige, 267.

(b) *Time of performance, and how enlarged or varied.*

85. A parol agreement to enlarge the time of the delivery of articles, promised in writing to be delivered on demand, made at the time, or before executing the written contract, though repented immediately afterwards, is no defence to an action on the contract brought before the time to which the parol agreement related. Such parol agreement is void, though for a valuable consideration. *Frost v. Everett*, 5 Cow. 497.

86. A valid agreement to enlarge the time of performing a contract may be given in evidence under the general issue. *Ibid.*

87. But if a plea or notice were necessary, the defendant is not confined to the precise day at which he states the agreement to enlarge to have been made. *Ibid.*

88. Where W. on the 31st October hired a house of G. from 1st of November, for six months, and agreed to pay \$50 in advance, and receive \$100 in a manner specified, but omitted to pay or give security till 3d November, when G. let the house to another; *held*, that the contract was at an end; though W. mentioned at the time of the contract, that he did not want possession under a fortnight. *McGaulter v. Wilber*, 1 Cow. 257.

89. The payment, &c. is in such case a condition precedent, not to his entering into possession, but to his being entitled to the possession. *Ibid.* And the agreement was accordingly construed to mean a payment, &c. before the 1st November. *Ibid.*

90. A promise to extend the time of payment of a note, made subsequent to its creation, may be set up by way of defence, if founded upon a good consideration. The promise of a maker of a note to pay a part of it, when due, and payment in pursuance thereof, is not such a consideration. *Miller et al. v. Holbrook*, 1 Wend. 317.

91. Where D. agreed with S. to exchange farms with him, and S. agreed to pay W. at the rate of \$37.50 per acre for the difference in quantity between the farms; and D. and S. also, at the same time, entered into an agree-

ment by which they bound themselves to correct any error which should subsequently be discovered as to the number of acres contained in either of the farms upon a survey thereof, provided the correction was made by the first day of April then next ensuing; and D. afterwards, but after the said first day of April, caused the two farms to be surveyed, and ascertained that there had been an error as to the quantity in the farm sold to S. by D., S. having paid for a less number of acres than that farm contained, and S. refused to correct the mistake; *it was held*, that the time mentioned in the agreement was not of the essence of the contract, and S. was decreed to pay the difference between the estimate and the actual number of acres, according to the agreement, together with the costs of suit. *Dumond v. Sharts*, 2 Paige, 182.

(c) *When a party will lose his right to enforce performance.*

92. Where a right of action has accrued for non-delivery of articles agreed to be delivered on a certain event, such right is not defeated by a subsequent tender; but if such tender be subsequently made, and the party to whom the property was to be delivered places his refusal to accept upon the ground that the article is not merchantable, he waives his right to insist upon the former default. *Gould v. Banks*, 8 Wend. 542.

93. In an action on a contract for the non-delivery of goods, the plaintiff is at liberty, in answer to proof of tender, to give evidence that the property tendered was defective in quality.

94. Notwithstanding the enlargement of the time for the performance of a sealed contract as to the doing of work, an action may be brought upon the contract after the expiration of the enlarged time, if the breaches assigned go only to the manner in which the work is done, and not to the failure in the time of performance. *Crane v. Maynard*, 12 Wend. 408.

95. If a plaintiff in such a case assigns as a breach that the defendant has not performed the work within the time limited by the original contract, the defendant may avail himself of the second agreement, as evidence of an enlargement of the time, and defeat a recovery.

V. Rescinding.

96. Where on a contract to pay for and receive a conveyance of land, the money has been paid, though a conveyance has not been given, the vendee cannot rescind the contract, and sue for the purchase money and interest; but must bring his action on the contract as one still subsisting. *Fuller v. Hubbard*, 6 Cow. 13.

97. Where the agreement is to convey land in fee simple, a judgment against the vendor will not at law authorize the vendee to rescind the contract. A conveyance without covenants would satisfy such an agreement. *Ibid.*

98. Whether a contract of sale is rescinded or released by the acts of the parties is a question of law, where the evidence establishing the acts and declarations from which such an effect is claimed is clear and undisputed. *Healy v. Ulley*, 1 Cow. 345.

99. Accordingly, where U. sold certain oars to H., who purchased by S. his agent, and the oars were delivered to S., who shortly after declared to V. that he could not pay for them, that U. must take them, and do the best he could with them; and U. took them accordingly, and delivered them to Henick, who sold them, and U. gave a receipt and order to Henick, in which he called them his (U.'s) oars, and thereby appropriated a part of the proceeds thereof when the same should be sold; *held*, that the contract of sale was rescinded by these declarations and acts of the parties; that the property in the oars was thereby re-vested in U., and that he could not be considered as the mere agent of H. either in fact or from necessity; that consequently H. was not liable to U. for the difference between the contract price and the sale price, as he would have been had the relation of vender and vendee continued to subsist between him and H. *Ibid.*

ALBANY BASIN.

1. The statute (Sess. 46, ch. 111.) authorizing the construction of a basin in the Hudson river, in the city of Albany, and erections, whereby the docks, &c. owned by individuals above, were rendered accessible, or less easily approached by vessels, &c., and, therefore, much depreciated in value, though it provided no compensation for such a consequence, is not unconstitutional, either as taking private property for public use without just compensation, or impairing the obligation of contracts. *Sansing v. Smith*, 8 Cow. 146.

2. This not being a direct invasion of private property, but remote and consequential merely, and arising from a public improvement, the injury is one to which individuals must submit, as the price of the social compact; and, in the eye of the law, the injury is *damnum absque injuria*. *Ibid.*

3. The erection of temporary bridges running from the main land, for the purpose of conveying dirt and other materials to be used in forming a pier for the basin and sloop lock, were authorized by the statute. *Ibid.*

4. But if an erection working a common injury to the owners of lock, &c. above, were unauthorized by the statute, yet no action would lie at the suit of an individual, though he should show his share of the common injury to be greater than that of others; for the Hudson at the place being a public highway, some injury from the erections, peculiar and personal to the party, is necessary to sustain the action. *Ibid.*

5. The injury being common to a large class of the community, it is the subject of indictment only as a common nuisance. *Ibid.*

6. The authorities distinguishing what is such an injury peculiar and personal to the party, as will sustain a private action for a public nuisance, cited, considered, and applied. *Per Sutherland J.* delivering the opinion of the Court. *Ibid.*

ALBANY CITY.

1. The corporation of *Albany* have a right to pass ordinances to prevent obstructions in the docks and slips within its bounds, and in the river opposite to such docks, wharves, and slips, and to enforce the same by the infliction of a penalty not exceeding \$25 for each offence; but they cannot pass a by-law, subjecting a vessel lying in any basin, dock, &c. to seizure and sale, in case of refusal by the owner after notice to remove the same; the right to make a by-law creating a forfeiture not being given, and the remedy of enforcing their by-laws having been specified. *Hart v. Mayor of Albany*, 9 Wend. 571.

2. The act of 1823, authorizing the construction of a basin in the *Hudson* river opposite the city of *Albany*, does not affect the jurisdiction of the corporation over the waters in the same, though for some purposes the basin is considered a part of the canal. *Ibid.*

3. Where parties, complainants in Chancery, had obtained an injunction restraining the corporation of *Albany*, their officers, agents, and servants, from intermeddling with a floating store-house constructed by them, and moored in the *Albany* basin, which the corporation had threatened to remove and destroy, which injunction was dissolved by the chancellor, and the parties appealed; it was held by the Court of Errors, that the appellants had utterly failed in establishing a right to erect and continue their floating store-house in the basin; that if the question of right was less clear against the complainants, they were not entitled to an injunction, because they could obtain ample compensation in an action at law, by way of damages, for any injury they might sustain from the threatened acts of the corporation; that if the right of the complainants was doubtful, and the injury which they might sustain susceptible of adequate compensation at law, they were not entitled to an injunction simply on the ground that the threatened trespass would cause a total destruction of their property; that alone not being a sufficient ground for an injunction; and for these reasons, the order of the chancellor dissolving the injunction was affirmed. *Ibid.*

4. The corporation of the city of *Albany* has the same general jurisdiction over the pier and basin as over any other part of the territory within its chartered limits, subject to such provisions of the act for the construction of the *Albany* basin as are inconsistent with that jurisdiction. *Hart v. Mayor, &c. of Albany*, 3 Paige, 213.

5. By the act of March, 1808, the jurisdiction of the city of *Albany* was extended from the western bank of the *Hudson* river to the middle of the main channel. *Ibid.*

6. Where the board of health of the city of *Albany* adjudged certain premises to be a nuisance, and an ordinance of the corporation was therefore passed directing its abatement, and an action of trespass was subsequently brought against the corporation for the acts of an agent in carrying the ordinance into effect; it was held, that the plaintiff in such action was not at

liberty to show that the nuisance did not in fact exist at the time of the adjudication; and also that it was not competent to him to show any irregularity or non-compliance on the part of the board of health with the requirements of the statutes in such cases. *Van Wormer v. Mayor, &c. of Albany*, 15 Wend. 262.

ALIEN.

I. Effect of alienage.

II. Naturalization.

I. Effect of alienage.

1. Aliens authorized by statute to hold lands, but prohibited from leasing or demising the same, are not precluded from making a demise for the purpose of bringing an ejectment. *Jackson v. Britton*, 4 Wend. 507.

2. Where a person seised of real estate died intestate without issue, and a question arose whether the whole of his estate should go to his brother, who had been naturalized, or whether a nephew, who also had been naturalized, but whose father died an alien, should come in for a part, it was held, that the brother was entitled to the whole, and that the nephew, being obliged to trace his descent through his father, who was an alien, could not claim any portion of the estate; the intestate having died previously to January 1st, 1830, until which time the provisions of 11 and 12 Wm. 3 ch. 6, enabling parties to inherit, notwithstanding their ancestors through whom they derived their title were aliens, had not been adopted in *New York*. *Jackson v. Fitzsimmons*, 10 Wend. 9.

3. An alien widow of a natural born citizen cannot be endowed by reason of her alienism; and the revised statutes having declared void a devise to an alien not authorized by statute to hold real estate, such widow cannot hold lands devised to her by her husband, although after the death of the husband she files, within the time limited by the act of 1830, the deposition required to be filed by aliens. *Mick v. Mick*, 10 Wend. 379.

4. It seems, had the widow taken the incipient steps to become naturalized previously to the death of her husband, so that at the time of his death she had been authorized to take and hold real estate, that she would have held the land devised to her. *Ibid.*

5. Where an alien was enabled by special act of the legislature to take, hold, and convey real estate, subject to the restriction that he should not demise any part thereof, or charge the same with rent; and by a subsequent act of the legislature, it was enacted, that all lands purchased by such alien previously to the passing of the last act should vest in him in the same manner as if he had been duly naturalized at the time the title to such lands was acquired; it was held, that the prohibition to lease contained in the first act was removed by the second; and that an action lay for the recovery of rent reserved in a lease executed by the alien of lands, the title to which was acquired by him previously to the passage of the last act. *Ellice v. Winn*, 13 Wend. 342.

6. An alien who has received a conveyance of title from an alien may transmit the title by conveyance to an alien, under the provision of the acts of the legislature relative to aliens holding and conveying real estate, passed in 1798 and 1819. *Aldrich v. Manton*, 13 Wend. 458.

7. An alien friend is entitled, at common law, not only to take and hold real estate until office found, but to maintain an action for its recovery, in the case of an intrusion by an individual. *Bradstreet v. Supervisors of Oneida County*, 13 Wend. 547.

8. When an alien, for the purpose of evading the law of the state prohibiting him from taking and holding real property, purchases land and takes conveyance thereof in the name of a third person, without any written declaration of trust, a resulting trust will not arise in favour of the purchaser; as equity will never raise a resulting trust in fraud of the rights of the state or of the laws of the land. *Leggett v. Dubois*, 5 Paige, 114.

9. The law never casts either a legal or an equitable estate upon a person who has no right to hold it; although such estate may for the benefit of the state be vested in an alien until office found by an express contract or conveyance. *Ibid.*

10. When an alien purchases land, and takes a conveyance of the same in the name of a trustee upon certain express trusts, with authority to sell the land to satisfy such trusts, the surplus proceeds, if any, belong to the state by escheat, and may be reached by a bill in equity. *Ibid.*

11. So where an alien purchases real estate in fraud of the law of escheat, and takes a conveyance in the name of a third person, either upon an express and declared or a secret trust, to permit the alien to receive the rents and profits thereof, the interest in such trust belongs to the state, and may be enforced in its favour and for its benefit in a Court of Equity. *Ibid.*

II. Naturalization.

12. Naturalization merely removes the disability of the alien to hold lands, leaving a right in the government to enter if he dies without heirs, or leaving alien heirs only. *Sutliff v. Forgey*, 1 Cow. 89.

13. Where alienage is interposed to a recovery in ejectment, the production of the record of naturalization of the party is a sufficient answer, without showing a compliance with all the preliminary requisites to the naturalization; the judgment of the Court admitting the alien to become a citizen is conclusive evidence upon that point. *Ritchie v. Putnam*, 13 Wend. 524.

AMENDMENT.

I. Amendment of process.

II. Amendment of declaration and pleadings;

(a) Declaration; (b) Pleas; (c) Amendment after demurrer; (d) Amendment of course.

III. Amendment of verdict.

IV. Amendment of record and judgment.

V. Amending execution.

I. Amendment of process.

1. *Certiorari* amended, where by mistake a term intervened between the test and return. *Jackson v. Crane*, 1 Cow. 38.

2. Though this may not be done in *meane process* for arrest in personal actions. *Ibid.*

3. *Certiorari* amended by inserting the test day. *Brink v. Fulton*, 1 Cow. 41.

4. A *capias ad respondendum* returnable at a wrong place is amendable. *M'Konkey v. Glen*, 1 Cow. 141.

5. A *capias ad respondendum* amended by correcting the test as to the name of the chief justice. *Brown v. Apkin*, 1 Cow. 203.

6. *Capias ad respondendum* tested by mistake at Utica, when it should have been Albany, is amendable. *Raymond v. Hiaman*, 4 Cow. 41.

7. *Capias ad respondendum*, not bailable, returnable out of a term is void, and not amendable. *Miller v. Gregory*, 4 Cow. 504.

8. A *venire* for the circuit amended by adding a seal, and making out and filing a sheriff's return thereto, *nunc pro tunc*. *Jackson ex dem. Culver v. Brown*, 4 Cow. 550.

9. Where there is non-joinder of defendants in a *capias ad respondendum* which is pleaded in abatement, the plaintiff will not be allowed to amend it by adding a name, though the statute of limitations is on the point of attaching. *Commission Co. v. Russ*, 8 Cow. 122.

10. Whether the omission of a *venire* in a civil case is not within the spirit and policy of the statute of *jeofails*? *Quere. Brown v. Genung*, 1 Wend. 115.

11. A *certiorari* may be amended on payment of costs, though a term intervene between the test and return of the writ. *Kissam v. Morris*, 2 Wend. 259.

12. Where the seal attached to a *certiorari* is not of the seal of the court out of which the writ issues, an amendment by affixing the right seal may be allowed. *The People v. Steuben C. P.*, 5 Wend. 103.

13. The omission to state the *title of office* of the presiding officer of a court in the test of a writ is no cause for setting aside the process; an amendment will be allowed. *People v. Albany Court*, 9 Wend. 486.

II. Amendment of declaration and pleadings.

(a) Declaration.

14. In ejectment it is generally allowed of course to amend by inserting a new demise, where the proposed lessee has a subsisting title. *Jackson v. Murray*, 1 Cow. 186.

15. Otherwise where the statute of limitations has attached. *Ibid.*

16. And where the action was for a military lot, the defendants being *bona fide* possessors, and the effect would have been to defeat the operation of the statutes passed April 5, 1803, (Sess. 26. ch. 88. 3 Webster, 399.) and afterwards in 1813, (Sess. 36 ch. 80. s. 4. 1 R. L. 304.) for their protection, the amendment was refused. *Ibid.*

17. For such an amendment would be equivalent to a new action, with a rule that it should overreach the statute. *Ibid.*

18. Form of the rule to amend a declaration

under the eighth general rule of April term, 1796. *Mumford v. Stocker*, 1 Cow. 601.

19. This need not specify the particulars in which the amendment is to be made, but may be general, that the plaintiff have leave to amend the declaration or file without saying how. *Ibid.*

20. Clerical mistake, by which cause of action was laid after commencement of suit, amended after verdict, though it was made a ground of objection at the trial; and the point was reserved. *Sargent v. Dennison*, 2 Cow. 515.

21. The plaintiff's attorney, in declaring on a bond, from which the seals had been torn by mistake, inadvertently made *profect* and gave *oyer*, and went to trial on *non est factum*, when the objection was taken, for the variance; but the circuit judge reserved the point, and the verdict being for the plaintiff, this with other points were put into a case with a view to move for a new trial; and on motion before the case was argued, it not appearing that the defendant had been misled by the form of declaring, the plaintiff was allowed to amend by adapting his declaration to the fact. *Ross v. Overbaugh*, 4 Cow. 124.

22. Amendment, as to the place laid in a declaration of ejectment, granted after the plaintiff had been nonsuited at the trial for variance. *Jackson v. Bailey*, 5 Cow. 265.

23. In replevin, where the defendant was defeated at the trial for a technical defeat in his avowry, which was an executor, when it should have been as heir or devisee, he was allowed to amend on payment of all costs. *Wright v. Williams*, 5 Cow. 501.

24. Leave to amend a declaration in ejectment, by adding a new demise, will not be given on a mere notice of motion, without any cause shown by affidavit. *Jackson v. Smith*, 6 Cow. 39.

25. Where, on a judgment by default on a declaration upon a promissory note, with the money counts, the plaintiff had caused the damages to be assessed by the clerk, and taken final judgment without entering a *nolle prosequi* as to the money counts; on a motion to set aside the judgment and subsequent proceedings, he was allowed to amend on payment of costs, by then entering a *nolle prosequi*; and the motion to set aside the judgment was denied. *Seebur v. Yates*, 6 Cow. 40.

26. Declaration in ejectment was allowed to be amended on the payment of costs, by altering the time of demise; though the case had been twice noticed for trial, and an objection taken on the trial that the time was laid too early; and a bill of exceptions signed on this point. *Jackson v. Tuttle*, 6 Cow. 590.

27. The plaintiff may amend his declaration of course before the defendant has answered it. *Wakeman v. Sprague*, 7 Cow. 164.

28. In a case where the plaintiff may amend, of course he may so amend as to change the venue. *Ibid.*

29. Amendment of plaintiff's *oyer*, granted on paying costs of the motion after trial, and verdict for him, though the defendant's attorney supposed the *oyer* to be correct till the

trial, and relied on moving an arrest of judgment, of which he was deprived by the amendment. *Daley v. Atwood*, 7 Cow. 483.

30. Otherwise, if it had happened that the defendant was deprived by the mistake of a substantial defence. *Ibid.*

31. Declaration in trover for notes, misdescribing them, amended after verdict and a case made, upon which the variance was presented as one objection. *Haffnagle v. Leavitt*, 7 Cow. 517.

32. But it appearing that the defendant's reliance on the variance, under advice of counsel, had caused a material want of preparation for defence on the merits, the motion was accompanied with the condition that the plaintiff should consent to a new trial. Otherwise, that the case should proceed to argument with the variance upon it. *Ibid.*

33. An amendment granted in a Court of Error after assignment of errors, by entering a *nolle prosequi* on the records returned as to the money counts, the damages having been assessed below by the clerk, on these counts, with one upon a promissory note in the same declaration. *Coster v. Phoenix*, 7 Cow. 524.

34. And this though the defendant below had been committed on a *ca. sa.*, and a suit brought for his escape against him and his bail for the gaol liberties. *Ibid.*

35. But the amendment was granted on paying the costs of the motion to amend, and of the writ of error. *Ibid.*

36. Writ of error amended as to the return and parties, in the Court of Errors. *Clapp v. Bramagham*, 9 Cow. 304.

37. A plaintiff may amend, of course, within twenty days after the plea, (if it be the general issue,) and the defendant is bound to plead anew. *Hitchcock ads. Post et al.* 1 Wend. 16.

38. Under a rule to amend, the name of a person not arrested cannot be inserted as a defendant in the declaration; and a defendant who is in Court can take advantage of such an irregularity. *Atkinson ads. Clapp*, 1 Wend. 71.

39. A declaration may be amended after verdict, on the plaintiff's agreeing to set aside the verdict and pay the defendant's costs of trial, and on the motion to amend. *Hull et al. v. Turner*, 1 Wend. 72.

40. An amendment of a *scrr.* in slander will be allowed, after issue joined, especially where the action would otherwise be lost by the running of the statute. *Tobias v. Harland*, 1 Wend. 93.

41. In slander, the plaintiff cannot add words giving a new and distinct cause of action from that originally set forth under the rule allowing an amendment as of course within twenty days. *Wiley v. Moore*, 2 Wend. 259.

42. The defendant in an action of *assumpsit* is not entitled to a new trial because the verdict exceeded the damages claimed in the declaration; but in such a case the plaintiff will not be permitted to amend his declaration by increasing the damages, unless he abandons his verdict, pays the defendant his costs of trial, and of resisting the motion to amend, and consents to a new trial. *Dox v. Day*, 3 Wend. 356.

43. A declaration was permitted to be amended

by adding a count setting forth a special agreement, nine years after the commencement of the suit, and after three trials had at the circuit; the agreement having been proved at each trial, without objection to the declaration, and the statute of limitations having run so as to bar a new action. *Miller v. Watson*, 6 Wend. 506.

44. An amendment of a declaration in a personal suit will be allowed the same as in ordinary actions. *Barber v. McHenry*, 6 Wend. 516.

45. A plaintiff after notice of trial will, on application, be allowed to amend his declaration by changing the venue, or paying costs of motion and of former plea, if new defence be interposed. *Farrington v. Suydam*, 9 Wend. 430.

46. Where a defendant who has a defence on the merits relies upon a variance between the declaration and an instrument declared on, and does not prepare for trial, and the circuit judge disregards the variance, and permits the plaintiff to take a verdict, the Court will not permit the plaintiff to amend without vacating his verdict, but he will be permitted to do so without costs. *Carpenter v. Payne*, 10 Wend. 604.

47. In slander, the omission of an averment that the slanderous words were spoken of and concerning the plaintiff is fatal to a count, even after verdict, although there be an innuendo that the defendant meant the plaintiff when he said he is a thief. *Seyre v. Jewett*, 12 Wend. 135.

48. Where, however, there is one good count in the declaration besides such defective count, and the judge before whom the cause is tried certifies "that all the evidence given would properly apply to the good count as well as to the other," the verdict will be allowed to be amended, by applying it to the good count, on payment of the costs of a motion to arrest. *Ibid.*

49. After a cause has been two years at issue, and twice noticed for trial, the plaintiff will be allowed to amend his declaration by adding a new count upon the same cause of action, upon payment only of the costs of the motion, unless the pleas are withdrawn or a new defence becomes necessary in consequence of the amendment. *Saltus et al. v. Bayard et al.* 12 Wend. 228.

50. A plaintiff may amend his declaration as of course, as well in ejectment as in a personal action. *Lounsbury v. Ball*, 12 Wend. 247.

(b) Plea.

51. On a motion to amend, the Court inquire no further into the merits of the amendment than to see that it is not frivolous; and they allowed a defendant to amend by adding a notice of special matter, though it was doubtful whether it was a defence at law, or belonged exclusively to equity. *Turner v. Dexter*, 4 Cow. 555.

52. Plea amended after replication, demurrer joinder in demurrer, judgment in Supreme Court for defendant on the ground that the replication was bad and plea good, writ of error to the Court of Errors and reversal, because plea was bad; but this was on paying the costs of both counts. The Supreme Court considered the case the same as if the plea had been overruled

in that Court on the demurrer. *Utica Ins. Co. v. Scott*, 6 Cow. 606.

53. That Court will allow a plea, holden bad on demurrer to the replication, to be amended; though the plea set up an unconscionable defence. *Ibid.*

54. But they will not allow a new plea to be added, setting up a new defence which is unconscionable. *Ibid.*

55. Where a cause has been carried down to trial upon the general issue, and contingent damages assessed on issues of law, and the replication of the plaintiff has been subsequently adjudged to be bad, leave will not be given to amend, nor in such a case would leave be given to amend a plea, also adjudged insufficient, where from the facts of the case ascertained on the trial, it is apparent that such permission would be useless. *Grinwood v. Sedgwick*, 1 Wend. 126.

56. A notice of set-off may be added to the general issue, (with the leave of the Court,) but a plea of the statute of limitations cannot be interposed after issue joined. *Hallagen ad. Golden*, 1 Wend. 302.

57. Where a plea of an insolvent discharge was clearly bad, from the want of proper averments giving jurisdiction to the officer granting it, the Court suspended judgment *non obstante veredicto*, so as to give the defendant the opportunity to apply for leave to amend. *Loper v. Loper*, 5 Wend. 112.

(c) Amendment after demurrer.

58. On reversing a judgment of the Common Pleas, given for the defendant, and on a demurrer to one of his pleas, he was allowed to amend his plea upon payment of costs. *Stokes v. Campbell*, 5 Cow. 21.

59. A defendant will be permitted to amend, though the special causes assigned by him for demurrer to the plaintiff's declaration are ruled against him, provided the questions of law presented by the special demurrer could have been properly raised under the general demurrer. *The People v. Tilton*, 13 Wend. 597.

(d) Amendment of course.

60. A defendant cannot amend his plea of course under the 8 Reg. Gen. of April term, 1796, unless it be demurred to; and then he cannot add a new plea. *Benedict v. Ripley*, 5 Cow. 37.

III. Amendment of verdict.

61. A mistake in framing a special verdict in the Common Pleas may be amended there, after error to this Court, joinder in error, and several notices of argument; especially where the delay is accounted for; as where, by mistake, a sale, in question upon the trial below, was in the special verdict stated to have been after, instead of before, the suit brought. *Rew v. Barker*, 2 Cow. 406.

62. A verdict on only one of three issues is amendable, and will be amended on error, where its finding comprises the whole merits of the three issues; or the defect will be disregarded, and passed over as already amended. *Rockefeller v. Donnelly*, 8 Cow. 623.

63. After a general verdict upon two counts,

one good and the other bad, and after a reversal of the judgment for such cause, the postea may be amended by the entry of the verdict upon the good count only, where it appears that the evidence given at the trial applies to both counts, and that they are founded on the same cause of action. *Allen v. Addington*, 12 Wend. 215.

IV. Amendment of record and judgment.

64. On motion to set aside a *ca. sc.* for irregularity, on the ground that it was returnable at a wrong place, the Court allowed it to be amended, without giving notice of a *crœs* motion for the purpose. *Jarman v. Griewood*, 1 Cow. 129.

65. And such motions to amend are often granted upon the papers brought forward to impeach the proceedings. *Ibid.*

66. Amendment by inserting the defendant's name in the *nisi prius* record, in the place where it is usually inserted before the allegation of entry and ouster, the omission being by mistake. *Jackson v. Young*, 1 Cow. 131.

67. This was done after a nonsuit at the Circuit for the defendant's not appearing. *Ibid.*

68. And though the defendant swear to merits in such a case, the Court will not relieve unless he excuses his default. Such an omission is not an irregularity. It is matter for motion in arrest or error, and the record is not void, but voidable, and may be amended. *Ibid.*

69. Record amended where by mistake the judgment was drawn *de bonis propriis*, whereas it should have been *de bonis intestatoris ei, &c.*, *et de bonis propriis ei non se*. *People v. M'Donald*, 1 Cow. 169.

70. The Court will not entertain a motion to amend a justice's return to a *certiorari*, unless the affidavit on which it is founded, and the return or certified copies thereof be furnished. *Cutler v. Gidney*, 1 Cow. 571.

71. Nor will they amend where a return is a full answer to the affidavit. *Ibid.*

72. Where a party inadvertently omits to file papers necessary to warrant his judgment, or to render it formally correct, or commits a formal mistake in drawing up his judgment roll, it is of course on motion to allow an amendment; as where he omits to file the *nisi prius* record, postea, clerk's certificate, venue and panel. These may be filed *nunc pro tunc*. *Holmes v. Remsen*, 2 Cow. 410.

73. And if these or the like papers are lost, the Court will allow new ones to be drawn and filed. *Ibid.*

74. And they will allow the party to amend his continuances, or a *nisi prius* clause, in the judgment roll. *Ibid.*

75. These and the like amendments will be allowed after error brought, on paying the costs of the motion; and the proceedings in error, provided the plaintiff in error choose to discontinue. *Ibid.*

76. On error from the Court of Common Pleas, the record in the eye of the law, for the purpose of being amended by that Court, remains in the Court below. Or if otherwise, this Court have power to amend it themselves. *New v. Barker*, 2 Cow. 408.

77. Judgment and execution by A. against B., but by accident the record was not filed; then judgment and execution in favour of C. against B. Both executions being levied on the same personal property, which was sold, and the avails paid over, by order of this Court, in certain portions, to A. and C. before the latter discovered that A.'s judgment was imperfect. Then C., on discovering this, applies for a preference as to the whole of the money. This was denied, and on A.'s application he was allowed to file his record *nunc pro tunc*, it appearing that his execution was first levied, and C. having full notice of A.'s judgment before his (C.'s) judgment was obtained. *Chichester v. Cande*, 3 Cow. 39. *S. P. Hart v. Reynolds*, 3 Cow. 42, (note a.)

78. When the plaintiff neglected to reply to a plea of the statute of limitations, and went to trial upon a *nisi prius* record, omitting it; but the defendant had the full benefit of a defence upon the statute at the time; the Court refused to set aside a verdict for the plaintiff for irregularity, but suffered him to amend. *Snyder v. Snyder*, 4 Cow. 394. *S. P. Cook v. Burke*, 4 Cow. 395, note (a.)

79. A mistake in a record as to the name of the party in whose favour judgment is rendered is clerical, and may be amended on error. *Marsh v. Berry*, 7 Cow. 344.

80. The general issue and infancy being pleaded on a general verdict for the plaintiff, his attorney, by mistake, drew the postea so as to cover only the first issue, and a writ of error was brought to the Court of Errors, upon which issue was joined; *held*, that the postea should be amended so as to embrace both issues. *Stakes v. Campbell*, 7 Cow. 425.

81. A decree of the Court of Errors will be amended, where, through inadvertence, costs have been given to an appellant on the reversal of a decree of the Court of Chancery, although the transcript and *remittitur* are in the hands of the register in Chancery, if the receiving and filing of the same have been suspended by order of the chancellor. *Murray v. Blatchford*, 2 Wend. 221.

82. A variance between a judgment and execution and the recitals in a sheriff's deed is amendable. *Brown v. Belts et al.* 13 Wend. 29.

V. Amending execution.

83. An execution tested after the plaintiff's death is irregular, but may be amended. *Center v. Bilinghurst*, 1 Cow. 33.

84. Where a sheriff sold land under two executions, the plaintiff in one of which died several years before it issued; and the certificate of sale was given under and the money applied on the execution, the plaintiff in which had so died; on due notice to the sheriff and the defendant, the Court ordered the certificate amended, and the money applied on the valid execution, and that the other execution be set aside. *Ganecvoort v. Gilliland*, 1 Cow. 218.

85. But an order that the rule be under the second execution validated was refused as unnecessary. *Ibid.*

86. *Fieri facias* amended by adding the name of a plaintiff, and correcting the name of the

place at which it was tested. *Porter v. Goodman*, 1 Cow. 413.

87. And this after an action of trespass brought for a levy under it. *Ibid.*

88. But this was done on payment of the costs both of the motion and the action. *Ibid.*

89. It seems that the Court would refuse to amend a *fiat facias* issued on a judgment by confession upon a bond and warrant of attorney which had been obtained fraudulently. *Ibid.*

90. Where a sheriff upon a *fiat facias* sold three parcels of land, but in the certificate of sale by mistake omitted to mention one of these parcels, the Court ordered him to amend his certificate according to the fact. *Smith v. Hudson*, 1 Cow. 430.

91. A *ca. sa.* tested out of term is not void, but voidable only, and may be amended on motion. *Jones v. Cook*, 1 Cow. 309.

92. The plaintiff's attorney may, with the consent of the defendant, alter a *fiat facias* after it is placed in the sheriff's hands, so as to make it correspond with the judgment record, without entering a rule for the purpose. *Oakley v. Becker*, 2 Cow. 464.

93. Though a *fiat facias* be voidable for variance from the record, the defendant alone can move to set it aside. *Ibid.*

94. A judgment creditor in another suit has no right to do this. *Ibid.*

95. A writ wrongly tested as to the name of the chief justice is amendable; and when this mistake is in a *ca. sa.*, the sheriff cannot object it in an action for an escape. *Ross v. Luther*, 4 Cow. 168.

96. Execution amended as to the return day. *Vandusen v. Brower*, 6 Cow. 50.

ARREST.

1. Arrest on process not bailable. *Emmett v. Bradstreet*, 2 Cow. 449.

2. The sheriff arrested the defendant on a *captas ad respondendum* not bailable, and on her refusing to endorse her appearance, he suffered her to go at large, and returned *expi corpus*; and on motion in his behalf, the Court ordered common bail filed. *Ibid.*

3. The arrest of a party under a wrong name cannot be justified, unless it be shown, that he was known as well by the one name as the other; and he may support an action against any one who has had a direct agency in causing the arrest; but the circumstance of a defendant's name being subscribed to the process, without other proof of his agency, is not sufficient to charge him. *Grinwald v. Sedgwick*, 1 Wend. 126.

4. A manual touching the body is not necessary to constitute an arrest; it is sufficient if the party be within the power of the officer, and submits to the arrest. *Bisell v. Gold*, 1 Wend. 210.

5. A party attending a reference is entitled to privilege from arrest, but such privilege lasts only during the hearing and a reasonable time afterwards, to enable the party to return to his residence. *Clark v. Grant*, 3 Wend. 257.

6. A constable may *ex officio* and without warrant arrest a breaker of the peace, and bring him before a justice. *Taylor v. Strong et al.* 8 Wend. 384.

7. A person arrested in one county, passing through another county, in the ordinary route of travel, from the place where he was arrested to the place where he is to be conveyed according to the process, is not subject to arrest in the county through which he passes; and if arrested, all persons concerned in the same with knowledge of the previous arrest, are answerable for an unlawful arrest. *Love v. Humphrey*, 9 Wend. 204.

8. A defendant in error, against whom there is judgment for costs, is not subject to arrest or imprisonment unless liable within the fourth section of the act to abolish imprisonment. *The People v. Onondaga C. P.* 9 Wend. 430.

9. Process, whether civil or criminal, against a person by a wrong or fictitious name, would not, previous to the act of 1830, justify an arrest, although the person taken was the one intended to be arrested. *Gurney v. Lovell*, 9 Wend. 319.

10. A regular officer is not bound to exhibit his authority or process when he arrests a defendant; a special deputy is. *Arnold v. Stoves*, 10 Wend. 514.

11. Where the defendant was in contempt for not putting in an answer, and an attachment had been issued against him, upon which he could not be found; and afterwards upon his application to the proper officer for his discharge under the insolvent act, the complainant, with the view of procuring his arrest upon the attachment, obtained an order for his personal examination before such officer, and after such examination of the defendant was closed, and as he was leaving the office, the complainant caused him to be arrested upon the attachment; it was held, that as the defendant was arrested by such an improper contrivance, he ought to be discharged. *Snelling v. Watrous*, 2 Paige, 314.

12. An attachment for the non-payment of costs only, although in form a criminal, yet in substance is a civil proceeding, and a party will be entitled to the like protection from arrest thereon as on other civil process during his attendance as a party or witness before some Court or officer, and a reasonable time to go and return. *Ibid.*

13. Whether the like protection would be extended to cases where the Court can punish by fine and imprisonment upon attachment to enforce a civil right or remedy? *Quere. Ibid.*

14. A person who has been illegally arrested while returning from Court, where he has been examined, will be liable to arrest under the writ after a discharge from the unlawful taking. The process is still good in the sheriff's hands. *Van Wesel v. Van Wesel*, 1 Edw. C. R. 113.

ARREST OF SHIPS AND VESSELS.

1. In a proceeding under the act (1 R. L. 130.) against ships and vessels for debts, the

cause cannot be referred during the pendency of a demurrer. *Ritter v. Steamboat Olive Branch*, 1 Wend. 35.

2. In proceedings under the statute (1 R. L. 130.) against a vessel, when there are sundry attachments, the creditor who first sues out an attachment is entitled to a preference in the appropriation of the proceeds of the vessel, although others obtain judgment before him. There is no *pro rata* distribution in such a case. *The People v. The Judges of the Mayor's Court of New York*, 1 Wend. 39.

3. A sloop of such a burthen as ought to have been licensed, under the act of Congress, as a coasting vessel, employed in navigating the Hudson river, between Albany and New York, may be proceeded against by attachment under the act authorizing the arrest of ships or vessels for debts contracted, &c. *Walker v. Blackwell*, 1 Wend. 557.

4. In a proceeding under the statute authorizing the arrest of ships or vessels, &c., after the appearance of the owner, and the discharge of the vessel on his giving bond, judgment may be awarded against him *personally* for the amount found due. *Densing v. Smith*, 2 Wend. 303.

5. The judgment will be sustained, though the amount found due to the plaintiff be less than the sum required to be sworn to in order to authorize the issuing of the attachment. *Ibid.*

6. It is not necessary that the account of the plaintiff should be set forth in the record of judgment. It is sufficient that it be annexed to and filed with the declaration. *Ibid.*

7. A party who has furnished wood as fuel for a steamboat is not entitled to the remedy given by the act authorizing the arrest of ships or vessels for debts, &c. The supplies contemplated by the act are such as enter into the construction of equipment of the vessel and become a part of her, and not such articles as are daily consumed and constantly replaced. *Johnson v. The Steamboat Sandusky*, 5 Wend. 510.

8. The act authorizing the arrest of ships or vessels, &c., does not include small, open, undecked boats, employed within a port, and not performing voyages coastwise from state to state, or from one port to another. *Farmer's Delight v. Lawrence*, 5 Wend. 564.

9. The rule of damages in a proceeding under the statute against ships and vessels, for injuries done to other vessels through negligence or wilful misconduct, is the actual damage to the vessel injured, and not contingent damages sustained, such as the loss of earnings, &c. *Finch v. Brown*, 13 Wend. 601.

10. Whether the omission to have a light in the rigging of a vessel lying at anchor in the night time on the Hudson, will deprive the owner of the right to recover damages, in case his vessel is run foul of through the negligence or wilful misconduct of persons navigating other vessels? *Quare*.

ASSAULT AND BATTERY.

1. The party first attacked in a personal encounter between two individuals is not entitled

to maintain an action for an assault and battery, if he use so much personal violence towards the other party (exceeding the bounds of self-defence) as could not be justified under a plea of *non assault de me*, were he the party defendant in a suit. *Elliott v. Brown*, 2 Wend. 497.

2. An assault and battery cannot be compromised after conviction. *The People v. Bishop*, 5 Wend. 111.

3. In an action for an assault and battery, if the defendant does not plead, but suffers a default, such default admits an assault and battery, but it does not admit one on any particular day, (e. g. the day laid in the declaration,) nor any circumstances laid in the declaration by way of aggravation. Without proof in such case that the injury complained of was committed by the defendant, the plaintiff is entitled to only nominal damages. *Bates v. Loomis*, 5 Wend. 134.

ASSIGNMENT.

- I. *What is assignable, and the effect of an assignment.*
- II. *How far the interest of an assignee will be protected at law.*

1. *What is assignable, and the effects of an assignment.*

1. An assignee of a *chose* in action takes it subject to all equities existing against it at the time of the assignment, though he have no notice of such equity. *Chamberlin v. Day*, 3 Cow. 353.

2. Where W. purchased a judgment of C. against D. without notice that D. had previously purchased a judgment against C.; *held*, that D. might, notwithstanding, set off his judgment so purchased against the judgment in favour of C. *Ibid.*

3. Assignee of a judgment against the plaintiff allowed, on motion, to set it off against the judgment in favour of the plaintiff against the assignee. *Ibid.*

4. An assignee of a *chose* in action takes subject to all liens against the assignor. *Taylor v. Bates*, 5 Cow. 376.

5. T., an assignee of a demand left with an attorney for collection, assigned it to another, excepting fifty dollars, of which the attorney had notice, and then received the money; *held*, that an action for money had and received would lie in the name of T. against the attorney for the fifty dollars, but no more; and his assignee must sue for the residue; that the money was received for the use of those who had right as assignees respectively; but that neither could sue till demand made of the attorney. *Ibid.*

6. An assignee is liable for covenants broken only while he continues assignee; and he may discharge himself of liability for any subsequent breaches by assigning to another. *Armstrong v. Wheeler*, 9 Cow. 88.

7. The assignment of a judgment for a debt carries the debt; and if the latter be secured by mortgage, it carries the mortgage in trust. *Pattison v. Hall*, 9 Cbw. 747.

8. So if the assignment be of only part of

judgment, and consequently a part of the mortgage debt, an interest in the mortgage passes corresponding to the proportion of the debt assigned. *Ibid.*

9. The assignor of a judgment is liable for the costs awarded on setting aside, for irregularity, an execution issued by the assignee. *Worden v. Bank of Orange Co.*, 2 Wend. 245.

10. A right of action for a tort is not assignable. *Gardner v. Adams*, 12 Wend. 297.

11. If a party take the assignment of a chose in action in suit, and on a compromise with the defendant accept a specific sum in lieu of damages and costs, he will thereby become liable, to the attorney prosecuting the suit, for the taxable costs. *Ward v. Lee*, 13 Wend. 41.

12. The assignee of a judgment takes if subject to all the equities which existed against it in the hands of the assignor. *Webster v. Wise*, 1 Paige, 319.

13. The general assignees of a bankrupt take his estate subject to every equitable claim existing against it on the part of third persons; and this is the case, although they had no notice of such claims at the time of the assignment. A different rule exists in the case of mortgages and bona fide purchasers of the legal estate. *In the matter of Howe*, 1 Paige, 135.

14. Where an absolute assignment of all the assignor's property and choses in action contained a provision that the assignor would, with all convenient speed, make out an inventory of such property and choses in action, and which inventory, when made out, was to be considered a part of the assignment; it was held, that the assignment conveyed a present interest to the assignee, and that its taking effect did not depend upon the making out of the inventory. *Keyes v. Brush*, 2 Paige, 311.

II. How far the interest of an assignee will be protected at law.

15. The assignee of a chose of action, who takes it as collateral security for a debt, has a power coupled with an interest, and will be protected as an assignee against the release of his assignor made after notice of the assignment to the debtor. *Wheeler v. Wheeler*, 9 Cow. 34.

16. To constitute such an assignee of a chose in action as courts of law will protect against the acts of his assignor, the assignment need not be absolute, or of the whole subject-matter. It is enough that it carry to the assignee a power coupled with an interest. *Ibid.*

17. An assignment, void in part upon the ground of being against the provisions of a statute, is void in toto, and no interest passes thereby to the assignee as against creditors who did not assent to it. *Wakeman v. Grover*, 4 Paige, 24.

18. When the holder of a mail contract assigned the same to the complainant, who agreed to carry the mail during the continuance of the contract, and was to receive therefor all the moneys which should become payable under the contract according to the terms thereof; and the assignor afterwards gave R. an order upon the postmaster-general for the moneys which might become payable upon the contract, to in-

demnify R. and S. against a responsibility which they had previously incurred as his endorers; held, that the complainant by the assignment of the mail contract had a specific equitable lien upon the moneys which were to be received for carrying the mail under the same; and that having the prior as well as the superior equitable right to such moneys, R. was bound to pay over to him the amount which had been received from the postmaster-general upon such order. *Bradley v. Root*, 5 Paige, 632.

19. C. held a single bill or sealed note against H. for \$2425, payable to himself in twelve months from the date, with interest. C. borrowed of M. \$100, and pledged this sealed note to him to secure the repayment, and endorsed his name in blank on the note. M. being indebted to the Tradesman's Bank in the sum of \$2600, agreed to transfer the note to the bank as security for \$1000, part of the debt he owed the bank, provided the bank would advance to him the remainder of the note. The bank advanced the money, and M. endorsed his name in blank on the note, and delivered it to the bank. M. afterwards became insolvent, and never paid any part of the \$1000, or of the money advanced to him by the bank. Soon after C. delivered the note to M., M. received a larger amount of money belonging to C. than the amount C. owed him. The bank were ignorant of the right of C., and gave H. notice not to pay the note to any one except themselves. C. gave notice to the bank of his title to the note, and demanded it from them. The bank refused to deliver C. the note. Held, that C., having both the prior equity and the legal right, was entitled to the note. *Owens v. Tradesman's Bank*, 1 Paige, 131.

20. Had the note been negotiable, and had it been taken by the bank in the usual course of business, the equity of the bank would have been equal to that of C., and the legal right of the bank to collect the money due on the note in their own name would have prevailed over the prior equity of C. *Ibid.*

21. *Aliter*, if the note, although negotiable, had been transferred to the bank merely as a security for an antecedent debt. *Ibid.*

22. The assignee of a chose in action, who only obtains an equitable interest therein, and who must sue in the name of the original owner, is not protected against a prior equity. *Ibid.*

23. Where an assignee of a patent right sold the same, and at the time of sale exhibited a machine as the one which he then supposed to have been patented, but which afterwards was discovered to be different from the one actually patented as described in the specification, the deed of assignment and a note given for the purchase money, and an accompanying agreement in relation to the sale of the patent right, were ordered to be delivered up and cancelled, the whole transaction having been founded upon a mistake as to a matter of fact. *It was also held*, that the vendee was not entitled to the damages which he had sustained in consequence of such purchase; but that if any part of the purchase money had been paid, he would have been entitled to have the same refunded. *Burrall v. Jewett*, 9 Paige, 134.

ASSIGNMENT UNDER FOREIGN BANKRUPT ACT.

1. An assignee under a foreign commission of bankruptcy is not entitled before judgment to an injunction to restrain the bankrupt from receiving from the custom house here, property which was on the high seas, on board a vessel on its way from England to New York at the time of the suing out of the commission. *Abram v. Pletoro et al* 3 Wend. 538.

ASSUMPSIT.

- I. *When an action of assumpsit will lie.*
- II. *What consideration will support an assumpsit; (a) Benefit to the defendant; (b) Submission to arbitration.*
- III. *Assumpsit on an express promise.*
- IV. *Assumpsit on an implied promise and the general indebitatus assumpsit; (a) When a party may recover on an implied promise, notwithstanding an express agreement; (b) Money paid; (c) Goods sold; (d) Work and labour; (e) Money had and received.*

I. *When an action of assumpsit will lie.*

1. A promise by the assignee of a contract to pay the money due thereon, when collected by due course of law, is broken, if the promisor suffer a term to elapse after the money is due without prosecuting therefor; and this especially where he is directed by the promisee to proceed in the collection. *Kies v. Tiff*, 1 Cow. 98.

2. An adjournment in a Justice's Court is a sufficient consideration for a promise; and that appearing upon the face of the contract in writing takes it out of the statute of frauds. *Assumpsit* is the proper form of action upon such an agreement. It is not a recognisance. *Stewart v. McGuin*, 1 Cow. 99.

3. One who had a promise of indemnity against a debt, and is sued and compelled to pay it with costs, may recover over against the promisor, not only the principal and interest upon the money which he has paid, but also the costs. *Mott v. Hicks*, 1 Cow. 513.

4. An action of *assumpsit* will lie against a corporation upon simple contracts of its authorized agents, when acting within the scope of the legitimate purposes of such incorporation. *Ibid.*

5. Where one by action recovers money which has been before paid, no action lies to recover it back; and this though the first recovery be fraudulent. *Walker v. Ames*, 2 Cow. 428.

6. A promise to pay the assignee of a chose in action entitles him to sue in his own name in *assumpsit*, though the contract assigned to him be a specialty. *Chumpton v. Jones*, 4 Cow. 13.

7. Where W. gave M. a deed with warranty, and afterwards admitted that the title had failed; and promised M. to refund the consideration money which he had received, and stated a balance due; yet, *held*, that *assumpsit* would not lie to recover it; but that M. should be put to

his action on the covenant. *Miller v. Watson*, 5 Cow. 195.

8. *Semble*, that a contract for the sale of lands, signed and sealed by the vendor only, and delivered to and accepted by the vendee, and which purports to contain on the part of the latter a covenant to pay the consideration money, may be enforced against the latter by an action of *assumpsit*. *Gale v. Nixon*, 6 Cow. 445.

9. And where such a contract was recognised and ratified on the part of the vendees by an endorsement under their hands and seals; *held*, that this was a sufficient signing to take the case out of the statute of frauds. *Ibid.*

10. The covenant by the vendor was to convey within two years from the date, and the contract purported to contain a covenant on the part of the vendees to pay on receiving the conveyance. The latter took immediate possession pursuant to another covenant in the contract on the part of the vendor, and by an arrangement between the parties and A., part of the premises were conveyed to the vendees, by A., within two years, A. having title; but the time had elapsed when the conveyance for the residue was tendered, and for that reason the vendees refused to receive the conveyance; yet, *held*, that the contract was not rescinded, and that the vendees were liable in *indebitatus assumpsit* for the consideration money. *Ibid.*

11. A written recognition of a contract void by the statute of frauds, though after it is entered into will make it binding. *Ibid.*

12. S. wrote a letter in Salem, addressed to C., of Salem, stating that he (S.) had told R., his brother, that if he (R.) could make an arrangement with his creditors there, (Salem,) he would be responsible for payment in one year. M. was one of the creditors, and on the letter being shown him, he waited one year, and then demanded his debt of S., and brought an action on the promise contained in the letter. R. had other creditors at Salem, with whom no arrangements had been made; *held*, that the promise in the letter was upon the condition that an arrangement should be made with all the creditors at Salem, and the action would not therefore lie. *McFarland v. Smith*, 6 Cow. 669.

13. *Held*, also, that if it referred to an arrangement with a single creditor, yet M. must prove a binding agreement not to sue upon the original debt within the year, and that there was nothing in the fact that he knew of the letter, and actually waited a year, which would authorize a jury to infer such an arrangement. *Ibid.*

14. Though a note, discounted as security for money lent by the members of an association, contrary to the restraining act, (2 R. L. 234.) be void; yet the contract of loan remains good; on which an action lies by the lender to recover it of the borrower. *Utica Ins. Co. v. Kipp*, 8 Cow. 90.

15. H. owning a Hudson line of boats, contracted with S. to transport S.'s goods from New York to Rochester. H. transported them to Troy, where A.'s line of canal boats received them, and transported them to Rochester. A. remitting the price of transportation from New York to Troy to H. A. not knowing that "

contract of H. was to transport farther than Troy, and it being the custom between H. and A. to help each other to freight, and for the river lines of transportation to deliver goods, to be transported by them to Troy, and destined to the west, to lines on the Erie canal, the owners of the latter paying the price of transportation to Troy, and charging this with farther transportation to the owner of the goods, made out a bill for both, and presented it to S., who received the goods from A. without objection to the bill, and without disclosing the contract with H.; but afterwards, on the ground that the goods had been injured before they reached Troy, S. refused to pay A.'s bill until he should be indemnified for the injury to the goods. *Held*, that, under the circumstances of the case, it should be left to a jury to infer a promise to A. to pay both for the transportation and the money advanced; though if S. had, in the first instance, refused to pay, it would have been otherwise. *Allen v. Smith*, 8 Cow. 301.

16. Several persons entered into an agreement to form a joint stock company for the purchase of a steam brig, the managing owners of which were among the subscribers. The terms of the agreement required one-fourth of the subscription to the stock to be paid on delivery of the bill of sale of the vessel, and the residue by instalment. Before the delivery of the vessel, or the execution of a bill of sale of her, she was destroyed by fire; previously to which, one of the subscribers paid an instalment of ten per cent. to the managing owners. *Held*, that the vessel was at the risk of the owners until the bill of sale was executed, or the vessel itself delivered to the subscribers; that until then, there was no subject in which the subscribers had a joint interest or property, and consequently no partnership; that it having become impossible for the owners of the vessel to comply with the contract on their part, and the consideration on which the ten per cent. was paid having failed, the subscriber who paid the money was entitled to recover it. *Murray et al. v. Richards*, 1 Wend. 58.

17. An action of *assumpsit* for use and occupation will not lie against a tenant, who holds over after the expiration of his term, where proceedings under the statute have been instituted against him, to turn him out of possession; such proceedings being in the nature of an ejectment, by which the relation of landlord and tenant is disavowed. *Peabodysen v. Bradshaw*, 1 Wend. 134.

18. *Assumpsit* will lie against a sheriff for money collected by him on an execution, without a previous demand. The ruling of a sheriff to return an execution, after the commencement of a suit against him for the money received by him, is not an abandonment of the action; nor will the return of the execution, and the payment of the money into court, after such proceeding, discharge the sheriff's liability. An allegation in a declaration, that the defendant "seized and took in execution, divers goods, &c., of the value of the moneys directed to be levied," "and levied the same thereout," is synonymous with the statement that he had made money. *Dygart ad. Crane*, 1 Wend. 534.

19. An action will not lie against an officer of the army acting in his official capacity, and as an agent of the government, on his promise to pay a reward offered for the apprehension of a deserter. *Belknap v. Reinhart et al.* 2 Wend. 375.

20. Where there is an agreement to demise a house for five years, and leases to be executed, under which the party enters and subsequently refuses to accept a lease, the owner may maintain *assumpsit* for the use and occupation. *Little v. Martin*, 3 Wend. 219.

21. Taking the key of the house, without a continued actual possession, is enough to entitle the plaintiff to sustain the action. *Ibid.*

22. Money erroneously paid by one party to another in mutual ignorance of facts which, if known, would have prevented the payment, may be recovered back in an action of *assumpsit*. *Burr v. Feeder*, 3 Wend. 412.

23. A grantee of lands may maintain an action of *assumpsit* against the grantor for the consideration money and interest on a promise made by him subsequently to the conveyance to pay such sum, if possession should be surrendered to a claimant of such; notwithstanding the conveyance contained a covenant of warranty. But the plaintiff must declare on the special contract, and he is not entitled to recover under the common money counts, or an *in simul compulsum*. *Miller v. Watson*, 4 Wend. 267.

24. The grantee may sustain the action, though he has conveyed the land to third persons, with covenants of seisin and warranty, who, in pursuance of the grantor's request, have surrendered the possession to the claimant, and have received satisfaction of their claims against the first grantee, by a repayment of the moneys advanced to him. *Ibid.*

25. After such admission of the title of the claimant, the grantor is estopped from showing title in himself. *Ibid.*

26. The proceeds of real estate placed by a father under the control of a son, for the benefit and support of a daughter who is a *feme covert*, cannot be recovered in an action at law in the name of the husband and wife; the remedy is in equity. *Duval et al. v. Covenhoven*, 4 Wend. 561.

27. Where two persons agree equally to bear and pay the losses and damages which may be sustained in consequence of one of them becoming special bail for a third person, and after they have equally contributed to the payment of the debt, one of them is refunded the amount paid by him, he is answerable to the other for a moiety of the money received by him. *Smith et al. v. Hicks*, 5 Wend. 48.

28. Where A., in consideration of property transferred and delivered to him by B., promises to pay and discharge, amongst other creditors of B. named and specified at the time, the demand or claim of C. against B. on certain notes held by him, an action will lie by C. against A., although the promise of A. is not reduced to writing. *Ellwood v. Monk*, 5 Wend. 235.

29. Where a director of a moneyed institution renders extra services for the company, and during the period of eight years that he continues a director after rendering such services,

presents no account and makes no claim for compensation, and there is no express contract on the part of the company to pay for such services, a contract to pay will not be implied. *Ulrich Ins. Co. v. Bloodgood*, 5 Wend. 652.

30. A second action of *assumpsit* will lie by a second endorser against the first endorser of a note for moneys paid on account of the note after a former action and recovery for moneys previously paid: and such action may be maintained before the taking up and final payment of the note, and whilst it remains in the hands of a third person as the legal holder thereof. *Wright v. Butler*, 6 Wend. 284.

31. Actions of *assumpsit* on the money counts are resorted to as substitutes for bills in Chancery, and are encouraged whenever the law affords no other remedy, and where a Court of Equity would compel a defendant to repay to a plaintiff money which the latter had been compelled to pay for his benefit. *Ibid*.

32. The holder of *bank bills* cut in two parts for the purpose of safe transmission per mail, is entitled to recover of the bank the amount of the bills, where it appears that the bills were actually mailed, and that only one set of the halves came safe to hand. *Hinsdale v. Bank of Orange*, 6 Wend. 378.

33. Such recovery may be had under the common money counts. *Ibid*.

34. Where a slave was bequeathed by will to a son-in-law, and a son of the testator, who had a bill of sale of the slave dated before the time of the testator's death, permitted the slave to work for the son-in-law without giving notice of his claim in any way; *it was held*, that an action could not be maintained by the son for the services of the slave. *Demyer v. Souzer*, 6 Wend. 436.

35. Where the *payee* of a note accepted from the maker a deed of land subject to certain mortgages, and delivered up the note to the maker, and at the same time executed an instrument to him, agreeing that in case the land should sell for more than enough to pay the amount of the note, satisfy the mortgages, and discharge all necessary expenses, to pay over the *surplus* to him; *it was held*, that the deed and agreement should be construed as a *mortgage*; and that the land having been sold, and not having brought enough to satisfy the mortgages, that the maker was entitled to recover the amount of his note in an action of *assumpsit*. *Palmer v. Gurnsey*, 7 Wend. 248.

36. A contract founded upon an unlawful act, whether it be *malum in se*, or *prohibitum*, cannot be enforced by action. *Pennington v. Thwmsend*, 7 Wend. 276.

37. A. sold to B. a machine for making shingles, for the price of which notes were taken, payable to C. The machine proved worthless, and an infringement on another patent right, though the running gear of it was valuable for other purposes. In an action by C. thereon, *it was held*, that he could not recover on the notes on account of the failure of consideration; nor on a general count for the running gear, as it was sold by A. and not by C. *Peck v. Farrington*, 9 Wend. 44.

38. A constable or other officer, whose duty

it is to serve process, is entitled to recover an extra compensation beyond the fees allowed by law, when, on the request of the plaintiff in the process, and on a promise of extra reward, he uses extraordinary efforts beyond those which an officer is strictly bound to make, or which could be legally required of him, to arrest the defendant. *Hatch v. Mann*, 9 Wend. 262.

39. *Assumpsit* will not lie by the assignee of a bond, to recover the amount due to him, except on an express promise to pay him by the original debtor, although his right to the money has been recognised, a partial payment made to him, and a negotiation had for the payment of the balance. *Dubois v. Doubleday*, 9 Wend. 317.

40. Where a deed is executed to enable the grantee to compromise with the persons in possession, and the grantee conveys a portion of the land and receives the consideration money, the guarantor of the contract, on the part of the grantee, is liable for the money thus received; but where the grantee receives a remainder of a portion of the land from the tenant who attorns to him, the guarantor is not liable for its value, the grantee, or his heirs, being considered in law as holding the same in trust for the grantors. *Stymetz v. Brooks*, 10 Wend. 216.

41. Had the land thus surrendered been sold under a valid judgment and execution against the grantee, and thus, applied to the benefit of the grantee, it seems that the guarantor would have been liable for its value. *Ibid*.

42. An agreement by a mortgagee to sell mortgaged premises, (the equity of redemption in which is released by the mortgagor,) and after deducting the amount due to himself, to pay the surplus of such sale to the mortgagor, is not void, as within the statute of frauds; and after a sale of the premises for more than enough to satisfy the debt due to the mortgagee, the mortgagor may maintain *assumpsit* for the surplus. *Hess v. Fox, Ex. of Fox*, 10 Wend. 436.

43. Such action lies immediately after the sale; it is no defence that the mortgagee has sold on credit, and is not in funds. *Ibid*. 439.

44. *Assumpsit* lies to recover back money paid under a judgment subsequently reversed; and the plaintiff may recover on the common money count. *Sturges v. Allen et al.* 10 Wend. 354.

45. The award of a *venire de novo* to be issued by the Court below, and an order that the costs of reversal abide the event of the suit, are no bar to the action to recover back the money paid. *Ibid*. 355.

46. The withdrawing of a *caveat* by an heir at law, to the proving of the will of his ancestor, is a sufficient consideration to support a promise by the devisees for the payment of a specific sum of money to the heir. It is necessary, however, in such a case, to aver in the declaration that the heir would have reaped a benefit if the will had not been proved. *Seaman v. Seaman et al.* 12 Wend. 381.

47. The same principle which allows the plaintiff in an action of *assumpsit* to recover what *ex equo et bono* he is entitled to, operates in favour of a defendant when called on for the payment of money; and if he can show the

better equity, he will be permitted to retain the money. *Eddy v. Smith*, 13 Wend. 488.

48. Where an allowance is made under the revenue laws to a marshal of the United States, as a compensation for the custody of property seized and detained under an order of the Court, and the property in respect to which an allowance is made had, for a portion of the time, been in the keeping of a predecessor in office of the marshal to whom the allowance was made; *it was held*, that an action at law could not be maintained by the former marshal against the present marshal for a recovery of a proportionate amount of the sum allowed and paid. *Waddell v. Morris*, 14 Wend. 76.

49. *It seems*, that the remedy of the former marshal, if any, is by invoking the exercise of the equitable powers of the Court in which the services were rendered. *Ibid*.

50. A promise by a party to pay all he owes to another, accompanied by an express denial that he owes, or is under a legal liability to pay any thing, will not support an action. *Porter v. McClure*, 15 Wend. 187.

51. Where, in a mortgage of property, a party acknowledges his indebtedness to another in a sum certain, and declares that for the purpose of receiving the payment thereof, he transfers the property specified in the instrument; the creditor, on default of payment, may bring his action, and is not bound in the first instance to resort for satisfaction to the property. *Elder v. Rouse*, 15 Wend. 218.

52. *Assumpsit* will not lie upon a note of a corporation, to which the corporate seal is affixed; and if a count upon such note be joined with the money counts in *assumpsit*, the judgment will be arrested. *Steele v. The Onwego Cotton Manufacturing Company*, 15 Wend. 265.

53. Where a contract is entered into between two parties, the object of which is to violate the provisions or the spirit and policy of a public statute, and one pays money to the other in furtherance of such contract, and the contract is in part executed by the accomplishment in part of the original design, leaving, however, a portion of the money advanced unexpended, an action will not lie to recover back the unexpended balance. *Perkins v. Garvige*, 15 Wend. 412.

54. Where a carriage built by a mechanic in pursuance of a contract is tendered to the customer, and on his refusal to accept and pay for it, it is left in charge of a third person, of which the customer has notice; the mechanic, instead of selling it for what it may bring, and suing for the difference, may forthwith bring his action, declaring upon the contract, and averring a delivery, and is entitled to recover the price agreed upon between the parties at the time of the contract. *Bement v. Smith*, 15 Wend. 493.

55. A contract for the benefit of a third person, made without his knowledge or authority, is a binding contract on the promisor; and if subsequently adopted by him for whose benefit it was made, it may be enforced by him. *Bridge v. Niagara Ins. Company* 1 Hall, 247.

56. A bettor who has deposited money in the hands of a stakeholder, upon the event of a

trotting match, cannot recover it back by an action of *indebitatus assumpsit*. The transaction being illegal, no action can be sustained by the common law for any cause growing out of it. *M'Keon v. Caherty*, 1 Hall, 300.

57. But by the fifth section of the act to prevent horse-racing, (1 R. L. p. 322.) any person who has paid money upon the event of a race may recover the same, in like manner as is provided in the second and third sections of "the act to prevent excessive and deceitful gaming." (1 R. L. 153.) By the second section of this act, any person losing at any game any sum above \$25, and paying the same, may at any time recover it back of the winner by an action of debt founded on the act. As the remedy afforded to the loser is provided by statute, in pursuing that remedy, the forms and limitations prescribed must be observed, and a general action of *assumpsit* will not lie. *Ibid*.

58. The plaintiffs, as the holders of certain notes or memorandums, payable to bearer, brought an action of *assumpsit*, to recover their amount. At the trial, the defendant offered to show that the notes were given for a consideration, made unlawful by an act of Congress; but he offered no evidence to prove that the plaintiffs were acquainted with the consideration for which the notes were given. *Held*, that as the act of Congress did not make the notes void, the evidence offered by the defendant, to defeat the recovery, was inadmissible. *Gould v. Armstrong*, 2 Hall, 266.

59. The declaration in this case contained seven special counts, the second of which set forth that an action had been commenced against the plaintiff relative to a sale of cotton, made by him as the agent and factor of certain persons residing in Alabama, who were liable to indemnify the plaintiff against the consequences of such sale; and that the defendants, in consideration of a sum of money paid to them by the plaintiff, at the request of his principals in Alabama, promised to indemnify him against said action. It then averred that a judgment had been recovered against the plaintiff, the amount of which he had been compelled to pay, and that the defendants had never indemnified him, &c. *Kneeland v. Rogers*, 2 Hall, 579.

60. The defendants pleaded the general issue to the whole declaration, and four special pleas to the first seven counts, alleging in substance that the judgment complained of was obtained upon the ground that in the sale of the cotton the plaintiff had been guilty of a fraud. Upon demurrer to these pleas, *it was held*, that there was nothing unlawful in the contract set forth in the declaration, and that the pleas were no answer to the second count. *Ibid*.

II. What consideration will support an assumpsit.

(a) Benefit to the defendant.

61. Possession of an article by a person claiming a lien on it (though such claim be unfounded) is a sufficient consideration to support a promise by the assignee of such article to the claimant, to pay a debt due to him from the assignor, if possession be given to the assignee

in pursuance of the promise. *Gardiner v. Hopkins*, 5 Wend. 23.

62. The possession of lands is an interest which may be the subject of a sale, and therefore is an adequate consideration to support a promise for the price thereof. *Parker v. Crane*, 6 Wend. 647.

63. If the consideration be *past* at the time of the promise, the act done, which is the consideration of the promise, must be stated to have been done *upon the request* of the party promising. *Ibid.*

(b) *Submission to arbitration.*

64. Where a person resident here executed a power of attorney to another also residing here, to obtain possession of an estate in the West Indies, consisting of real and personal property belonging to the constituent, to convert the same into money, and pay over the proceeds; and the parties entered into an agreement, whereby the attorney covenanted faithfully to execute the trust at his own proper cost and charges, and, if unsuccessful, to charge nothing for his services and expenses; and the constituent covenanted that the attorney should be remunerated and paid, on his realizing the property and paying over the same, such amount or sum of money as should be adjudged and considered by two individuals named in the agreement a just and fair compensation for his time, trouble, and risk; and the attorney obtained possession of the property, disposed of the same, and paid over the proceeds before the death of the constituent; after which an award was made by the parties named in the agreement, that the administrators of the constituent should pay to the attorney a certain sum as a just compensation for his time, trouble, risk, costs, and charges in the business; *it was held*, that the amount thus awarded was recoverable under a count of *quantum meruit*; the agreement having been substantially, although not literally, performed on the part of the attorney. *M'Intire v. Morris' Administrators*, 14 Wend. 90.

65. *It was further held*, that the stipulation in respect to the compensation was not in the nature of a *submission to arbitration*, but a *covenant* to secure compensation, and was not affected by the death of the constituent. *Ibid.*

III. *Assumpsit on an express promise.*

66. In an action for *use and occupation*, the plaintiff may avail himself of an agreement, not under seal, whereby a rent certain is fixed, to regulate the amount of recovery; and although the plaintiff has not declared upon the agreement, and claims generally to recover for use and occupation, the defendant is not at liberty to give evidence of the value of the premises occupied, to reduce the recovery below the sum stipulated. *Williams v. Sherman*, 7 Wend. 109.

67. Where parties agreed to pay a printer the cost of publishing a work, and to be responsible for one hundred copies if the author should fail in paying after three months from the delivery of the books, and the author subsequently directed only eight hundred copies to be printed; *it was held*, that the printing of one

thousand copies was not a *condition precedent* to a right to recover; that the specification of the number of copies limited the responsibility of the contractors, but did not impose the obligation to print the whole number, if the author dispensed with a part; and that the direction to publish a less number was not a violation, but a contemplated modification, of the contract. *Kemble v. Walkis et al.* 10 Wend. 374.

68. A contract stated in a special count of a declaration in reference to a mortgage executed to A. is not supported by proof of a contract relating to a mortgage executed to A. and B.; but a claim arising under such contract may, however, be recovered under the money counts, although there be a bill of particulars, referring to the contract as set forth in the special count of the declaration; the strictness governing in relation to a special count does not prevail in reference to a bill of particulars. *Hess v. Fox, Executor of Fox*, 10 Wend. 436.

69. A party may recover, under the common counts in *assumpsit*, for the stipulated price due upon a special contract, not under seal, where such contract has been executed. *Petler v. Heath*, 11 Wend. 477.

70. Interest is recoverable from the time of the commencement of a writ for the recovery of the amount due for work done under a special contract. *Ibid.*

71. It is no objection to a recovery in *assumpsit* that the indebtedness of the defendant is double the amount of damages claimed in the declaration; provided that the sum certified in favour of the plaintiff does not exceed such damages. *Ibid.*

72. Where cotton is bought to be shipped to a foreign market, and the whole price is paid by the purchaser, but the vendor agrees to retain an interest to the amount of one-half of the cotton, which by the agreement of the parties is to be consigned to the correspondents of the purchaser at the foreign port, and returns to be made to him; the cotton having been sold at a foreign market at a loss, the vendor is liable to the purchaser for his proportion of the loss in an action at law, although no balance has been struck between, and there has been no promise to pay. *Peltier v. Sewall*, 12 Wend. 386.

73. The plaintiff in such case is entitled to recover under the common counts, and is not bound to declare specially. The account sales rendered by the consignees may be read in evidence, they being the common agents of the parties. *Ibid.*

IV. *Assumpsit on an implied promise.*

(a) *When a party may recover on an implied promise, notwithstanding an express agreement.*

74. Where a party contracted to do a piece of work within a stipulated time, and a provision was contained in the contract that a portion of the work should not be done until directions were given by the other party, and by the omission to give such directions, the performance of the contract within the stipulated time was prevented, though the work was subsequently completed, but at an enhanced expense, *it was held*, that the contractor could recover compen-

sation for such extra expense. *Dubois v. Delaware and Hudson Canal Company*, 4 Wend. 286.

75. Though there have been a special agreement, a plaintiff may recover on a *quantum meruit* for work done, where the evidence is sufficient to warrant the plaintiff's action on the general count, supposing no special agreement had been laid in the declaration; but in such case, the terms of the special agreement regulate the compensation. *Ibid.*

76. Where work is done under a special contract, and there is a deviation from the original plan by the consent of the parties, so far as it can be traced, the contract is to be the rule of payment; but for the extra labour, and any additional expense incurred in consequence of the work being done under disadvantageous circumstances, occasioned by the opposite party, the contractor is entitled to recover under a *quantum meruit*. *Ibid.*

77. Where a written contract for excavating a canal makes no provision for a certain kind of excavation, and it appears to have been understood by the parties that it was not embraced by the contract, which provides a rate of payment for the work therein mentioned, the contractor may recover for such extra work upon a *quantum meruit*, whatever he can show the work was worth. *Dubois v. The Delaware and Hudson Canal Company*, 13 Wend. 324.

78. Where by such contract it was stipulated that an engineer, to be selected by the canal company, should estimate the value of any extra work caused by an alteration of the line of the canal, and determine every other question necessary to the adjustment and final settlement of the contract, his decision to be final and conclusive between the parties, it was held, that the estimate of the engineer of the value of such work was not conclusive upon the contractor.

79. Where a carpenter agrees to build a house according to a certain plan, for a specific sum, and the plan is abandoned, so that it is impossible to trace the contract in the work done, the measure of compensation is the value of the work as if no contract had been entered into. *Hollingshead v. MacTier*, 13 Wend. 276.

80. Where such a contract has been only partially set aside, it seems, that so far as the work was done according to the special contract, the compensation would be regulated by the contract.

81. Where a master, entitled to the services of a negro boy born a slave, omitted, in compliance with the act in such cases, to file a certificate in the form prescribed, and the servant remained in the service of the master nearly three years after he was entitled to a release from servitude, and it appeared that the services of the servant had originally been purchased by the master at the request of the servant; it was held, that the servant could not maintain an action against the master for his work and labour; there being no contract, either express or implied, to pay for such services. *Griffin v. Potter*, 14 Wend. 209.

82. Where there is an entire contract for the performance of any particular service, the party contracting to do the service failing in full performance is not entitled to sustain an action for

a part performance. *Sickle v. Pattison*, 14 Wend. 257.

83. Where there is a part performance, and by the terms of the contract payment may be demanded for the same, an action lies. In such case, however, the other party may give evidence of damages sustained in consequence of the non-performance of the residue of the contract, in diminution or even extinguishment of the claim made against him; but he cannot, in an action against him, have a balance certified in his favour for money paid on account of the services done, nor for damages sustained by reason of the non-performance of the contract; his remedy is by action against the other party to recover damages for the violation of the contract. *Ibid.*

(b) Goods sold.

84. The plaintiffs sold the defendant a quantity of timber, and having presented their account for the same to the defendant on the 28th day of May, 1828, at five, P. M., received his check on the Franklin Bank in the city of New York. At half-past ten, A. M., the next day, the bank was prohibited from making any payments by an injunction out of Chancery, and the check was consequently never presented. In an action by the holders against the drawer of the check, it was held: that the plaintiffs might, under these circumstances, waive the check altogether, and recover the value of the timber in an action of *indebitatus assumpsit*. *Coomwell and Wing v. Lovett*, 1 Hall, 56.

85. The plaintiffs (auctioneers) sold to the defendants a quantity of goods, by auction, to be paid for in an improved endorsed note, at six months. The plaintiffs, having delivered the goods, demanded the note, which being refused, they immediately commenced an action for goods sold and delivered. The defendants contended that the action should have been special, for the non-delivery of the notes, and that *indebitatus assumpsit* would not lie until the credit had expired. Held, that the sale and delivery of the goods were conditional, and that the plaintiffs, upon the non-compliance with the conditions of sale by the defendants, might reclaim their goods, or treat the sale as an absolute one, without credit, and bring their action for the price without delay. *Corlies et al. v. Gardner*, 2 Hall, 345.

(c) Money paid

86. Advances of money by one man for another without an express or implied authority from the latter, will not bind him to pay. Per *Colden*, Senator, *Ren's Glass Factory v. Rent*, 5 Cow. 587.

87. Where money, &c., is received upon or in consequence of illegal contract, both parties being in *pari delicto*, it cannot be recovered back. *Burt v. Place*, 6 Cow. 431.

88. An action for money paid, laid out and expended, will lie at the suit of an endorsee of a promissory note against an endorser for money paid on a judgment obtained against the former by the holder of the note, although such payment is but in part satisfaction of the debt; and such suit will lie for every payment made in good faith, and with the bona fide intention of

reducing or extinguishing the debt. *Butler v. Wright*, 2 Wend. 369.

89. Where A. agreed to furnish B. a certain number of bales of cotton towards completing the cargo of a vessel bound to a foreign port, provided B. advanced the full price of the cotton, the shipment was to be made one-half on account of A., and on return of sales coming to hand, A. was to receive his share of the profits, or to pay his share of loss; the shipment having been made and a loss incurred, it was held, that an action for money paid would not lie against A., and that B. could only recover in an action on the special agreement. *Pellier v. Sewall*, 3 Wend. 269.

90. The owner of property in the possession of a tenant of demised premises, may buy it on a sale of the same as a distress for rent, and bring his action for money paid against the tenant. *Wells v. Porter*, 7 Wend. 119.

91. And such action was held to lie against a joint tenant of the premises, although he had no interest in the contract under which his cotenant became possessor of the property sold, the joint liability being adjudged to rest upon the fact, that their joint property was benefited by the payment of the rent. *Ibid.*

92. Where several are liable for work done for their benefit, and a payment is made to their creditor by a third person at the request of one of the debtors, an action lies against all for money paid to their use. *Tradesman's Bank v. Astor et al.* 11 Wend. 87.

(d) *Work and labour.*

93. Where one purchased the time of a negro till he was 28, for a valuable and full consideration, both the negro and vendee supposing that he was bound to serve that length of time, though the negro was, in fact, a freeman, no action lies at his suit against the vendee for his services. *Livingston v. Ackston*, 5 Cow. 531.

94. Under such circumstances, the law will not imply a promise to pay for the services. *Ibid.*

95. Where work is done by one for the benefit of another, with his knowledge and approbation, the law will imply a promise to pay for it, unless it appear that there was an understanding that no compensation should be given; but where there is such understanding, the law will not imply a promise. *Ibid.*

96. A party furnishing necessities for one whom another person is under a legal obligation to maintain, may recover in *assumpsit* from such person for the articles so furnished. *Forryth v. Ganson et al.* 5 Wend. 558.

97. A committee, appointed at a public meeting to carry into effect the objects of that meeting, are responsible to workmen for labour performed by them. The workmen are not bound to look for compensation to the individuals composing that meeting. *McCartee v. Chambers*, 6 Wend. 649.

98. If there be a special agreement under seal to do work, and it be done, but not pursuant to the agreement, either in point of time or in any other respect, the party who did the work may recover on the common count in *assumpsit* for work and labour. *Jewell v. Schrappe*, 4 Cow. 531.

99. If, when the time of performance arrives in such case, the party goes on, with knowledge and assent of his employer, to complete the work subsequently, this is evidence of a promise to pay for the work. So if he do not object. *Ibid.*

100. And it is no objection to his bringing *assumpsit*, that his employer had previously sued him in covenant for not performing in time, and recovered damages. *Ibid.*

101. The workman cannot maintain covenant unless he perform the work strictly within the time. *Ibid.*

102. When the terms of a special agreement are performed, a duty is raised for which a general *indebitatus assumpsit* will lie; but as long as the special contract remains unrescinded or unperformed, the party cannot recover under the common counts. *Ibid.*

(e) *Money had and received.*

103. T., having title to land held in possession by others, made an agreement not void for *champerty* or maintenance, in consideration of H.'s agreeing to furnish pecuniary assistance about recovering the land, that he would convey one-fourth of the land which should be recovered to H. T. appointed B. his attorney to conduct suits for the recovery of the land; the suits were finally compromised by T., who conveyed to the possessors by various deeds executed by B. as his attorney, which deeds acknowledged the receipt of the consideration money. Held, that an action for money had and received would lie against T., if he had received the money in behalf of H., for one-fourth of the money so received by T.; but B. having received the money, the action would lie against him. *Thalheimer v. Brinckerhoff*, 6 Cow. 90.

104. Where I. sold a note to T. and guaranteed the payment, the note to be sued in the name of the payee, one O. T., who died, and J. became his administrator, and T. in J.'s name sued on the name, and obtained judgment against and imprisoned the maker; and then I. compromised with him, taking notes with good sureties, and discharging him from imprisonment; and then I. received the money on the last notes, all which, except receiving the money, was more than six years before suit, but the money was received within six years; held, that I. was liable to T. as for money had and received, and that the claim was not barred by the statute of limitations. *Tucker v. Ives*, 6 Cow. 193.

105. Where the money was paid on a judgment of a Court of Common Pleas, which was afterwards reversed on error, held, that it might be recovered back in an action of *indebitatus assumpsit* for money had and received. *Clark v. Pinney*, 6 Cow. 297.

106. Taking a promissory note as payment of an execution and endorsing it, satisfied with the consent of the plaintiff, is equivalent to the payment of money, though the note be not negotiable; and the amount of such a note will be regarded as money, in an action for money had and received, on a reversal of the judgment upon which the execution issued. *Ibid.*

106*. Property paid or received as money will support the action for money paid, or had and received, the same as if money itself had been paid and received. *Ainsie v. Wilson*, 7 Cow. 682.

107. Where money is advanced upon a contract which is *malum prohibitum* merely, it

seems that it may be recovered back by an action proceeding under a disaffirmance of the contract. *Ulica Ins. Co. v. Kipp*, 8 Cow. 20.

108. To deprive a party of his action for money paid voluntarily beyond what is due on the ground of knowing that it was not due, it must appear that it was paid with a full knowledge that it ought not to be paid. *Waite v. Leggett*, 8 Cow. 195.

109. That the party paying had the means of knowing this, and might have availed of those means by a careful attention to the state of accounts and transactions between him and the creditor, is no answer to the action; provided there be in fact a mistake in the payment. *Ibid.*

110. For the circumstances in evidence upon which such mistake may be inferred, see the cases and opinions of the Court. *Ibid.*

111. To warrant a recovery as for money had and received, paid under a special contract, (e. g. a contract to convey land,) a strict performance must be shown by the plaintiff, the same as if he had sued on the special contract itself, unless the contract has been expressly rescinded, or impliedly so, as by nothing having been done under it for a long time, or the party sought to be charged having acted inconsistent with it. *Green v. Green*, 9 Cow. 46.

112. Thus where a party covenanted to pay money for land by instalments, in completing which he was to have a deed, and he took possession and continued it for some time, making partial payments, but finally failed to pay, and the vendor took possession, in an action for money had and received to recover back the money; *held*, that it would not lie. *Ibid.*

113. And the covenant to pay being independent; *held*, no breach that the defendant had never any title to the land; for *non constat* had the plaintiff paid, that the defendant might not have procured a title and conveyed. *Ibid.*

114. Where money is paid with a full knowledge of the facts and circumstances upon which it is demanded, or with the means of such knowledge, it cannot be recovered back upon the ground that the party supposed he was bound in law to pay it, when in truth he was not. He shall not be permitted to allege his ignorance of the law; and it shall be considered a voluntary payment. *Clarke v. Dutcher*, 9 Cow. 674.

115. Thus where a tenant paid rent to his landlord at the rate of £4 14s. currency, for £3 10s. sterling, the rent being reserved in sterling money; *held*, that he could not recover back the excess. *Ibid.*

116. A. and B. enter into an agreement that A. shall become special bail of C. (sued with D., partners in trade) in a certain suit against him, and that A. and B. will equally bear and pay the losses and damages which may be sustained in consequence of A. becoming such bail. Subsequently A. pays the amount of the judgment in the suit, and B. contributes the half of it; and afterwards A. receives from D. (C.'s partner) the sum which he had advanced. *Held*, that in an action for money had and received, B. could recover from A. the half of the sum which he so received. *Smith et al. v. Hicks*, 1 Wend. 202.

117. An action for money had and received

lies in general, for money which, *ex equo et bono*, the defendant ought to refund, as for money paid by mistake; but the mistake which entitles a party to sustain this action must be a mistake of fact. If the law only was mistaken, the rule applies that *ignorantia juris non excusat*. *Mowatt et al. v. Wright*, 1 Wend. 355.

118. *Assumpsit* for money had and received may be maintained by one tenant in common against another, where one receives the whole amount of damages assessed for the land owned in common, taken for the construction of the Erie canal; and where a receipt for the money was produced, and the identity of the farm conclusively shown; it was held unnecessary to produce the appraisers' books of entries to show a description of the premises. *Brinckerhoff et al. v. Wemple*, 1 Wend. 470.

119. *Assumpsit* for money had and received will lie by an endorser of a note against the holder, to recover back money paid under a judgment against such endorser, where the holder, previous to the payment, makes an arrangement with a prior endorser, by which he discharges him, or enters into a covenant not to sue him. *Brown v. Williams*, 4 Wend. 360.

120. *Assumpsit* for money had and received was *held* to lie where, on a settlement and delivering up of a bond and mortgage, the obligor was credited with a year's interest which had not been paid. *Tinslar v. May*, 8 Wend. 561.

121. Where A. and B., members of a firm; took in deposit a mortgage as security for an advance made by them, with the understanding that it should be subsequently assigned to them, and it was subsequently assigned to A. alone, but in consummation of the original agreement, and A.'s assignee foreclosed the mortgage and brought in the mortgaged property in his own name, it was *held*, that an action might be maintained against both partners for the avails of such sale as for money had and received, and that the party depositing the mortgage was entitled to recover the amount of the purchase money, deducting the advance made to him. *Gilchrist v. Cunningham*, 8 Wend. 641.

122. *Assumpsit* for money had and received lies to recover back money paid on an execution issued on a satisfied judgment. *Wiener v. Bulkley*, 15 Wend. 321.

123. In order to maintain *assumpsit* against two trustees jointly, for money had and received to the use of the *cestui que trust*, the plaintiff must prove a *joint promise*, either express or implied. As each trustee is, in general, answerable for his own acts only, the law will not *imply* a joint promise on the part of both to pay over the money in their hands to the *cestui que trust*, from the mere fact that each trustee has, for himself, separately admitted that there were funds in his possession equal to the amount of the plaintiff's claim. *De Forest v. Jewett and Parsons*, 2 Hall, 130.

124. The plaintiffs in this case being creditors of C. and D., (who had assigned their property to the defendants by a deed of trust for the benefit of certain persons, among whom were the plaintiffs,) filed a bill in equity against the defendants. The defendants answered separately, and each in his answer admitted that he had

received funds to a considerable amount out of the estate assigned, and that he *then* held in his hands a sum equal to the plaintiff's demand, which he professed his readiness to distribute according to the terms of the trust. *Ibid.*

125. Upon an action of *assumpsit* against both trustees for money had and received to the use of the plaintiffs, founded upon these admissions, it was held, that the proof did not support the declaration, and that the plaintiffs could not recover, unless they proved a joint promise on the part of both defendants. *Ibid.*

ATTACHMENT.

- I. In what cases an attachment will be granted, and what will be admitted in excuse.
- II. Rule to show cause, attachment, and subsequent proceedings.

- I. In what cases an attachment will be granted, and what will be admitted in excuse.

1. To warrant an attachment for not paying costs pursuant to a rule of Court, where the costs are not demanded by the party entitled to them, or his attorney, the power to demand them should be exhibited to the party of whom they are demanded. *Jackson v. Sackett*, 6 Cow. 38.

2. The sheriff is liable to an attachment for not retaining process pursuant to a rule, though it never came to his own hands, but only to the hands of his deputy. *People v. Brown*, 6 Cow. 41.

3. An attachment for not performing an award on the submission being made a rule of Court, cannot go till the rule be served and performance demanded. *Ex parte Walkis*, 6 Cow. 581.

4. An attachment for non-payment of costs, ordered by rule, will not be granted unless a copy of the bill of costs be served at the time of the demand. *St. John ads. Hubbard*, 1 Wend. 94.

5. If a defendant take possession of his goods after a levy upon them, an attachment will not be granted against him. The sheriff has as much power in such a case as the Court can give him. *The People v. Church*, 2 Wend. 262.

6. An attachment will not be awarded against those who continue the proceedings after the service of a *certiorari* to remove them from the Supreme Court to a subordinate tribunal, if the party who obtained the writ asked, at the time of the granting thereof, for a stay of proceedings, which was refused. *Patchin v. The Mayor, &c. of Brooklyn*, 13 Wend. 664.

7. If the sheriff neglects to return an attachment by the return day thereof, an attachment may, forthwith, be allowed against him. And he will also be liable for the damages and costs sustained by such neglect. *The People v. Elmer*, 3 Paige, 85.

8. The amount of sheriff's fees, stated in the return to an attachment, will be presumed correct until the contrary is shown. *Ibid.*

9. When there are conflicting affidavits in relation to the alleged contempt, an attachment may be issued to bring the defendant into Court, so that he may be examined on interrogatories

as to the contempt, and to enable the complainant to compel the attendance of witnesses to prove the facts. *McCurdy v. Senior*, 4 Paige, 378.

- II. Rule to show cause, attachment, and subsequent proceedings.

10. An attachment against the sheriff for not returning an execution should be accompanied with instructions in what amount to take a recognisance for the defendant's appearance. *People v. Chapman*, 1 Cow. 679.

11. And if these instructions are not given, the coroner is not in fault, though the penalty of the recognisance be less than the execution. *Ibid.*

12. In such case, however, the plaintiffs may on motion proceed by an *alias* attachment, if the sheriff do not appear upon his recognisance. *Ibid.*

13. But the Court will not, at the same time, allow the recognisance to be prosecuted. *Ibid.*

14. This Court cannot control the effect of an attachment, by ordering the defendant therein to be denied the gaol liberties. *Anon.* 2 Cow. 589.

15. The defendant in an attachment being in custody on a *ca. sa.* before the attachment was served, the Court ordered that interrogatories should be administered at the gaol by a commissioner. *People v. Bull*, 5 Cow. 415.

16. Interrogatories filed on the return of an attachment may be amended by inserting an additional interrogatory. *People v. Brown*, 6 Cow. 41.

17. Where costs have been awarded against a bank, a rule will be granted on the cashier to pay them, or show cause why an attachment should not issue against him. *Warden ads. Bank of Orange County*, 1 Wend. 94.

18. A person attending on recognisance entered into, on being served with an attachment, is entitled to his discharge on the *quarto die post*, if interrogatories are not filed. *The People v. Ten Eyck*, 2 Wend. 617.

19. A rule to show cause why an attachment should not issue will be ordered on a petition for the production of papers to enable a party to declare. *Birdsall et al. v. Pirly*, 3 Wend. 425.

20. If an attachment which is returnable on a particular day is not received by the sheriff in time to serve it, and to bring the defendant before the Court, at the place where it is to be held on the return day, he should not arrest the defendant on the attachment, but should return it *tarde*. *Stafford v. Brown*, 4 Paige, 360.

21. When the sheriff neglected to serve an attachment until it was too late for the defendant to appear at the time and place where it was returnable, the Court set aside the arrest of the defendant on the attachment. *Ibid.*

22. A party who is committed to gaol on a procept, in the nature of an attachment for the non-payment of costs, is entitled to the gaol liberties; but he is not exempt from imprisonment under the act to abolish imprisonment for debt, and to punish fraudulent debtors. *Patrick v. Warner*, 4 Paige, 397.

23. The order for an attachment to bring the

defendant into Court, to answer for a contempt, should not contain an adjudication of the Court that he has been guilty of the contempt. It should merely direct the issuing of the attachment, or only declare that it appears to the Court there is a probable cause for the issuing of an attachment, to bring the defendant before the Court to answer as to the alleged contempt. *M'Creedy v. Senior*, 4 Paige, 378.

24. In a proceeding as for a contempt against a party to the suit to compel the appearance or answer of a defendant, or to enforce the performance of a decree or order, the affidavits and other proceedings as well after as before the order for an attachment are properly entitled in the original cause. *Stafford v. Brown*, 4 Paige, 360.

25. In proceedings as for contempts against witnesses or others who are not parties to the suit, the affidavits and papers previous to and including the order for attachment should be entitled in the original cause, and all subsequent proceedings should be in the name of the people, or the relation of the party prosecuting the attachment. *Ibid.*

26. In prosecutions for criminal contempts, all proceedings subsequent to the order for an attachment, or to show cause including such order, should be in the name of the people. *Ibid.*

ATTORNEY.

- I. Admission of an attorney.
- II. Agents of an attorney.
- III. Duty and authority of an attorney.
- IV. Privilege of attorneys and counsel.
- V. Liability of an attorney.
- VI. Attorney's lien and remedy for his costs.

I. Admission of an attorney.

1. In computing the time of clerkship for admission as attorney, four terms make one year. *Ex parte Sayre*, 7 Cow. 368.

2. But a certificate filed in vacation shall not be reckoned as relating to the previous term. *Ibid.*

3. The order for allowance for classical studies to clerks of attorneys must be obtained at the commencement of the term of clerkship: if omitted, a judge's order should be obtained in vacation. *Anon.* 3 Wend. 456.

4. The Court adopted as a rule to admit to examination, at the customary time of examination, all candidates for admission as attorneys, whose period of clerkship expires at any time during the term at which the application is made. 12 Wend. 424.

II. Agents of an attorney.

5. An attorney's clerk during the absence of the attorney represents him as to all the ordinary business of the office. *Power v. Kent*, 1 Cow. 211.

6. Accordingly where, during his principal's absence, he received an amended replication, and agreed to waive the formality of a rule for such amendment, it was held binding upon the attorney. *Ibid.*

III. Duty and authority of an attorney.

7. After actual notice, the parties have no right to settle the attorney's costs, nor do any act to obstruct his proceeding in the course to collect. *Power v. Kent*, 1 Cow. 179.

8. Accordingly where the defendant had judgment upon demurrer to some of the counts, and had taken issue upon the others, upon which he was entitled to judgment as in case of nonsuit, the judgment upon demurrer having disposed of the whole cause of action, and the other counts being inserted for mere form, the defendant's attorney having given notice to the attorney for the plaintiff not to make any arrangement with the defendant which should affect the attorney's claim for costs; held, that an agreement between the defendant and the plaintiff's attorney to put the cause off with a view to settle a claim between the parties, and thereby stay the further progress of the suit, did not prevent the defendant's attorney from proceeding to move for judgment as in case of nonsuit. *Ibid.*

9. A general power to defend a cause will not authorize the attorney to execute an appeal bond in the name of his client. *Ex parte Holbrook*, 5 Cow. 35.

10. An attorney may discontinue a suit in virtue of his general power as attorney on record. *Gaillard v. Smart*, 6 Cow. 385.

11. The attorney of the plaintiff has power, under his general warrant, to direct the sheriff as to the time and manner of enforcing the execution. *Gorkam v. Gale*, 7 Cow. 739.

12. An attorney other than the regular attorney in the cause may issue executions in his own name without any formal substitution. *Thorp v. Fowler*, 5 Cow. 446.

13. A client has no right to control his attorney in the due and orderly conduct of a suit. An attorney may waive a default where there could be no doubt that it would be opened by the Court, contrary to the instructions of his client. *Anonymous*, 1 Wend. 108.

14. Where an attorney is retained, another attorney cannot act for the party without being regularly substituted, and the acts of such second attorney will be disregarded by the Court. *Jarome v. Borren*, 1 Wend. 293.

IV. Privilege of attorneys and counsels.

15. The purchase of a senior judgment by a junior judgment creditor, who is an attorney at law, made for the mere purpose of securing the younger debt, is not void within the statute to prevent abuses in the practice of the law. (Sess. 41. ch. 259.) Nor is it forbidden by that statute which is penal, and ought not to be extended by construction. *Van Rensselaer v. Sheriff of Onondago*, 1 Cow. 443.

16. A circuit judge cannot practise as an attorney; and service of papers upon him, in a cause wherein before his appointment he was attorney, is irregular. *Hobby v. Smith*, 1 Cow. 588.

17. Whether an attorney, counsellor, &c. hold as such an office, or public trust, within the meaning of the seventh section of the fifth article of the constitution? *Quære.* *Seymour v. Ellison*, 2 Cow. 13.

18. On moving to set aside proceedings

against an attorney for irregularity, because they were as against a common person, the attorney need not state in his affidavit that he was a practising attorney, &c. *Coll v. Gregory*, 3 Cow. 22.

19. But it is enough that he swear he was an attorney, which throws it upon the other party to show that he had not practised within the year. *Ibid.*

20. Construction of the act (1 R. L. 417.) prohibiting an attorney to buy a chose in action for prosecution. To bring an attorney within the act, there must have been an intent to prosecute. *Williams v. Matthews*, 3 Cow. 252.

21. An attorney, or other officer of the Court, is never privileged from arrest when sued with another, though during the actual sitting of the Court, and during his attendance at Court. *Gay v. Rogers*, 3 Cow. 368.

22. An attorney sued with a common person is not entitled to be served with the papers in the cause, if he give no notice of defending. *Chenango Bank v. Root*, 4 Cow. 126.

23. An attorney defends his client, who obtains judgment, and, being sued as deputy sheriff, is entitled to double costs, which his attorney receives; *held*, that the attorney is entitled to the double costs, as the measure of his compensation. *M'Farland v. Crury*, 8 Cow. 253.

24. The rule is, that the costs recovered, and taxable in the cause, as between party and party, are the measure of compensation to the attorney, as between him and the party recovered. *Ibid.*

25. Where an attorney of the Supreme Court is a defendant in a suit in it, he is entitled to the service of papers and notices in the same manner as if he had appeared as the attorney of another. *Hitchcock v. Barlow*, 2 Wend. 629.

26. By the act to prevent abuses in the practice of the law, attorneys and counsellors at law are prohibited from the purchase of a promissory note except in the specified cases, although such note be not purchased for collection, or for the purpose of bringing a suit thereon. *The People v. Walbridge*, 3 Wend. 120.

27. Attorneys and counsellors of the Supreme Court are not privileged from arrest, although such arrest prevents their contemplated attendance upon Court, if the arrest be made while they remain at home. *Corey v. Russell*, 4 Wend. 204.

28. An attorney sued by declaration under the statute is entitled to notice of subsequent proceedings, the same as if sued by bill. *N. Y. State Bank v. Wood*, 10 Wend. 594.

29. Advances by an attorney to his client, from motives of humanity, long after the commencement of a suit on a security for money, are not a violation of the statute prohibiting advances in consideration of a security for the payment of money being left with an attorney for collection. *Bristol v. Dam*, 12 Wend. 142.

V. Liabilities of an attorney.

30. An attorney who was ordered to pay the costs of an action which he had brought without being retained was attached for not paying them, and a rule made, that unless he paid them

in ten days after notice of the rule, he should be suspended till he paid. *Anon.* 2 Cow. 589.

31. When a bond is left with an attorney of this Court, to the end that he should write to the obligor, and obtain the money, but without any express directions to bring a suit in default of payment, the attorney having received the money without suit, and neglected to pay it over, on demand, to his client; *held*, that he had received the bond to collect in his character of attorney, and that an attachment should issue against him unless he paid over the money. *Ex parte Staats*, 4 Cow. 76. *Matter of Knight*, 77, note (a).

32. An attorney is not liable to a suit for money collected for another, till demand made or directions to remit. He is not in default till he receives orders from his principal. *Taylor v. Balca*, 5 Cow. 376.

33. Money collected by an attorney for his client must be demanded before the client can move for an attachment for its non-payment. *Ex parte Ferguson*, 6 Cow. 596.

34. Two attorneys are in partnership; one receives money, in behalf of the firm, due to their client, of whom the client demands the money; this is a receipt by, and a demand of, both, who are liable to the client, jointly, without any demand upon, or notice to, the other. *M'Farland v. Crury*, 8 Cow. 253.

35. Overreaching and oppressive practice will be discouraged and punished. *Smith v. Bowen*, et al. 2 Wend. 245.

36. An attorney is liable for costs where he proceeds in a suit after his client has removed out of the state, to the amount of \$100, whether they accrued before or after such removal. *Wright v. Black*, 2 Wend. 258.

37. An attorney is not liable to an action for money collected by him until demand or direction to remit. *Rathburn v. Ingalls*, 7 Wend. 320.

38. Declarations of the attorney, made to third persons, not the agents of the plaintiff, nor in any manner connected with him in this business, that he intended to retain the money to indemnify him for a fraud which had been committed upon him by the plaintiff in the sale of a horse, are not to be considered such a refusal to pay as would dispense with the necessity of a demand. *Ibid.*

39. An attorney is not liable to imprisonment in an action for moneys collected. If the plaintiff seeks to imprison him, he must proceed by attachment, as for contempt. *Bobanan v. Peterson*, 9 Wend. 503.

VI. Attorney's lien and remedy for his costs.

40. In *assumpsit* by an attorney against his client for fees, the attorney need not show that a copy of the bill of costs was served on the client before action brought. *Gleason v. Clarke*, 9 Cow. 57.

41. Nor on producing a taxed bill need he show that notice of taxation had been served on the client. *Ibid.*

42. In an action for fees by an attorney against his client, the latter may show, under the general issue, that the attorney conducted the business so negligently that his services were of no benefit to the client; and thus defeat the whole

claim. But if the evidence be merely in mitigation or diminution of the value of the attorney's services, then notice should be given with the general issue. *Ibid.*

43. Proof, in such an action, that judgment, as in case of nonsuit, was obtained against the client, is not, *per se*, evidence of negligence. *Ibid.*

44. An attorney is not bound to proceed in a cause unless his legal fees are tendered or secured to him, if he requests that this should be done.

45. An attorney has no lien upon the damages recovered in a cause before they come to his hands, although he has a demand against his client equal to the amount of the recovery; and an execution will be ordered to be returned satisfied, where the plaintiff has discharged the defendant from the payment of the damages, and the costs and sheriff's fees are offered to be paid. *St. John v. Dieffendorf et al.* 12 Wend. 261.

46. An attorney cannot recover against his client the costs of a suit in which the judgment is set aside for irregularity, nor the costs of opposing the motion to set aside the proceedings, nor can he recover for money paid for his client, if it be paid to satisfy the costs of a judgment of discontinuance, suffered by his negligence or ignorance. *Hopping v. Quin*, 12 Wend. 517.

47. Where an attorney is retained to bring a suit, which he accordingly brings and prosecutes to judgment, and the judgment is subsequently set aside for irregularity, it seems that he cannot subject his client to the costs of a second suit for the same cause of action, if since the commencement of the first suit; the party against whom the suit was brought has obtained his discharge as an insolvent debtor.

48. A defendant, against whom a verdict is rendered for nominal damages in an action of *tort*, may, after the verdict, procure an assignment of a judgment against the plaintiff in the suit in which the verdict is rendered, and may claim to set off such judgment against the judgment rendered upon the verdict, although such latter judgment consists entirely of costs, with the exception of the nominal damages, notwithstanding the lien of the attorney. *The People v. New York C. P.* 13 Wend. 649.

49. The equities of the parties are superior to those of the attorney, and the lien of the latter must yield to the equitable claims of the former. *Ibid.*

50. Attorneys will, however, be protected against the frauds of the parties to the suit; as where notice is given to a party liable to the payment of costs that they belong to the attorney, and the costs are subsequently paid to the client of the attorney, the party will, notwithstanding, be compelled to repay them to the attorney. *Ibid.*

means of enhancing the price of the goods, or an imposition upon fair purchasers. *Wolf v. Luyster*, 1 Hall, 146:

AWARD.

- I. *The submission and parties to it; the effect of the submission, and how it is to be construed.*
- II. *Revocation of a submission.*
- III. *Arbitration and umpire.*
- IV. *What is a good award; (a) How the arbitrators are to decide, and the effect of their decision; (b) An award must correspond with the submission, and what will be a sufficient conformity to it; (c) It must be final; (d) Certain; (e) What instrument will be made in support of an award; (f) Void in part.*
- V. *Performance of, and action to enforce an award.*
- VI. *Where an award will be set aside.*

I. *The submission and parties to it; the effect of the submission, and how it is to be construed.*

1. A submission to arbitration may, within 1 R. L. 125. be made a rule of Court, as well after as before the award. *Ex parte Pasques*, 5 Cow. 29.

2. The mere submission of a cause pending in Court to arbitration, the arbitrators never taking or consenting to take upon themselves the burden of the submission, operates as a discontinuance of the suit. *Larkin v. Robbins*, 2 Wend. 503.

3. A promise to pay the amount at which arbitrators should estimate the labour and services performed by one party for the other, is implied in the agreement of the parties contained in the submission, "to abide by the decision of the arbitrators." *Efner v. Shaw*, 2 Wend. 397.

4. The submission to arbitration by a *feme covert*, and a promissory note made by her to bind the submission, without the assent of her husband, are void; and the coverture may be shown in bar to an action on a note given by the opposite party, (to bind the submission on his side,) if want of consideration would constitute a defence. *Rumsey v. Leek*, 5 Wend. 30.

5. A submission of all demands includes all questions concerning real as well as personal estate. *Byers v. Van Deuser*, 5 Wend. 268.

6. Where after a suit in Chancery by the complainant, as the endorsee of certain bills of exchange accepted by the defendant, had progressed to an order of reference to a master to state an account, the complainant assigned all his estate and effects as an insolvent debtor; and it was then agreed between the solicitor for the complainant and the defendant to submit the question to the master whether or not the suit could be farther prosecuted in the name of the complainant, it not being stated in the bill or otherwise appearing in the cause that the complainant sued in *autre droit*; and if he should be of opinion that it could not, then it was agreed by the solicitor, as the attorney and of counsel for and acting in behalf of the holders and owners of certain acceptances, the sub-

AUCTIONEER.

It is not lawful to place goods in the hands of an auctioneer for sale, with directions that he should not part with or dispose of them unless they produce a certain sum; the restriction not being considered as an unlawful

ject-matter of the suit on the one part, and the defendant on the other, that all claims and demands upon or relating to the acceptances, and all matters of set-off, should be referred to the arbitration of the master; and the master determined that the suit did abate by the assignment, that the complainant in the suit in Chancery was the true and lawful holder of the acceptances, and that the defendant was bound to account to him for the moneys in his hands belonging to the drawer of the bills at the time of the acceptances, and certified a balance as due from the defendant to the complainant; and an action was brought upon such award in the name of the complainant, to which the defendant pleaded, that after the drawing, accepting, and endorsing of the bills of exchange, and previous to the submission, the complainant assigned all his estate and effects, as an insolvent debtor, to assignees, who thereby became the true and lawful holders and owners of the bills of exchange; *it was held*, that the decision of the master that the suit abated by the assignment was correctly made; that the reference of all claims and demands upon, or relating to the acceptances, authorized the arbiter to determine that the complainant was the true and lawful holder of the bills of exchange, and that the defendant was estopped by the submission and award from pleading that the assignees were the true and lawful holders of the bills. *Garr v. Gomez*, 9 Wend. 649.

7. *It was further held*, in this case, that there is a distinction between the reference of a collateral or incidental matter of appraisalment or calculation, and the submission of matters in controversy for the purpose of a final determination; that the latter, and not the former, is a submission to arbitration. *Ibid*.

8. A submission to arbitration is a discontinuance of a suit, and if after the commencement of a suit, and before plea pleaded, all actions, &c. be submitted to arbitration, the defendant may plead the fact, in bar of the further maintenance of the suit. *Thorne v. Wilcox*, 19 Wend. 503.

9. Such plea is not a plea *puis darrein continuance*. *Ibid*.

10. A parol submission to arbitrators of a cause depending in Court is good, notwithstanding the existence of a general rule of the Court in which the cause is pending, that no agreement between the parties in respect to the proceedings in a case shall be binding unless reduced to the form of a rule, or the evidence thereof be in writing, subscribed by the party against whom the agreement is alleged. *Wells v. Lavin*, 15 Wend. 99.

11. Where a matter in difference between the parties is submitted by them to arbitration by their mutual bonds, and a particular time is specified in the bonds, within which the award is to be made and ready to be delivered to the parties, a subsequent written agreement enlarging the time for making the award is valid, although not under seal; and an award made within such extended time will be as decisive of the rights of the parties as if it had been made within the time originally specified in the condition of the bonds. But an action will not lie upon the bond itself, if the award is not

made within the time specified in the condition of such bonds. *Bloomer v. Sherman*, 5 Paige, 575.

12. The twenty-third section of the title of the revised statutes relative to arbitrations, which deprives a party to a submission of the right to revoke the power of the arbitrators after the case is heard and finally submitted to them for their decision, applies to all cases of submission to arbitration; whether the parties have or have not agreed in their submission that a judgment shall be entered on the award which is to be made in pursuance of such submission. *Ibid*.

13. The parties to a suit in this Court, and to another also in the Supreme Court, for the purpose of bringing the matters in controversy to a speedy decision, and save costs, referred the same to disinterested persons, of their own selection, for a decision, under a stipulation, that if the issue was found in favour of the defendant, the said several suits were to be discontinued; but if in favour of the plaintiff, that then a *reliefs* for a given sum should be delivered to the real party in interest, on which a judgment was to be entered up, for the amount, together with costs, to be taxed, including the expense of the reference, upon a motion of the defendant, to set aside the award of these referees or arbitrators, upon the ground principally that certain evidence offered by them at the trial was rejected; *it was held*, that the parties were precluded by the terms of their submission from questioning the award, there being no stipulation for a review. *Lowndes v. Campbell*, 1 Hall, 598.

II. Revocation of a submission.

14. Though the instrument of revocation of an award do not in terms declare that the party revoke the submission, yet if enough appear therein to show an intention to revoke, it is sufficient. *Frets v. Frets*, 1 Cow. 335.

15. Accordingly where the parties had submitted to arbitration by bond; and two of them signed and sealed a revocation thus: "To J. S. and S. M., (the arbitrators,) and E. F., (the opposite party,) we the subscribers revoke. Take notice, that the arbitration bonds executed by us and you, dated, &c., (the true date,) referring certain disputes, &c., therein mentioned between us and you, the said E. F. to you, the said J. S. and S. M., as by reference, &c. In witness, &c." This was holden sufficiently certain as a revocation. *Ibid*.

16. The same rules applied by the judges in construing a revocation, as in construing a contract. *Ibid*.

17. The intention of the parties is to govern in both cases; not merely a literal or grammatical construction, which would often be absurd. *Ibid*.

18. Where a submission is made a rule of Court, a revocation would be a contempt. *Ibid*.

19. But though agreed to be made a rule of Court, yet until actually made so it is revocable, and the party is not placed in contempt by revoking. *Ibid*.

20. Where the submission is by one on the one side, and two on the other, one of the two

cannot revoke the powers of the arbitrators without the assent of the other. *Robertson v. M'Neil*, 12 Wend. 578.

III. Arbitrator and umpire.

21. The authority to award costs is necessarily incident to the power of arbitrators. *Cox v. Jagger*, 2 Cow. 638.

22. The penalty of an arbitration bond does not limit the power of the arbitrators so that they cannot award a sum beyond it. *Ex parte Wallis*, 7 Cow. 522.

23. Where there is a submission to three arbitrators, with power to two to make the award, two have power to hear and act under the submission, if notice has been given to the third, and he refuses to attend, or is wilfully absent. *Crofoot v. Allen*, 2 Wend. 494.

24. A parol appointment by arbitrators of an umpire is good, unless the submission require it be made in writing. *Ehrendorf v. Harris*, 5 Wend. 516.

25. An arbitrator cannot contradict an award which he has signed. *Campbell v. Western*, 3 Paige, 124.

26. It is not necessary that all the arbitrators should concur in the decision of every question which arises, during the hearing, as to the admissibility of evidence; it is sufficient if all actually hear the cause, and join in the award which is finally made. *Ibid.*

IV. What is a good award; (a) How the arbitrators are to decide, and the effect of their decision.

27. Where the parties have power to transfer real property, arbitrators may award that they shall do it. *Cox v. Jagger*, 2 Cow. 638.

28. An award that all suits touching the premises shall cease is equivalent to a release. *Ibid.*

29. An award does not transfer a title, but a party to it is concluded by his own agreement from disputing the title. It operates as an estoppel. *Ibid.*

30. The right to dower till assigned rests in action only. It may be released, but the widow cannot invest another with the right to an action for it; and an award will extinguish the right. *Ibid.*

31. The award of commissioners, under the act of March 11, 1793, to settle the limits, &c., between the Kayaderosas patent, the Half-moon patent, and the Shannondhoi or Clifton park patent, (3 Gr. 81, sess. 16, ch. 57.) was operative upon such persons only as petitioned for the act; whether proprietors of, purchasers from, or lessees under the patents. (And see on the same subject, statutes sess. 18, ch. 57, 3 Gr. 222; and sess. 16, ch. 15. 3 Gr. 21.) *Jackson v. Davis*, 5 Cow. 123.

32. *Seem*, that an award on parol submission, as to the boundaries or location under a deed of land, is binding in an action of ejectment. *Jackson v. Gager*, 5 Cow. 383.

33. This Court will not intermeddle with an award of arbitrators upon the merits, except to modify it where there is an evident miscalculation of figures, or mistake in the description of the person, &c. *Smith v. Cutler*, 10 Wend. 589.

34. Where there are no legal objections appearing on the face of an award, it is in general final, and nothing *dehors* can be pleaded or given in evidence against it, except misconduct or corruption in the arbitrators. *Emery et al. v. Hitchcock et al.* 12 Wend. 156.

35. Where an action depending in Court is submitted to arbitration, and it is stipulated that judgment shall be rendered upon the award of the arbitrators, with costs, according to the rules and practice of the Court, and an award is made in favour of the plaintiff, upon which judgment is entered as upon a report of referees, the defendant cannot question the validity of such judgment, and costs will be awarded by the Court in the same manner as if a verdict had been rendered for the amount of the award. *Farrington v. Hamblin*, 12 Wend. 212.

36. Where the award was for \$37, the plaintiff cannot show by the certificate of the arbitrators, that his claim established at the trial exceeded \$200, and was reduced by set-offs to the amount of the award; such fact must be shown by affidavit, on motion for costs. *Ibid.*

(b) *An award must correspond with the submission, and what will be a sufficient conformity to it.*

37. Under a general submission to arbitration by partners of all accounts, dealings, controversies, demands, &c., as well individually as partnership concerns and transactions, an award giving the joint property to one of the partners, and directing him to pay the other partner a sum in gross, and to discharge and satisfy the debts owing by the firm, is good, and will be supported, especially if there be no evidence that the arbitrators have decided matters not in dispute between the parties. *Byers v. Van Deusen*, 5 Wend. 268.

38. Where after a suit in Chancery had progressed to an order of reference to a master to state an account, the complainant assigned all his estate and effects as an insolvent debtor, and it was then agreed between the solicitor for complainant and the defendant to submit the question to the master, whether the suit had abated or not; and if he should be of opinion that it had, then it was agreed by the solicitor, as the attorney and of counsel for and acting on behalf of the holders and owners of certain acceptances, the subject-matter of the suit, on the one part, and the defendant on the other, that all claims and demands upon or relating to the acceptances, and all matters of set-off should be referred to the arbitration of the master; and in case of any sum being awarded to be paid by the defendant, time should be given him for the payment of the same, until a certain day; and the master determined that the suit did abate by the assignment, that the plaintiff was the true and lawful holder of the acceptances, that the defendant was bound to account to him for the moneys in his hands belonging to the drawer of the bills at the time of the acceptances, that each party should pay his own costs in the suit in Chancery, and that the expense of the arbitration should be borne by them equally; it was held, notwithstanding a plea of the assignment of the estate and effects of the plaintiff, previous

to the making of the award, that the award directing payment to *him* was good, that the arbitrator had not exceeded his authority, that the day of payment having been agreed upon in the submission, the omission to specify it in the award was immaterial, and that the order in relation to costs, if not within the submission, being void only *pro tanto*, did not destroy its validity as to the residue. *Gomez v. Garr*, 6 Wend. 583.

39. An award of arbitrators may determine a question of location or boundary; and it is competent for the arbitrators to prove by parol the conformity of the award to the submission. *Robertson v. McNeil*, 12 Wend. 578.

40. When by the terms of submission to arbitration, the award is to be attested by a subsisting witness, or is required to be made by the arbitrators in any other particular form, the award is not made, and ready to be delivered to the parties, until such form is complied with. *Bhomer v. Sherman*, 5 Paige, 575

(c) *It must be final.*

41. It is essential to the validity of an award that it should make a final disposition of the matters embraced in the submission, so that they may not become the subject or occasion of future litigation between the parties. *Waite v. Barry*, 12 Wend. 377.

(d) *Certain.*

42. Where it appears by the submission that A. and B. own adjoining lots, the settling the division line between which is the subject of the submission, award which declares that B. is in possession of A.'s land, and at the same time declares the division line between them by courses and distances, is sufficiently certain as to the extent of the possession, and B. is bound to surrender accordingly. *Bacon v. Wilber*, 1 Cow. 117.

43. An award that one shall pay money or give security is valid for the money, though void as to the security, being general and uncertain, and not saying what the security shall be; the latter may, therefore, be rejected as surplusage. *Stanley v. Chappell*, 8 Cow. 235.

44. An award that one of the parties shall save and own, in his own right, all the interest which the parties jointly had in a certain brewery near a certain village, cannot be objected to for uncertainty. *Byers v. Van Deusen*, 5 Wend. 168.

(e) *What intentment will be made in support of an award.*

45. Upon demurrer to a declaration upon an arbitration bond, it will be intended that the arbitrators acted within the submission, unless the contrary appear upon the face of the award.

46. Accordingly, where parties submitted the settlement of a division line between their farms, and the bonds recited that a cedar post should be the place of beginning, and that the lines described in certain original leases should guide as to courses and distances, and that parol evidence should be excluded, and the award adopted a stake as the place of beginning, and certain stakes newly set up, &c. to regulate the

courses and distances, and said nothing as to the cedar post or original leases; *held*, that the place of beginning, and courses and distances mentioned in the award, should be intended the same as those described in the bonds: the contrary is matter of defence, and comes properly from the defendant. *Bacon v. Wilber*, 1 Cow. 117.

47. The arbitration bonds were dated August 21st, 1813, and the award was dated August 23, 1813, and recited bonds dated the 21st of August last past; *held*, that if a correct recital were necessary, it should be construed, in support of the award, to refer to the day, *i. e.* the 21st last past, instead of the month, *i. e.* August last past. *Brotten v. Hankerson*, 3 Cow. 70.

48. A parol submission and award that B. shall pay to M. a sum of money as a compensation for the future use of M.'s private road, made by him partly over his own land, and partly over the land of others, without their permission, is valid, the passing a permanent right of way not being in the contemplation of the parties. *Mitchell v. Bush*, 7 Cow. 185.

49. Such a submission and award are not an agreement concerning an interest in land within the statute of frauds. *Ibid.*

(f) *Void in part.*

50. Though an award is bad in one part, yet it may be good in another, if there is no connexion between the two subjects, and they do not depend upon each other. *Bacon v. Wilber*, 1 Cow. 117.

51. If the submission be of a particular thing, and the award be of that and something else, though the latter be void, the party is bound to fulfil the former. It is void only *pro tanto*. *Ibid.*

52. In dower, the tenants pleaded that the demandant's son having conveyed the premises to the tenants with warranty, &c., the demandant and her son, by writing sealed, reciting these facts, and that the demandant had agreed with her son to take a certain annual sum in lieu of dower, referred it to three arbitrators to determine the amount and the security for payment, and the demandant covenanted, that on the award being fulfilled, she would release her dower to the son, and the performance of the son was guaranteed by one of the tenants; that the arbitrators award a sum payable quarterly by the son, or the tenants, or either of them, and that the son should pay the costs of the controversy; that a certain sum of money, vested in the tenants' hands for their indemnity, should be the security; and that all suits, quarrels, &c., touching the premises, should cease, &c., and that in default of fulfilling the award, the demandant might enter, &c.; and the plea then averred that the costs had been tendered; that the quarterly sum had been paid to and accepted by the demandant up to the time of the commencement of the suit; and the award, in all respects, performed on the part of the son and tenants: *held*, that this award was a bar to the action; that it was not necessary that a release should be awarded; that though the arbitrators might have misjudged as to the security, and fixed upon one which was insufficient, this

would not affect the award, their determination being conclusive; that though the award was void so far as it provided for a payment by the tenants, and though it might be void in awarding costs, which had been provided for by the submission, yet this would not affect the whole, and it should stand and be enforced for the residue. *Cox v. Jagger*, 2 Cow. 638.

53. An award may be good in part and bad in part. *Ibid.*

54. Where the part which is void is not so connected with the rest as to affect the justice of the case, it is only void *pro tanto*. *Ibid.*

55. An award, that an annual sum shall be paid in lieu of dower, is valid; but a further provision, that in default of payment the demandant may enter, is void, as being repugnant to the former. The latter must be rejected, but the former remains. *Ibid.*

56. The rule is, that when one part of an award is irreconcilable with another, the first part shall prevail, and the latter be rejected. *Ibid.*

IV. Performance of, and action to enforce, an award.

57. A rule for an attachment for not performing an award will not be granted at the time of making the submission a rule of Court, especially where there has been no demand of performance. *Knight v. Carey*, 1 Cow. 39.

58. Where the bond of submission provide that if the arbitrators shall award that the lands of A. are in possession of B., then B. shall surrender the lands, and pay the costs of an ejectment brought by A. for their recovery, and the arbitrators award accordingly; and further, that B. should surrender the land, and pay the costs of the ejectment: *held*, that though they had no power to award the surrender and payment, yet these being a part of the condition, an action lies on the bond for a breach in either particular. *Bacon v. Wilber*, 1 Cow. 117.

59. Attachment does not lie to enforce the payment of costs which have been provided for in the bond, and do not depend on the award. 1 Cow. 121, note (a).

60. It is no defence to an action on an award that the arbitrators awarded a sum of money upon a claim which the law would not enforce. *Mitchell v. Bush*, 7 Cow. 185.

61. An award cannot be impeached in an action on the ground that it is against law. *Ibid.*

62. A submission was to the award of three arbitrators, so that they, or any two of them, award by such a day. Two made the award in writing within the time, but it did not appear on the face of the award that the three heard the proofs and allegations of the parties. *Held*, that this might be shown by evidence *aliunde*. *Achley v. Finch*, 7 Cow. 290.

63. An action of debt will lie on an award of money without regard to the penalty of the bond. *Ex parte Wallis*, 7 Cow. 522.

64. The penalty is important only to enforce payment of damages for a revocation, in which case the bond must be made the direct foundation of the action. *Ibid.*

65. Where, under a submission, the arbitrators, in an appraisement of the value of work

done, were directed "to make a statement of the value of the work, according to the usual prices paid in the county for such work;" *it was held*, that such direction merely prescribed the rule by which the labour was to be valued; and that such statement, not forming a part of the award, need not be served on the defendant previous to suit brought. *Efner v. Shute*, 2 Wend. 567.

66. A promise, by a party in whose favour an award is made, to correct any mistakes which may have been made by the arbitrators, is void for want of consideration. At all events, a defendant cannot avail himself of it by way of set-off or defence in an action on the award. *Ibid.*

67. Proof that arbitrators, before making an award, resigned their authority, and that such resignation was accepted by the parties, is admissible in bar of an action on an award. *Rel-yea v. Ramsey*, 2 Wend. 602.

68. In a suit at law on an arbitration bond for not performing an award, it is no defence that the party sought to be charged had no notice of the hearing, and did not attend. *Elmesdorf v. Harris*, 5 Wend. 616.

69. Where an action is brought upon an award for a proportion of a prize in a lottery, it is not necessary to allege in the declaration that the lottery was authorized by law. *Waite v. Barry*, 12 Wend. 377.

70. Where, by the terms of an award, acts are to be performed on the same day by both parties to the submission, it is incumbent on the plaintiff to aver performance, or an offer to perform on his part; and if he neglects so to do, the defendant may craveoyer of the award, and demur to the declaration, or plead the non-performance of the plaintiff in bar of the action. *Huy v. Erown et al.* 12 Wend. 591.

V. When an award will be set aside.

71. An award made without giving notice to the parties, so that they can be heard before the arbitrator, is a nullity. *Peters v. Newkirk*, 6 Cow. 103.

72. Where the award was, that H. should deliver the said farm to B., &c., and that B. should pay H. certain moneys; *held*, that the delivery of the farm was a consideration for the money, and the award being uncertain, in not describing the farm by reference or otherwise, the award of the money was also void. *Erown v. Hankerson*, 3 Cow. 70.

73. If that part of the award which is void is so connected with the rest as to affect the justice of the case, the award is void for the whole. *Ibid.*

74. Upon a general bond of submission to arbitrators, with an *ita quod* clause, if they do not award on all the matters in controversy between the parties, of which they have notice, the award is void *in toto*; adjudged upon plea that they had omitted to pass upon a certain matter, replication setting forth an award, which on its face excluded the matter, demurrer and joinder. *Wright v. Wright*, 5 Cow. 197.

75. To avoid an award by dissent of one of the arbitrators, he must dissent when the award is published. *Jackson v. Gager*, 5 Cow. 383.

76. On a motion to set aside an award which

was agreed to be made a rule of Court, the merits of the award are not inquirable into. It will not be set aside in a Court of law, unless the arbitrators have acted dishonestly or corruptly. *Ex parte M'Kinney v. Newcomb*, 5 Cow. 425.

77. The revised statutes have not changed the law as to the power of this Court to set aside an award, in respect to the conduct of the arbitrators; formerly, as well as now, an award might be set aside for partiality or corruption in the arbitrators. *Smith v. Culler*, 10 Wend. 589.

78. The terms *misconduct* and *misbehaviour*, used in the statute, imply a *wrongful* intention, and not a mere *error* in judgment on the part of the arbitrators. *Ibid.*

79. Where two parties submit their differences to arbitrators, and agree to make the submission a rule of Court, in a Court of common law, pursuant to the act for determining differences by arbitrators, (1 R. L. 125.) the Court of Chancery will not entertain jurisdiction to set aside the award, unless injustice would be done. *Toppin v. Heath*, 1 Paige, 293.

80. A mistake of judgment in arbitrators is not sufficient evidence of improper conduct on their part, to justify the setting aside of their award in a Court of Chancery. *Campbell v. Western*, 3 Paige, 124.

BAIL.

I. Discharging defendant without bail.

II. Bail to the sheriff.

III. Proceedings and action on the bail bond.

(a) *When and how the plaintiff may proceed on the bail bond*; (b) *When the bail will be relieved.*

IV. Proceedings against the sheriff.

V. *Bail to the action*: (a) *Filing and giving notice of bail*; (b) *Justification of bail*; (c) *Filing common bail.*

VI. *Proceedings against bail on their recognisance*: (a) *Surrender of principal in discharge of bail*; (b) *Bail relieved on their principal being discharged as an insolvent*; (c) *Other grounds for relief or discharge.*

VII. Bail in criminal cases.

I. Discharging defendant without bail.

1. A defendant surrendered by his bail is not entitled to be discharged from imprisonment, on the ground that the plaintiff had given notice of exception to the bail, where no exception had in fact been entered on the bail piece. *Lawrence v. Graham*, 9 Wend. 477.

2. Such notice, it seems, would have discharged the bail; but the bail not having availed himself of the right to a discharge growing out of the exception, the defendant can claim no advantage under it. *Ibid.*

II. Bail to the sheriff.

3. Bail to the sheriff are entitled to relief on the usual terms, although the sheriff, after a rule for an attachment for not bringing in the body, pays the plaintiff's demand. *Curteis ad. Seymour*, 1 Wend. 105.

III. Proceedings and action on the bail bond.

(a) *When and how the plaintiff may proceed on the bail bond.*

4. There is no distinction between proceedings against bail and other joint debtors, and the plaintiff may proceed and declare against both, under the statute, as in ordinary cases when one defendant is taken and the other not found. *Steward v. Patten and Culler*, 1 Hall, 38.

5. In an action upon a recognisance, the sheriff returned upon the writ, "one of the defendants taken and the other not found." The plaintiff, under the statute relating to joint debtors, having declared against both bail, a motion was made in the name of the defendant not taken for an *exoneretur* upon the bail piece in the original suit, with the avowed object of making it available to both; but the motion was denied. *Ibid.*

(b) *When the bail will be relieved.*

6. On a motion to set aside the proceedings on a bail bond, affidavits made in support of the motion, and entitled in the original cause, attached to an order to stay proceedings entitled in the bail bond suit, with a notice of motion, showing the real object of the application, may be read. *Ex parte Metzler*, 5 Cow. 287.

7. Where the bail below became bail above, and the plaintiff excepted, and then took an assignment of the bond, and commenced an action upon it; *held*, that the proceeding was irregular, and should be set aside with costs. *Ibid.*

IV. Proceedings against the sheriff.

8. A sheriff will be discharged from an attachment for not bringing in the body where special bail has been put in, but the bail piece has been lost in its transmission to the clerk's office. *The People v. Shoemaker*, 2 Wend. 253.

V. *Bail to the action*: (a) *Filing and giving notice of bail.*

9. Notice of bail in error must specify their names, additions, and places, or residence. *Moody v. Baker*, 5 Cow. 413.

10. They are liable to exception in the same manner as bail to the action. *Ibid.*

11. The plaintiff has a right to act on a notice of bail received from an attorney of this court; though he may not have been retained, and though bail may not be in as stated in the notice. *Cobb v. Danow*, 6 Cow. 390.

12. The plaintiff is not bound to know that special bail is in, unless the defendant give regular notice thereof, and may therefore, though special bail be in, issue a *ca. sa.* without first having issued a *fl. sa.*, if there be no notice of bail given. *Butterfield v. Cooper*, 6 Cow. 608.

13. The plaintiff's attorney is not bound to regard the filing a special bail piece unless he have notice of it, and though special bail be actually in without notice, the filing common bail and entry of a default after the ordinary time is proper even within the four days after special bail is filed. *Pardoe v. Reid*, 4 Cow. 51.

(b) *Justification of bail.*

14. Though the general rule is, that bail must justify in double the amount contained in

the writ, or in the order to hold to bail, and the plaintiff may demand two bail, yet where the debt is enormously large, the Court will exercise discretion and direct reasonable bail. In this case the debt demanded was \$30,000, and the Court ordered that the bail should justify by two, or any greater number of persons, in the amount of \$45,000 in the aggregate. *Cromlines ads. Beldens*, 1 Wend. 107.

15. A justification of bail at the time and place specified in the notice is good, although before an officer other than the one named in the notice, especially if the plaintiff has not been misled. *Southerland v. Sheffield*, 2 Wend. 293.

(c) *Filing common bail.*

16. The plaintiff is not bound to accept a plea until the bail have justified; and though he refuse a plea on this ground, he may afterwards file common bail, and enter a default. *Waterman v. Allen*, 1 Cow. 60.

17. Where bail are excepted to, and neglect to justify in the regular time, they are as no bail, and the plaintiff may file common bail, and proceed under the statute, and take a default, which will be set aside only on terms. *Ibid. Trotter et al. v. Hawley et al.* 1 Cow. 226. S. P.

18. Where the plaintiff took his judgment by default, omitting by mistake to file common bail, the Supreme Court on motion allowed him to appear for the defendant *nunc pro tunc*. Per *Sudan*, Senator, interrupting the argument for the defendant in error. *Colden v. Knickerbocker*, 2 Cow. 31.

19. Where a plaintiff takes a judgment by default, but inadvertently omits to file common bail, the Court on motion will always give liberty to do this *nunc pro tunc*. *Phelps v. Bronson*, 4 Cow. 61.

20. Common bail can be filed by a plaintiff only in a non-bailable action. *Anon.* 2 Wend. 630.

VI. *Proceedings against bail on their recognisance: (a) Surrender of principal in discharge of bail.*

21. Bail may surrender their principal, and obtain an *exoneretur* on motion, after the eight days allowed, *ex gratia*, for surrender, if the surrender within that time was prevented by the sickness of the principal; and this though no order to stay proceedings, or rule for enlarging the time to surrender, was obtained within the eight days, the sickness of the principal not being known to the bail within that time. *Thomas v. Bulkley*, 5 Cow. 25.

22. If a defendant omit to plead his discharge to a *scire facias*, whereby judgment by default goes against him, he is concluded; yet in such case, if the bail apply within eight days after the return of the writ against them, the Court will, on a proper case being made out, give time to surrender, as they would do in other cases; and, in the mean time, stay the proceedings; and will further order, that on surrendering the defendants, and paying the costs of the action, proceedings against them be perpetually stayed. *Franklin v. Thurber*, 1 Cow. 437.

23. A judge at chambers, or a commissioner,

&c. may order an *exoneretur*, on the discharge of the principal under the body act, in the same manner as on an actual surrender. *Cunningham v. Brown*, 5 Cow. 289.

24. The discharge is conclusive, and cannot be questioned, as against the bail, for irregularity or fraud. *Ibid.*

25. The eight days during which special bail may surrender *ex gratia* are to be computed of those within the test and return days of process. *Wiggins v. Wilson*, 5 Cow. 420.

26. The force of a special bail piece is spent by arrest on a *ca. sa.*, though the prisoner escape, and he cannot afterwards be surrendered by his special bail. *Ex parte Badgley*, 7 Cow. 472.

27. A surety for the gaol liberties has no power as such to surrender his principal to close confinement. *Ibid.*

28. To warrant this, the technical relation of principal and bail must exist. *Ibid.*

29. Bail on recognisance will be relieved on such a *bona fide* attempt to surrender within the eight days allowed for the surrender. *Warner v. Hayden*, 2 Wend. 251.

30. Bail have eight days in full term to surrender their principal, whether the suit against them be commenced by declaration or *capias*. *Mayell v. Follett*, 7 Wend. 507.

31. The plaintiff, however, may proceed in his suit against the bail, subject to the right of the bail to surrender their principal, and to be discharged, on payment of costs.

32. The right of the bail to discharge himself by a surrender of his principal ends with the return of the *ca. sa.* in the original suit; and the eight days are allowed as matter of grace rather than right. *Steward v. Patton*, 1 Hall, 38.

(b) *Bail relieved on their principal being discharged as an insolvent.*

33. Where a defendant has obtained his discharge under the insolvent act, after a judgment against him, which is revived by a *scire facias* personally served, his bail will not be relieved on motion. *Franklin v. Thurber*, 1 Cow. 437.

34. The defendant himself would not be relieved on motion, so that the reason of the rule dispensing with actual surrender, in such a case, which is to avoid the idle circuitry of surrendering a defendant who must be immediately liberated, does not apply. *Ibid.*

35. Though a defendant be discharged under the insolvent act, if he have time to plead the discharge, but omit to do so, an *exoneretur* will not after judgment be ordered in favour of his special bail, on account of the discharge. *Campbell v. Palmer*, 6 Cow. 596.

36. They must surrender in the ordinary way. *Ibid.*

(c) *Other grounds for relief or discharge.*

37. If bail do not justify within the time allowed by the rules of the Court, they cease to be bail, and the plaintiff cannot hold them by giving notice that he waives the exception. *People v. Judges of Onondago*, 1 Cow. 84.

38. This Court will in such case, where the bail are sued in a Court of Common Pleas,

grant a *writ* commanding the Court below to order an *exoneretur* to be entered upon the bail piece, and to set aside the proceedings. *Ibid.*

39. Charging a defendant in execution discharges his bail. *Stewart v. M'Guin*, 1 Cow. 99.

40. Charging one of two bail in execution will not discharge the other. *Ibid.*

41. It seems, that special bail are liable only to the amount of the *ac etiam*. *Mumford v. Stocker*, 1 Cow. 601.

42. Bail who are excepted to, and do not justify, cease to be bail. *Thorp v. Faulkner*, 2 Cow. 514.

43. And an agreement between the parties to waive the exception, filing a declaration in chief, and going on to judgment, are no reasons against ordering an *exoneretur*. *Ibid.*

44. Special bail who are excepted to, and neglect to justify, cease to be bail, and may move to have an *exoneretur* entered upon the bail piece. *Cooper v. Spicer*, 3 Cow. 619.

45. But till they do this, they may be proceeded against as bail, and their names are properly inserted in the recognisance roll. *Ibid.*

46. Where one excepted to, and not justifying, was only made a party *pro forma* and sued, but no process served on him, held, that the exception was no defence for the other bail, but judgment might go against all, with a stay of execution as to the one not brought in. *Ibid.*

47. Held also, that the other bail had no right to move in his behalf for an *exoneretur*. The right is personal to himself, which he may waive, and suffer himself to be charged. *Ibid.*

48. Special bail cannot object to an amendment of the *ac etiam*. *Blue v. Stout*, 3 Cow. 354.

49. Proceedings will be stayed against special bail pending a writ of error brought by the principal. *Wheeler v. Raymond*, 6 Cow. 589.

50. The special bail will not be discharged because their principal is imprisoned on conviction for a crime, unless it be for life; or for a long time in another state. *Phoenix Fire Insurance Company v. Morvatt*, 6 Cow. 589.

51. In a suit on a recognisance of bail, if the defendant in the original action is confined as a debtor in another state, the proceedings will be stayed, and time will be given for his surrender after his liberation from such imprisonment. *The People v. New York C. P.* 2 Wend. 263.

52. Bail for females in actions founded on contract are entitled to have an *exoneretur* entered on the bail piece, under the revised statutes, which declare that no female shall be imprisoned on any process in such action. *Dunham v. Macomber*, 5 Wend. 113.

53. Special bail sued on their recognisance may insist, by way of *plea* in bar of the action, that before a breach of the condition of the recognisance, an agreement was entered into by the plaintiff, that the defendant in the original action might depart from the state, and that no proceedings should be held in such action until his return. *Clark v. Niblo*, 6 Wend. 236.

54. If such agreement is made with the knowledge and consent of the bail, it is founded on a sufficient consideration, and the remedy of the

plaintiff is suspended until the return of the defendant; if made with the defendant only, without the privity or consent of the bail, the latter is absolutely discharged, as it would be a fraud upon him for the plaintiff to induce the defendant to leave the state under such circumstances, and then to proceed against the bail. *Ibid.*

55. The Court in which the original proceedings were pending might in such case set aside a *ca. sa.* and the sheriff's return thereon, or order a stay of proceedings until the return of the defendant; or a Court of Chancery might grant relief. *Ibid.*

56. In an action of debt on recognisance of bail, it is no defence that the sheriff might have arrested the defendant in the original suit on the *ca. sa.* issued therein, unless fraud or collusion is charged upon the plaintiffs. *Bradley v. Bishop*, 7 Wend. 359.

57. An *exoneretur* will be ordered on a bail piece, where it is shown that the action in which the bail is given is founded upon contract, and that the defendant in such action is not liable to arrest, according to the provisions of the act abolishing imprisonment for debt. *Russell v. Champion*, 9 Wend. 462.

58. In an action on a recognisance of bail, entered into in a Court of Common Pleas, sued in this Court, the fact that the defendant is a resident inhabitant of the county where the Court in which the original action was prosecuted is held, cannot be pleaded in abatement or bar; the remedy of the defendant is by motion. *Mathews v. Cook*, 12 Wend. 33.

59. If the declaration be for a cause of action different from the *ac etiam*, the special bail may move for an *exoneretur*, which will be ordered with costs. *Pell v. Grigg*, 4 Cow. 426.

VII. Bail in criminal cases.

60. The Supreme Court have the same powers in relation to bail as the English K. B., and may let persons charged with criminal offences to bail, in all cases whatsoever. *Ex parte Thyloe*, 5 Cow. 39.

61. Though the crime appears to be but manslaughter, it is not of course to allow bail. *Ibid.*

62. But if the guilt or innocence of the prisoner appear to be indifferent, he may be bailed. *Ibid.*

63. Though the warrant of commitment be defective, the Court will not discharge the prisoner finally for that reason; but if a crime be made out upon the depositions, the course is to discharge *pro forma*; but remand upon a special rule. *Form thereof*, *Ibid.*

64. If there be no reasonable doubt of the guilt of a prisoner charged with committing a felony, he ought not to be bailed even by the Supreme Court. *Ibid.*

BAILMENT.

1. A naked bailee of a chattel, *c. g.* one who gives a receipt for it to be kept and delivered to another, at a certain time, without reward, is responsible for gross negligence only. *Edson v. Weston*, 7 Cow. 278.

2. If a chattel be taken from one who receipts, and promises in writing to re-deliver it by another who has a paramount title, the bailee is discharged. *Ibid.*

3. Thus where a constable had levied on chattels by virtue of a justice's execution, but left them with the defendant, who pledged them to E., to whom W. gave a receipt, promising to re-deliver them at a certain day, and before that day the constable took them from W., and they were afterwards sold on junior executions; *held*, that this discharged the promise of W. *Ibid.*

4. In an action of *assumpsit* by E. against W., *held*, that these circumstances were a good defence upon the general issue. *Ibid.*

5. One who receives goods for reward into his store, though standing upon a wharf, the goods to remain there for the purpose of being forwarded subject to the bailor's order, is liable merely as a warehouseman, not as a common carrier or wharfinger; and he is bound to exercise no more than ordinary care in preserving the goods. *Platt v. Hibbard*, 7 Cow. 497.

6. *Semble*, that a wharfinger is bound only to the same degree of care as a warehouseman, and is not liable to the same extent as a common carrier. *Ibid.*

7. Public storekeepers receiving and storing goods for hire are not liable to the same extent as common carriers, nor are they bound to take better care of the goods than a prudent man would ordinarily take of his own property. *Ibid.*

8. *Semble*, that where goods so received are of themselves well secured, the mere circumstance of receiving goods of another sort into the same store which invite thieves into the store, who set it on fire and consume the former goods, will not make the bailee liable; unless the receipt of the latter goods will probably produce such a consequence. *Ibid.*

9. *Semble*, that where goods are so destroyed the bailee is *prima facie* liable; on the bailor showing the loss or destruction of the goods; and it lies with the bailee to show they were not lost in consequence of the want of ordinary care on his part; but *quære, vide note (a)* to this case. *Ibid.*

10. The standard by which ordinary diligence in a bailee is to be tested. Per *Walworth*, C. J., in his charge to the jury. *Ibid.*

11. The difference in extent between the liability of a common carrier and innkeepers and other bailees for reward, and what is meant by the words "the act of God." Per *Walworth*, C. J., in his charge to the jury, 14. *Ibid.*

12. Forwarding merchants, with whom goods are deposited, and who are instructed to forward them, are not liable for their loss, in an action charging the defendants as depositaries, if it is shown that they have used due diligence in sending on the property by responsible persons. *Brown v. Denison et al.* 2 Wend. 593.

13. An innkeeper is not liable in trover for property intrusted to him in the line of his business, unless an actual conversion be shown; a demand and refusal is not sufficient evidence of a conversion, unless at the time of the demand the goods were in the possession or under

the control of the defendant. *Hallenbake v. Fish*, 8 Wend. 547.

14. Warehousemen are not liable for injury to property intrusted to them, if they use all the care and diligence in relation to the property which prudent men exercise in respect to their own. *Knapp v. Curtis*, 9 Wend. 60.

15. A common carrier who carries passengers and their baggage is responsible for the baggage if lost, although no distinct price be paid for its transportation; the compensation for its conveyance, in contemplation of law, is included in the fare of the passenger. *Orange County Bank v. Brown*, 9 Wend. 85.

16. Where, however, the baggage consists of an ordinary travelling trunk, in which there is a large sum of money, such money is not considered as included under the term "baggage," so as to render the carrier responsible for it. *Ibid.*

17. A warehouseman, not chargeable with negligence is not responsible for goods intrusted to him, stolen or embezzled by his storekeeper or servant; and the *onus* of showing negligence lies upon the owner. *Schmidt v. Blood*, 9 Wend. 268.

18. Where a large quantity of any particular kind of merchandise is stored in a warehouse, and portions of it from time to time delivered out without the storage thereon being paid, the warehouseman has a lien upon the portion left for the storage of the whole. *Ibid.*

19. Where a steamboat chartered for six months to ply between New York and New Brunswick, was arrested in New Jersey by process of attachment sued out by a creditor of the owner, who on receiving notice of the seizure of the boat refused to procure her liberation by giving bonds or otherwise, it was *held*, that by such refusal the hirer was discharged from the contract, and from all liability for the hire of the boat for the residue of the term. *Stamford Steamboat Company v. Gibbons*, 9 Wend. 327.

20. An attachment thus issued will be presumed to have issued conformably to the laws of the place where it is executed, and will protect the hirer from responsibility, the same as if the property had been taken on an execution against the owner. *Ibid.*

21. Where a person received a sealed letter containing a \$100 bank bill at New Orleans, and engaged to deliver it to the individual to whom it was addressed at Salina, in New York, whose property he was told it was, it was *held*, that an action could not be sustained against him as a bailee on the common money counts, without showing that he broke the seal and appropriated the money to his own use. *Beardslee v. Richardson*, 11 Wend. 25.

22. A bailee without hire is liable for gross neglect only; but, it seems, that if on demand he refuses or omits to deliver a packet intrusted to him, he is answerable, unless he can shew its loss without fault or negligence on his part. *Ibid.*

23. A common carrier, in respect to the time of delivery of goods, is responsible only for the exertion of due diligence, and may excuse delay in the delivery by accident or misfortune, although not inevitable; it is enough if he exert

due care and diligence to guard against delay. *Parsons v. Hardy*, 14 Wend. 215.

24. The principle upon which the extraordinary responsibility of common carriers is founded does not require that that responsibility should be extended to the time occupied in the transportation; the danger of robbery or embezzlement, by collusion or fraud on the part of the carrier, has no application in such case. *Ibid.*

25. Where a common carrier on the canals is prevented, by the canals freezing up, from accomplishing the whole voyage, he is bound to deliver the goods at the place to which he undertook to transport them on the canal again becoming navigable; but if the owner of the goods accept them at the place where the voyage is interrupted by the ice, the carrier is discharged from further responsibility, and becomes entitled to a *pro rata* compensation for the transportation of the goods to that place. *Ibid.*

26. If a common carrier on the canals, in unloading his boat at the termination of the voyage, uses the tackle or machinery of a third person in hoisting the goods from his boat, and the machinery breaks and the goods are injured or destroyed, he is responsible for the loss; the machinery is *pro hac vice* his, and he is answerable for its sufficiency. *De Mott v. Laraway*, 14 Wend. 225.

27. The undertaking of a carrier to transport the goods to a particular place necessarily includes the duty of delivering them there in safety. *Ibid.*

BANKS.

1. A clerk in a bank is not bound to produce its books on a *subpoena duces tecum*. *Utica Bank v. Hillard*, 5 Cow. 153.

2. Where it appeared that a bank had kept books or memoranda, in which they entered the time, manner, and terms of discounting notes; *held*, on a suit by the bank against an endorser, upon discount, that it was not competent for him to show the custom of the bank, under the direction of the cashier, to take an usurious discount, in all cases, from the creation of the bank till after the particular note had been discounted, without first showing that notice had been given to the bank to produce the books and memoranda on the trial, which had not been complied with. *Ibid.*

3. Under the tenth section of the act incorporating the Washington and Warren bank, (Sess. 40, ch. 185.) the person whose bills, &c. are refused payment in specie, may recover not only the principal sum due, with the usual interest at seven per cent., but also ten per cent. per annum on the same principal, from the time payment is demanded till it is made. *Wendell v. The Washington and Warren Bank*, 5 Cow. 161.

4. It is the duty of a bank, on the money being demanded upon its notes, to pay within a reasonable time, according to circumstances. *Hubbard v. Chenango Bank*, 8 Cow. 88.

5. Any sum of ordinary magnitude should be paid at least during the day of the demand. *Ibid.*

6. All, however, that can be exacted is 'that the officers of the bank be diligently employed in making payment, according to the order of time when demands are made. *Ibid.*

7. A bank cannot, at its option, pay out in small pieces when it has large on hand, thus creating delay; and it should keep money ready counted out, or servants sufficient to count it out within a reasonable time. *Ibid.*

8. If there be unreasonable delays, it amounts to a refusal of payment. *Ibid.* And

9. *Held*, that the Chenango Bank, by such a refusal, incurred the penalty of fourteen per cent. until tender, under the 10th section of its act of incorporation. (Sess. 41, ch. 263. 4 Laws N. Y. 269.) *Ibid.*

10. Under that section, a tender of the money, though at the banking house, without notice to the creditor, will prevent the running of the fourteen per cent. This tender must, however, be not only of the principal sum, but the fourteen per cent. intermediate the time of refusal and tender. *Ibid.*

11. But a tender of money, to avoid the running of ten per cent. after refusal of payment, within the general statute relative to banks, (Sess. 41, ch. 236, s. 3. 4 Laws N. Y. 243.) must be personal. *Ibid.*

12. A tender of money due on bank notes must, at the common law, be personal. A tender at the counter of the bank, the creditor not being present, is sufficient. *Ibid.*

13. A bank is bound by law to take its own bills or notes in payment of debts. Per *Woodworth, J.*, delivering the opinion of the Court. *Niagara Bank v. Rosevelt*, 9 Cow. 409.

14. A depositor in an insolvent bank proceeded against under the statute, (Sess. 38, ch. 325, s. 17.) must come in for his deposit as an ordinary creditor, having no preference to others. *Bruyn v. The Receiver of the Mid. Dist. Bank*. Note (a) to the opinion of *Woodworth, J.* *Ibid.*

15. So must a cashier of the insolvent bank for his salary. *Ibid.*

16. Neither a depositor nor cashier have any lien on the funds of an insolvent bank; the former for his deposit, nor the latter for his arrears of salary. *Ibid.*

17. A set-off existing against a bank when it stops payment is allowable, whether the debt of the bank be then payable or to become due afterwards. *Ibid.*

18. Bills of an insolvent bank are allowable in set-off against the bank, whether in the debtor's own hands or in the hands of another for his use. *Ibid.*

19. An endorser to the bank has the same right to set-off bills as other debtors; but not if he be indemnified, or the maker be able to pay. *Ibid.*

20. The evidence upon which the receiver is to act in allowing set-offs should be such as would maintain a set-off in a Court of justice. *Ibid.*

21. If he receive the affidavit of the debtor, it should state when, where, from whom, and under what circumstances he received the bills. *Ibid.*

22. If the debtors and sureties be insolvent, the bills of the bank may be received, whatever

time they may be obtained by the debtors or sureties; but they should be estimated as much below their par value as the debt due is probably below its par value. *Ibid.*

23. Bills obtained by the solvent debtors of a bank after it has stopped payment, though before a receiver be appointed, are not admissible as a set-off against the bank. *Ibid.*

24. An over-drawing is a debt due to a bank. *Ibid.*

25. In an action by the receivers of a bank, appointed under the act to prevent fraudulent bankruptcies, &c., to recover the amount of a note discounted at the bank falling due after the appointment of the receivers, bank notes of the same bank of which the defendant became the holder previously to his note falling due cannot be set off against the demand of the plaintiffs, although on the day his note falls due, the defendant makes a tender of the same in payment of his note. *Hanson et al. v. Bishop*, 3 Wend. 13.

26. An action on a promissory note endorsed in blank, belonging to a bank, may be sued by receivers or assignees in their proper names, as endorers, without specifying their characters as receivers or assignees. *Ibid.*

27. In a proceeding against a bank by the attorney-general under the "act to prevent fraudulent bankruptcies by incorporated companies, and to facilitate proceedings against them," if in the bill filed by way of information, facts and circumstances are stated, verified by affidavit, expressing belief in the truth of those facts, and they are of such a character as to raise a fair presumption that the bank proceeded against is insolvent, and are not contradicted or explained by the bank, on a motion for the appointment of a receiver, after due notice, the fact of insolvency will be considered as proved within the meaning of the act. *Bank of Columbia v. Attorney-general*, 3 Wend. 588.

28. A receiver may be appointed by the chancellor in the first instance, without a previous reference to an appointment by a master; and the amount of the security to be given by the receiver rests in the discretion of the chancellor. *Ibid.*

29. A direction by the chancellor to a master not to take a nomination of any person as receiver who was an officer or agent of the bank proceeded against at the time it stopped payment, or at any time within six months previous thereto, is discreet and proper. *Ibid.*

30. The act of the legislature under which these proceedings are had is a valid and not an unconstitutional law, as it respects previous incorporations. *Ibid.*

31. The government of the territory of Michigan had power in 1817, under the law organizing the territory, to incorporate a banking company. *Williams v. Bank of Michigan*, 7 Wend. 539.

32. A board of directors of a bank have no right to pass a resolution excluding one of its members from an inspection of its books, although they believe him to be hostile to the interests of the institution; and should the officer having custody of the books refuse a member permission to inspect the same, agreeably to

such resolution, a *mandamus* will be directed to such officer, ordering him to submit the books to the inspection of the director desiring it. *The People v. Throop*, 12 Wend. 183.

33. A bank may be assessed for a village tax voted previously to the bank going into operation, if before the assessment be made the bank is deriving an income from its capital stock. *Orwego Bank v. Oswego Village*, 12 Wend. 644.

34. Where a bill of exchange, payable at a distant place, is deposited with a bank for collection, without any agreement for compensation, the only obligation incurred is to forward the bill in due season to a bank, or other suitable agent at the place of payment, with directions to take the necessary measures to obtain payment. *Allen v. Merchants Bank of N. Y.* 16 Wend. 489.

35. When the bill is thus forwarded, and the bank receiving it places it in the hands of a notary to make presentment for acceptance, which is made and refused, and the notary omits to give notice of non-acceptance, whereby the debt is lost, an action will not lie against the bank where the note was originally deposited, but the holder must seek his remedy against the notary. *Ibid.*

36. It is competent for the holder to prove, if there has been no judicial determination upon the point, that by the usage and custom of the place, a bank thus receiving a note for collection incurs the obligation to answer for the negligence or omission of the bank, notary, or other agent to whom the bill is forwarded. *Ibid.*

37. The inquiry, however, is not to learn the opinion of lenders and merchants in respect to the law of the case, but to ascertain the usage or practice in the course of mercantile business in such cases; that is, what is the practice as generally understood by merchants, and as recognised and acquiesced in by the banks. *Ibid.*

BASTARDY.

1. A bond to indemnify a town concerning a bastard child, given pursuant to the statute, (Sess. 26, ch. 12, s. 2: 1 R. L. 306.) is broken, and an action may be maintained upon it, as soon as the town becomes liable or bound to maintain the child; and an action upon it, without actual disbursement, advance, or payment by the town. *Rothfeller v. Donnelly*, 8 Cow. 623.

2. An order of filiation and maintenance made, in pursuance of the first section, against the putative father, is, *per se*, conclusive evidence to sustain the action even against the sureties; and may be used in evidence to fix the amount of damages. *Ibid.*

3. Justices of the peace may commit a pauper, the mother of a bastard child, to prison, for refusing to discover the putative father. *Scott v. Ely et al.* 4 Wend. 555.

4. Where surety is given to perform the order of two justices made under the bastardy act, charging the reputed father with the payment of

money weekly for the support of the child, an order of a justice of the peace is not necessary to authorize the expenditure of money in support of the child. *The People v. Corbett*, 8 Wend. 590.

5. In an action on the recognisance, it is not necessary to prove the actual expenditure of money in support of the child; the order and recognisance are *prima facie* evidence of the child's being chargeable, and of his having been maintained by the town; if matter in discharge exists, it must be shown by the defendants. *Ibid.*

6. The extent of the liability of the defendant is definitively settled by the order and recognisance; no assignment of breaches or assessment of damages is necessary, the defendant having no right to inquire what amount has been expended. *Ibid.*

7. Evidence that the mother is of sufficient ability to support the bastard child is not admissible in discharge of the defendants. *Ibid.*

8. The surety given under the first section of the bastardy act need not be sued in the Common Pleas, or be prosecuted by the clerk of the county, where there has been no appeal from the order of the justices. *Ibid.*

9. Were it necessary that the suit should be brought in the Common Pleas, on a motion in arrest in this Court, the Court, in support of its jurisdiction, would presume that the cause had been removed into this Court by *habeas corpus*. *Ibid.*

10. Where there is no appeal, the security taken need not be returned to the General Sessions; nor is it necessary that it should be filed to make it effectual. *Ibid.*

11. A joint suit may be maintained although the recognisance be several. *Ibid.*

12. In an action against a town or county officer on the contract of his predecessor, it is not necessary to aver a promise or engagement on the part of the defendant in the suit; it is enough to set forth the contract on which the suit is brought. *Morse v. Earl*, 13 Wend. 271.

13. Where such contract is for the maintenance of a bastard child, and the suit is against a successor in office, an order of a justice authorizing the expenditure of money for the support of the child must be shown; but a judgment will not be arrested for the want of the averment of the existence of such an order, as the Court will presume that such order was produced on the trial. *Ibid.*

14. Where the putative father of a bastard child is arrested on a warrant in a county different from that in which the process was issued, and gives a bond conditioned that he will indemnify the county, or that he will appear at the next Court of General Sessions, the bond, although not strictly conformable to the statute, is valid, and may be enforced. *The People v. Tilton*, 13 Wend. 597.

15. Where a bond is conditioned for the performance of one thing or another, so that the obligor may discharge the obligation by a compliance with one of the alternatives, a breach assigning a non-performance of one of the alternatives only is bad. *Ibid.*

BILL OF EXCEPTIONS.

1. A bill of exceptions does not draw the whole matter into examination, but only the points upon which it is taken; and the party excepting must lay his finger upon these points, which might arise either in admitting or denying evidence or matter of law arising from a fact not denied, in which either party was overruled by the Court. *Jackson v. Cadwell*, 1 Cow. 692.

2. Exceptions to a judge's or Court's opinion should be noted down upon the trial, or they cannot be used in a bill of exceptions. *Shepherd v. White*, 3 Cow. 32.

3. On settling the bill, notice of time and place, when and where this is to be done, should be given to the defendant in error. *Ibid.*

4. Otherwise the judge or Court will not be compelled by *mandamus* to execute the bill. *Ibid.*

5. And if executed, it will be set aside. *Ibid.*

6. Whenever a bill of exceptions is signed under circumstances wherein the Supreme Court would not compel its execution by *mandamus*, it will be set aside on motion. *Ibid.*

7. General rule as to frivolous bills of exception. *Ibid.*

8. Though a bill of exceptions be a stay of proceedings, yet, like a certificate of a probable cause, it does not prevent a rule *nisi* for judgment. *Moran v. Davies*, 4 Cow. 22.

9. Matters properly inserted in a bill of exceptions cannot be heard on non-enumerated motion; e. g. an objection that the plaintiff was proceeding in defiance of an injunction from the Court of Chancery. *Roosevelt v. Fulton*, 6 Cow. 48.

10. Where a bill of exceptions taken in the C. P. stated the charge of the Court upon points of law, and that the jury found a verdict, and that the party excepted; *held*, that the bill was sufficiently pointed to bring the charge in question on error; and, although in the order of statement the exception appeared to be subject to the verdict, yet *held*, that it should be intended that the exception was taken at the proper time; otherwise the judges, it is to be presumed, would not have signed it. *Harlow v. Humiston*, 6 Cow. 189.

11. A bill of exceptions is inapplicable to a criminal cause; and except in such cases, the admissibility or legal effect of testimony can be examined in a superior Court only on a report or case agreed upon, the presumption being that where there is reasonable ground for doubt, the judgment will be suspended till the opinion of the superior Court be known. *Ex parte Vermilyea, cor. Woodworth*, J. 6 Cow. 555.

12. Where a bill of exceptions in the Common Pleas is not settled at the trial, it should be settled on notice of the time and place to the opposite attorney. *Marsh v. Rufison*, 7 Cow. 103.

13. If this be not done, the Court to which error is brought will not for that reason set aside the bill, but will allow it to be referred and settled on due notice. *Ibid.*

14. If a party perfect judgment, but after-

wards appear and argue against a new trial on the merits upon a bill of exceptions which is granted, this is a waiver of the judgment, and a *vacatur* will be ordered. *Roosevelt v. The Heirs of Pullon*, 7 Cow. 107.

15. After a bill of exceptions proposed at the trial is drawn, amendments proposed, and both are delivered to the judge for the purpose of being settled, though the bill be not actually signed, this is a stay of proceedings. *Ibid.*

16. A bill of exceptions is, *per se*, and without any order, a stay of proceedings. *Ibid.*

17. But till it be delivered to the judge, to be settled, with amendments, an order should be obtained for time. *Ibid.*

18. The circuit judge ruled that the plaintiff in ejectment had made out a *prima facie* title in G., under whom he claimed, and the defendant excepted. *Jackson v. Tuttle*, 7 Cow. 364.

19. Afterwards the defendant proved that he himself claimed under G. *Ibid.*

20. *Held*, that in afterwards settling the bill of exceptions, the judge should insert the defendant's proof, so that the plaintiff might insist upon it as a waiver of the exception. *Ibid.*

21. *Resemble*, it would be a waiver. *Ibid.*

22. A bill of exceptions stays proceedings no longer than while it is pending and undetermined in the Supreme Court. *Jackson v. Varick*, 7 Cow. 412.

22*. In settling a bill of exceptions, no facts should be inserted besides those necessary to present the question of law decided by the Court, and to which the exception is pointed. The only exception to this rule is, where the matter proposed to be inserted may reasonably be insisted on as a waiver of the exception. *Ex parte Jones*, 8 Cow. 123.

22†. Where a party takes exceptions at the trial, he may, as a matter of right, make a case, subject to be turned into a bill of exceptions. *Roof v. King*, 8 Cow. 126.

23. A bill of exceptions must be signed by the judge who tries the cause. *Law v. Jackson*, 8 Cow. 146.

24. The judge who tried the cause must turn the case into a bill of exceptions. *Per Jones*, Chancellor, *Ibid.*

25. On a bill of exceptions, although all the evidence given at the trial may be contained in the bill, the Court cannot take notice of any matter that is not specifically stated as a ground of exception. *White-side v. Jackson*, 1 Wend. 418.

26. Where a person in possession of land enters into a contract for the purchase of it, such act is a recognition of the vendor's title, and precludes the purchaser from denying it, and in case of forfeiture, he is a new tenant at will, and not entitled to notice to quit. *Ibid.*

27. A bill of exceptions to a charge of a judge to the jury does not necessarily bring into review all the questions decided in the course of the trial. *Ibid.*

28. Though a jury find a verdict against evidence, the error cannot be corrected on a bill of exceptions; the remedy is by motion for a new trial. *Ibid.*

29. Where a party excepts at the Circuit, if the bill of exceptions is not sealed at the trial, he must prepare his bill, and serve a copy within two days after the trial on the opposite party, who has four days to propose amendments, &c., as in the settlement of cases. *M'Gregor et al. v. Cleveland et al.* 3 Wend. 312.

30. A bill of exceptions must appear on its face to have been taken and signed at the trial of the cause; if not in fact signed at the trial, but afterwards reduced to form, it must be

signed *nunc pro tunc*. *Law v. Werrills*, 5 Wend. 268.

31. Where a verdict was rendered for plaintiff by consent of parties, subject to the opinion of the Court on a case made, who, after hearing argument, gave judgment for the plaintiff, and certified in a bill of exceptions that the jury was *charged*, and that under such charge they found, &c., this Court refused to direct an amendment of the bill, stating that the verdict was found by *consent, subject, &c.*, on the ground that the facts could not be reviewed on trial of error, whether found by Court or jury. *Pelletreau v. Jackson*, 7 Wend. 471.

32. Where there is an order to stay proceedings until the settlement of a bill of exceptions, the party tendering the bill is entitled to a reasonable time, after attending before the judge for settlement, to engross the bill and obtain the signature of the judge; and until the judge's signature is obtained, the bill is not settled, and a judgment entered previous thereto will be set aside as irregularly entered. *Pelletreau v. Moore*, 9 Wend. 493.

33. A bill of exceptions cannot be presented in a criminal case to review the charge of the Court, or the finding of the jury, upon mere matters of fact, where there has been no erroneous decision upon matters of law. *The People v. Haynes*, 14 Wend. 546.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. *Forms and requisites*: (a) *What are valid notes*; (b) *Inland bills*. *Foreign bills*. *Bank checks*; (c) *Consideration and construction of a bill or note*.

II. *Transfer and endorsement*.

III. *When a bill or note is void*.

IV. *When the consideration of a bill or note may be inquired into*: (a) *Between the parties not original*; (b) *Between the immediate parties*.

V. *Acceptance and non-acceptance*.

VI. *Payment and non-payment*: (a) *When and how payment is to be made*; (b) *When and how demand of payment is to be made*; (c) *When it will be excused*.

VII. *Notice of non-acceptance and non-payment*: (a) *When and how to be given*; (b) *When want of notice or irregular notice will be excused*.

VIII. *Liability of the parties, and how discharged*.

IX. *Action on a bill or note*: (a) *When and by whom the action may be brought*; (b) *Declaration*; (c) *When a bill or note may be given in evidence under the money counts*.

X. *Damages and costs*.

I. *Form and requisites*: (a) *What are valid notes*; (b) *Inland bills*. *Foreign bills*. *Bank checks*; (c) *Consideration and construction of a bill or note*.

(a) *What are valid notes.*

1. A note ran thus, "The president and directors of the Woodstock Glass Company promise to pay," &c., signed "W. H., President." Whereas the real name of the company was "The Woodstock Glass Company," of which W. H. was president; and the note was set forth, in pleading, as one against the company in its true name, and it appeared from the evidence, that the latter company were intended; *held*, that the company were liable. *Mott v. Hicks*, 1 Cow. 513.

2. Bills of exchange and promissory notes must be absolute between the original parties; but an endorser may make his liability depend upon a particular contingency, or restrict it to a particular character or fund. *Ibid*.

3. A promissory note, executed by a testator in his last sickness, and delivered to the payee without consideration, but in expectation of dissolution, and intended as a gift, is valid as a *donatio causa mortis*. *Wright v. Wright*, 1 Cow. 598.

4. And an action lies thereon, at the suit of the payee, against the executors of the maker. *Ibid*.

5. An instrument in writing, thus, "Due L. R., or bearer, &c., two hundred dollars and twenty-six cents, for value received," is a good promissory note, within the statute of Anne. *Russell v. Whipple*, 2 Cow. 536.

6. A note payable in Pennsylvania or New York paper currency, to be current in the state of Pennsylvania or the state of New York, is not a promissory note for the payment of money within the statute. (1 R. L. 151.) *Leiber v. Goodrich*, 5 Cow. 186.

7. Where a note is shown to be lost or destroyed, and the fact does not appear whether it was negotiable or not, the Court will not presume it to be negotiable. *McNair v. Gilbert*, 3 Wend. 344.

8. A due bill, i. e. a note in this form, "Due A. B. three hundred and twenty-five dollars, payable on demand," is a promissory note within the statute; the acknowledgement of indebtedness on its face implies a promise to pay. *Kimball v. Huntington*, 10 Wend. 675.

9. A note for the payment of money under seal, though in all other respects like a promissory note, is not negotiable, and an action cannot be maintained upon it in the name of a person to whom it is transferred. *Clark v. Farmer's Manufacturing Company*, 15 Wend. 256.

10. A promissory note, expressing no time when payable, is in judgment of law payable on demand, and draws interest from its date. *Gaylord v. Van Loan*, 15 Wend. 308.

11. An endorsement on the back of a promissory note, making its payment dependent on a contingency, does not affect its negotiability; its only effect is to give notice of the consideration to subsequent holders. *Thrippan v. Ely*, 15 Wend. 363.

12. In a suit on such note by a subsequent holder, the maker may avail himself of any defence which he could set up against the payee. *Ibid*.

(b) *Inland bills; foreign bills; and bank checks.*

13. A request to pay the amount of a promissory note, written underneath the same, is operative as a bill of exchange. *Leonard v. Mason*, 1 Wend. 522.

14. A check, post dated, is not, like a bill of exchange, payable on a particular day; the only effect of its being post dated is, that it is payable on demand, on or after the date on which it purports to bear date. *Mohawk Bank v. Broderick*, 10 Wend. 304.

15. Although it is said that checks are like inland bills of exchange, and are to be governed by the same principles, greater diligence is required in presenting them than in presenting bills of exchange. *Ibid*.

16. A post-dated bank check, like a check bearing date on the day it is issued, is payable on demand, and not at a day certain. *Ibid*. 13 Wend. 133.

17. A bill of exchange, drawn in one state on persons living in another, is to be treated, it seems, as a foreign and not as an inland bill. *Wells v. Whitehead*, 15 Wend. 527.

(c) *Consideration and construction of a bill or note.*

18. Where endorsers commit a promissory note to the maker, with a blank for the date, they authorize him to fill it up with what date he pleases. *Mitchell v. Coker*, 7 Cow. 336.

19. So of a blank for the sum or time of payment. *M. and F. Bank v. Schuyler*, note (a), 7 Cow. 337.

20. So of a note entirely blank. *Ibid*.

21. A promissory note is perfect without date or time of payment. *Ibid*.

22. A promissory note was signed by B. and B., and they added, "Trustees of Union Religious Society, Phelps," which was a corporation; *held*, that they were personally liable. *Hills v. Bannister*, 8 Cow. 31.

23. If a promissory note purports on its face to be for value received, the setting forth of the note according to its terms is a sufficient statement of consideration to entitle the plaintiff to recover as on a contract. *Walrad v. Petrie*, 4 Wend. 575.

II. *Transfer and endorsement.*

24. The negotiable quality of a note is not destroyed by an endorser's advancing the money and taking it up; unless this be done *animo solvendi*. *Havens v. Huntington*, 1 Cow. 387.

25. Yet, where in such a case its negotiation may work a wrong to any one of the previous parties, such a payment will be holden to extinguish the note, and prevent its negotiability; and this for the purposes of justice; as if a subsequent endorsee may thereby be rendered liable; and so of the like causes. *Ibid*.

26. It is no objection to the action by the endorsee against the maker, that the note thus taken up was originally given to the payee, and endorsed by him for the accommodation of the maker; for by paying it as endorser, he becomes possessed of the note as a purchaser; is capable of suing upon the note itself; is not confined to an action for money paid, and might make himself liable as endorser upon it. *Ibid*.

27. And the defendant may avail himself of any defence which he might have had against the payee, had the action been in his own name. *Ibid.*

28. A note, though overdue and dishonoured, may still be negotiated, subject to all the equities between the original parties. *Ibid.*

29. Where a note was made to "J. H. or order," who endorsed it thus: "J. H., Agent;" *held*, though nothing appeared to show that he was in fact agent, yet he was not liable as endorser; for, though payee, he has a right to make a special endorsement, so as to avoid personal liability; and put his name upon the note for the purpose of passing the interest therein to another, and nothing more. *Mott v. Hicks*, 1 Cow. 513.

30. Such an endorsement is equivalent to a declaration that the endorser will not be personally liable, especially where the endorsee has notice of the original transaction; and, *it seems*, there would be enough on the face of the paper to put any one on inquiry, so that no holder could recover against J. H. as endorser. *Ibid.*

31. It is analogous to a special endorsement, declaring that the note shall be at the risk of the endorsee, in which case the endorser would not be liable; and therefore one making such a special endorsement is a competent witness for his endorsee in an action by him against the maker; but it would be otherwise in both these instances, if the endorsement were absolute. *Ibid.*

32. A warranty of title or genuineness by one who transfers negotiable paper, if it turns out to be false, is broken the instant of the transfer, and his liability is taken away by a discharge under the insolvent act after the transfer, though before the want of title or genuineness be detected. *Murray v. Judah*, 6 Cow. 484.

33. The drawer of a check is not a surety for the payee, though it be but to a drawee for the accommodation of the latter. And therefore though a subsequent holder give time to the payee to make payment, he being bound to pay such holder, this will not discharge the drawer, even though such holder know the check was for the payee's accommodation. As between the drawer and the payee and subsequent holder, the drawer is the principal, and the payee is the surety. *Ibid.*

34. Though a check be transferred to two, as collateral security for two several debts due to them respectively, yet one alone may sue upon it, and possession by him is *prima facie* evidence that the other has sold his interest to him. *Ibid.*

35. In an action for money paid, &c., or money had and received, by the holder of a check against the drawer, the check is, *per se*, conclusive evidence; and the drawer cannot show in his defence that money was not had and received by, or paid for him. *Ibid.*

36. A check was transferred by the holder as collateral security for an antecedent debt. Afterwards the drawer failing, it was appraised, and the creditor took it absolutely at a sum less than its face, giving the holder credit at the amount of the appraisal. *Held*, that in an action by the creditor against the drawer, this circum-

stance could not be evidence to diminish the amount of the recovery; that though the creditor gave less, yet he was entitled to recover according to the face of the check. *Ibid.*

37. The initials of the name of the holder of a bank check endorsed on the check are enough to charge him as an endorser. *Merchants' Bank v. Spicer*, 6 Wend. 443.

38. The endorsement of a note, in presumption of law, is contemporaneous with the making of it, or at all events that it was antecedent to its becoming due; if the defendant, in a suit by the endorsee, wishes to avail himself of payment to the original holder, it is incumbent upon him to show the endorsement to have been subsequent to the payment. *Pinkerton v. Bailey*, 8 Wend. 600.

39. The endorser of a note not negotiable has no right, in an action against him, to insist upon a previous demand of the maker, and notice of non-payment; the endorsement is equivalent to a guarantee that the note will be paid, and not a conditional undertaking to pay if the maker does not; an absolute guarantee may be written over the endorsement, upon which a recovery may be had. *Seymour v. Van Slyck*, 8 Wend. 403.

40. Where a note is received by an officer of the government as collateral security for the payment of a debt due the state, the debtor cannot avail himself of the neglect or omission of the officer to perform the duties which the law in ordinary cases imposes upon a party thus receiving a note. *Ibid.*

41. A note endorsed for the accommodation of the maker, delivered to him to be used in renewal of a former note about to fall due at a bank, transferred by the maker as collateral security for the payment of another debt owing by him, cannot be enforced against the endorser by the creditor to whom such transfer is made. *Wardell v. Howell*, 9 Wend. 176.

42. Where a note has effected the substantial purpose for which it was designed by the parties, an accommodation endorser cannot object that it was not effected in the precise manner contemplated at the time of its creation; but where a note has been diverted from its original destination, and fraudulently put in circulation by the maker or his agent, the holder cannot recover upon it against an accommodation endorser, without showing that he received it in good faith, in the ordinary course of trade, and paid for it a valuable consideration. *Ibid.*

43. Receiving the transfer of a note as collateral security for the payment of a pre-existing debt is not taking it in the ordinary course of trade, and for a valuable consideration, as between the creditor and an accommodation endorser. *Ibid.*

44. In an action against a party sought to be charged as the endorser of a promissory note, where it is proved that the signature of the endorser is not in the handwriting of the party, but in that of the maker, it is competent to the plaintiff, for the purpose of showing authority in the maker and acquiescence in the endorser, to prove that the defendant remained silent, although he received notice of protest, was sued, suffered a default in pleading, and took

no measures to defend the suit until after the maker absconded, and that the endorser had assumed the payment of other notes similarly situated. *Weed v. Carpenter*, 10 Wend. 403.

45. It is for a jury to determine, in such a case, whether the drawer had authority or not, taking into view the connexion and relationship of the parties and the probable motives of the endorsee. The maker in this case was the brother-in-law of the defendant. *Ibid*.

46. A *feme covert* may make a valid endorsement of a note given to her before marriage, by a name different from that of her husband, if the circumstances of the case be such as to warrant the presumption that the endorsement was made with the assent of the husband. *Miller v. Delameter*, 12 Wend. 433.

47. Such endorsement will be valid, though, by an ante-nuptial contract, the note had been assigned to a trustee for the benefit of the wife; if the endorsement was made with the knowledge and assent of the trustee. *Ibid*.

48. If the holder of a bill, subject to certain duties and obligations in reference to the law of the place where the bill is drawn or made payable, wishes to impose the same obligations upon his endorsee, he must make a special endorsement, or the endorsee will incur no other obligations than those which are imposed by the law merchant of the place where the endorsement is made. *Symar et al. v. Skeldon et al.* 12 Wend. 439.

49. Where the holder of a note who is indebted to another to a greater amount than the sum of the note transmits it to such creditor, with directions to collect it, and apply the proceeds to the liquidation of the debt; the creditor takes the note subject to all the equities which attached to it in the hands of him from whom it was received. *Hart et al. v. Palmer*, 12 Wend. 523. *S. P. Rosa v. Brotherton*, 10 Wend. 86.

50. Any defence available against the payee may be set up against the holder of a negotiable note, unless the holder received the same in the usual course of trade, i. e. paid money or property, or incurred liability upon the credit of the note. *Payne v. Cutler*, 13 Wend. 605.

III. When a bill or note is void.

51. H. J. & Co. drew a promissory note to be discounted at the Chenango Bank, and payable to the bank. On the bank declining to discount it, B., an attorney at law, at the request of H., advanced him the money, and it was agreed between them that the note should be left at the bank, as the agent or trustee of B., for his security. B. afterwards sued and recovered against H. for money lent; but could not collect his judgment; he then brought an action in the name of the bank against all three of the makers; *held*, that he should recover; that this was not the purchase of a chose in action by an attorney at law, and therefore void within the act, (Sess. 41, ch. 259, s. 1, sec.) that the note was not void and without consideration, and was properly left as security; this not changing the liability of the parties from what it would have been had the note been regularly discounted by

the bank; that the bank did not exceed its powers in taking the note as agent or trustee for B., nor was the judgment against H. a bar to the suit upon the note. *Bank of Chenango v. Hyde*, 4 Cow. 567.

52. A promissory note, given in consideration of a sale of pews, followed with possession in the vendee, cannot be avoided on the ground that the vendor refuses to convey. The remedy is by compelling a performance. *Freligh v. Platt*, 5 Cow. 494.

53. S. and V. being partners in trade with Smith and three others, under the firm of S. & Co., S. made a promissory note payable to V., to secure an alleged balance due from the firm to V., without the knowledge or consent of Smith; which note was, before it became due, endorsed by V. to L. and M., who had notice of the firm, and that V. and S. were members of the firm, and of the consideration for which the note was given. In an action by the endorsees against the firm as makers, including V., these facts were pleaded by Smith; but he did not aver that the alleged debt was not in fact due, nor that the note was given in fraud of the firm; *held*, that though no action would have lain by V., he being both maker and payee, yet the endorsees might bring an action against the firm, and declare on the note, as payable by the firm to V., and endorsed by V. to them, and recover in that form. *Smith v. Lusher*, 5 Cow. 688.

54. But had the execution of the note been a fraud upon the firm, or the debt for which it was given depended on the adjustment of an account between the members of the firm, this would have constituted a defence at law or in equity. Per *Sanford*, Chancellor. *Ibid*.

55. A note, valid in its inception, may be sold at a discount greater than the legal interest, and yet be enforced by the holder; such transfer not being usurious. *Powell v. Waters*, 8 Cow. 669.

57. The test of a valid note is the right to maintain an action upon it, when due, against the parties to it. *Ibid*.

58. A note made, and endorsed for the purpose of a lawful discount, if discounted by another at a usurious rate, is void. *Ibid*.

59. A note, void as between the parties for usury, is void, even in the hands of a *bona fide* holder. *Ibid*.

60. Where a *bona fide* holder of a usurious note, without notice of the usury, takes a new substituted security, this cannot be avoided for usury. *Ibid*.

61. A renewed security, including the usury of the first, to one who was party to the original usury, is equally void with the first; and so to one who has notice of the usury. Per *Jones*, Chancellor. *Ibid*.

62. The drawers of a note cannot object that it was negotiated contrary to its terms, where they themselves put it in circulation. *Wardell et al. v. Hughes*, 3 Wend. 418.

63. A note reserving interest, negotiated by a broker or agent, who obtains the money on the same, for the maker, from a third person, is not usurious in the hands of the holder, although

the agent be the payee of the note, and receive twelve and a half per cent. for the negotiation, no part of such sum being paid or agreed to be paid to the person advancing the money. *Barretto v. Snowden*, 5 Wend. 181.

64. The want or illegality of consideration of a note transferred before due cannot be shown in an action by a *bona fide* holder without notice, except where the note is declared void by statute; and it was held, in an action by such holder, that a defence could not be set up that the note was delivered as an *escrow*. *Pallett v. Parker*, 6 Wend. 615.

65. Evidence that a note was delivered as an *escrow*, and that it was fraudulently put in circulation, is admissible; and when the fact is shown, the holder will be bound to prove that he came fairly by the note, and paid value for it. *Ibid*.

66. A note given on the purchase of real estate, held adversely, is not void by statute. *Ibid*.

67. Where a note is adjudged void by a Court for the want, failure, or illegality of the consideration, it is void only in the hands of the original holder, or of those who are chargeable with, or have had notice of the consideration. *Ibid*.

68. The transfer by the payee of a valid available note, upon which, when due, he might have maintained an action against the maker, and which he parts with at a discount beyond the legal rate of interest, is not a *usurious* transaction, although the payee on such transfer endorses the note; and on non-payment by the maker, the endorsee may maintain an action against the endorser. *Cram v. Hendricks*, 7 Wend. 569.

69. The sum which the endorsee is in such case entitled to recover from the endorser is the amount of the advance made by him, together with the interest thereof; such, under the settled law of the land, being the extent of the obligation of the endorser in cases of this kind; in an action against the maker, the endorser is entitled to the whole amount of the note. *Ibid*.

70. Where a note is intended to be made for eight hundred dollars, and is endorsed by the payee for the accommodation of the maker, and delivered to him, and by mistake the words hundred dollars are omitted, so that it purports to be a note for eight , the maker, without the assent of the endorser, may insert the words hundred dollars; and in an action by the holder to secure a debt to whom the note was made, the endorser cannot object to the insertion of such words. *Boyd v. Bratherson*, 10 Wend. 93.

71. In such case the question as to the sum intended to be inserted is properly submitted to a jury, and the maker of the note is a competent witness to prove such intention. *Ibid*.

72. A note given to an incorporated company for stock is valid in the hands of an endorsee, without notice, notwithstanding the statutory provision forbidding directors of such companies to receive a note or other evidence of debt in payment of any instalment actually called in and required to be paid, where it is not affirmatively shown that the note was given for stock called

in and required to be paid. *Willmarth v. Crawford*, 10 Wend. 341.

73. By the revised statutes, an acceptance of a bill of exchange is void, unless it be in writing; and before this statutory provision, although a parol acceptance of a bill already drawn was good, a parol agreement to accept a bill to be drawn could not be enforced by an endorsee, who had not taken the bill upon the faith of such promise, and, between whom and the drawee no communication had passed. *Ontario Bank v. Worthington*, 12 Wend. 693.

74. So, although, after the bill has been passed, the drawee gives a conditional acceptance to the drawer in writing, which is shown to the holder, such holder cannot maintain an action upon the acceptance, not having taken the bill upon the faith of the acceptance. *Ibid*.

IV. When the consideration of a bill or note may be inquired into: (a) Between the immediate parties.

75. The consideration of a promissory note is always inquirable into between the original parties. *Slade v. Halstead*, 7 Cow. 392.

76. S. being indebted to H. \$500, payable at a future day, advanced \$190 as part payment, and took a note from H. for the \$190, payable one day after date, but the note was taken under an agreement that it should be mere evidence that H. was to allow interest upon the \$190 till the \$500 should become due; held, that this was not a parol agreement, void as intending to vary a written one, but showed a want of consideration, and in that view would defeat a recovery upon the note as between the original parties. *Ibid*.

(b) Between the parties not original.

77. In an action on a promissory note by the payee, it seems, that a partial or total failure of consideration may be given in evidence by the maker, to mitigate or defeat a recovery; as fraud, or a breach of warranty in respect to the consideration. *Hills v. Bannister*, 8 Cow. 31.

78. It seems, that a fraud in the consideration may be given in evidence under the general issue, without notice. *Ibid*.

79. Accommodation endorsers of a note made in the name of a firm, by a member thereof, without the assent of his co-partner, and passed by him for his individual debt, are not liable for its payment. *Williams et al. v. Walbridge et al.* 3 Wend. 415.

80. The burden of proof lies with the holder to show that the several members of a firm assented to a note, in the name of a firm, where such note is taken for the private debt of one of the partners. *Ibid*.

81. A note void for want of consideration cannot be enforced by an assignee having full knowledge of the facts. *Rumsey v. Leek*, 5 Wend. 90.

82. Where a party endorsed an accommodation note for another at sixty days, with a view of enabling the maker to obtain a discount at a bank, and the maker, after refusal by the bank to discount the note, passed it off, with the bank marks upon it, when it had but eighteen

days to run, in the purchase of *lottery tickets* at *retail price*, and the vendor of the tickets knew that the maker of the note was not a dealer in lottery tickets, and was informed that the note had been in bank; *it was held*, in an action against the endorser, that the circumstances combined were sufficient to have put the vendor of the tickets on inquiry, and that he was then chargeable with notice of the misapplication of the note, and that the endorser was not liable. *Brown v. Taber*, 5 Wend. 566.

83. A., in New York, having two bills of exchange drawn on B. and C., a mercantile firm in Liverpool, for £500 sterling each, and endorsed by B., a member of that firm, for the accommodation of A., sold the bills to D. and E., and took their notes. The bills were not accepted or paid, the funds of A. in the hands of the drawees being less than £150. After notice of the non-acceptance of the bills, it was agreed between A. and D. that D. and E. should return the bills to A., and pay him \$1000, A. agreeing to deliver up D. and E.'s notes, and reserving to himself the right to pursue his remedies on the bills against B. and C.; subsequent to which arrangement, E., the other member of the firm of D. and E., entered into an agreement with C. in Liverpool, in consideration of receiving payment of two other bills which his firm held against B. and C., not to claim payment of the bills purchased from A. either from the endorser or the drawees. Under this state of facts, the bills, after being returned to New York, were tendered, together with the \$1000, to A.; and *it was held*, in an action on the notes against D. and E., that such tender discharged them from their liability; that a delay of three months and eighteen days in procuring a return of the bills was not unreasonable; and that the notes having come into the hands of certain creditors of A., as security for previous advances made by them, and the action being brought in their names, *it was further held*, that the arrangement between A. and D. having been made with the knowledge and assent of such creditors, the defence set up was as available against them as if the suit had been in the name of A. *Jones v. Swan*, 6 Wend. 589.

84. It is no defence in an action on a bill of exchange by the payee against the acceptor, that the bill was accepted without consideration, or in other words, was an *accommodation acceptance*, and that fact known to the payee. *Grant v. Ellicott*, 7 Wend. 227.

85. A note post dated and negotiated before the day of its date is recoverable by the endorsee: its transfer before the day of its date affords no cause of suspicion, so as to put the endorsee on inquiry, and subject him to the equities existing between the original parties. *Brewster v. McCordell*, 8 Wend. 478.

86. A promissory note imports a valuable consideration upon its face, and possession is presumptive evidence of property right fully acquired; but when the maker shows that it was obtained from him and put in circulation by force or fraud, all the above intendments of law are rebutted, and proof becomes necessary. *Rogers v. Morton*, 12 Wend. 484.

87. Where on the settlement of an account a debtor gave to his creditor a promissory note, payable to a third person, for a portion of the assumed balance, and two drafts for the residue, and after the payment of the drafts, an action was brought upon the note by the assignees of the payee, who had been discharged as an insolvent debtor; *it was held*, that it was competent to the defendant to show an error in the statement of the account, and that the plaintiffs were entitled to recover only the true balance due at the time of the settlement, deducting the amount of the drafts paid by the defendant. *Morton v. Rogers*, 14 Wend. 575.

88. Where the endorser of an accommodation note lend their names to the drawer, without any limitation or restriction as to the manner in which the note is to be used, he has a right to apply it to the payment or security of an antecedent debt; or to sustain his credit in any other way. *Grandin v. Leroy*, 2 Paige, 509.

V. Acceptance and non-acceptance.

89. A bill of exchange, payable a certain number of days after sight, in order to charge the drawer, should be presented for acceptance within a reasonable time. *Aymar v. Brers*, 7 Cow. 705.

90. What is a reasonable time is a question of law under the circumstances of each particular case; not a question of fact for a jury. *Ibid.*

91. The situation of the parties, as where they are when the bill is drawn, whether the payee is to be himself the bearer, the distance between the place of drawing the bill and the drawer, the delay arising from the sickness of the payee, or other accident not arising from his misconduct, are all proper to be considered. *Ibid.*

92. But not the consideration upon which the bill arose; for this can have no influence on the question of diligence. *Ibid.*

93. A bill of exchange was drawn in the city of New York, December 12th, 1822, payable at three days after sight, to be borne by the payee, who was then at New York, to Richmond, in Virginia, where the payee resided, a distance of about three hundred miles. The bill was presented for acceptance on the 10th of January, 1823, (twenty-nine days after the date,) which was refused. Whether this was reasonable time, delay by ill health and other accident being out of the question? *Quære. Ibid.*

94. But the payee being out of health at New York, on his journey, and after his arrival at his residence in Virginia, (which was the 1st of January,) *held*, that this excused the delay, if it would otherwise have been unreasonable. *Ibid.*

95. No consideration need be shown to support an acceptance or an agreement to accept, and a valid agreement to accept may be declared on as an acceptance. *Ontario Bank v. Worthington*, 12 Wend. 593.

VI. Payment and non-payment; (a) When and how payment is to be made.

96. In an action on a note, payable at a particular time and place, it lies with the defend-

ant to show that he was ready at the time and place; in which case he may plead this, and bring the money into Court, as on a plea of tender. But this plea goes merely in bar of the damages, not of the action; and is bad if the money be not brought into Court. *Caldwell v. Cassidy*, 8 Cow. 271.

97. Otherwise, it seems, where a note is payable on demand at a particular place; for on such a note there should be a demand at the place before action. *Ibid.*

(b) *Where and how demand of payment is to be made.*

98. A promissory note payable on demand is due presently; and in order to charge the endorser of such a note, payment must be demanded of the maker, and notice of non-payment given to the endorser within a reasonable time after the date. *Sice v. Cunningham*, 1 Cow. 397.

99. What is a reasonable time, when the facts are ascertained, is a question of law to be determined by the Court. *Ibid.*

100. Five months is an unreasonable delay where all parties reside in the same city. *Ibid.*

101. That the note is given for money lent and payable on demand with interest, does not take it out of the general rule. *Ibid.*

102. Nor would an agreement at the time of executing the note between the endorsee and the maker, that the money shall not be demanded at the time when the note purports on the face of it to be payable, excuse a delay of the demand, in order to charge the endorser, beyond the ordinary time, especially where the endorser is not a party to the agreement. *Ibid.*

103. Indeed, parol evidence of an agreement to pay at a different time than that which the note imports, is inadmissible within the rule, that the legal effect of a written contract cannot be varied by parol evidence. *Ibid.*

104. An offer by an endorser to give his own note in satisfaction of the endorsed note is not a waiver of demand and notice, unless such offer is accepted by the holder. *Ibid.*

105. To make a promise of payment operate as a waiver of demand and notice, the holder must show affirmatively and clearly, that the endorser promised with full knowledge that he had not been charged as endorser by a regular demand and notice. *Ibid.*

106. Demand of a check must be made of the drawer before the holder can sue the drawer. *Murray v. Judah*, 6 Cow. 484.

107. No particular time for demand is fixed. It is enough that it be within a reasonable time, and it does not lie with the drawer to object that the demand is too late, unless he has been injured by the delay. *Ibid.*

108. A draft falling due on Sunday may be demanded on the preceding day. *Ontario Bank v. Petrie*, 3 Wend. 456.

109. The delivery of a bank check by one bank to the porter of another bank upon which the check is drawn, and the return of the same as not good, accompanied by evidence of the inviolable practice of the porter to present checks thus received, and to return them, if dishonour-

ed, on the same day that they are delivered to him, is sufficient proof of presentment to authorize the submission of the case to the jury. *Merchants' Bank v. Spicer*, 6 Wend. 443.

110. A bank check need not be presented on the day it is received. *Ibid.*

111. It is sufficient evidence of demand of payment and of refusal to pay a note payable at a particular place, if the note be left there, and no funds are provided to take it up. *Nichols v. Goldsmith*, 7 Wend. 160.

112. The memorandum of a deceased cashier of a bank, who frequently notified endorsees of non-payment of notes in the name of the acting notary of the bank, that on a certain day he sent notice by mail to an endorser; was held to be competent, and *prima facie* sufficient evidence to charge the endorser.

113. A check on a bank for the payment of money, to charge an endorser, must be presented with all despatch and diligence consistent with the transaction of other commercial concerns; and it was accordingly held, where a check was received in Schenectady on the 14th of January, drawn on a bank in Albany, a distance of sixteen miles from the former place, and between which places there is a daily mail, and not presented until the 6th of February, that laches was imputable to the holder, and that the endorser was discharged. *Mohawk Bank v. Broderick*, 10 Wend. 304.

114. It seems, had the check in this case been sent to Albany on the 15th day of January, and presented on the next day and notice given, the endorser would have been held liable. *Ibid.*

115. Inland bills of exchange and promissory notes payable on demand must be demanded within a reasonable time; what shall be deemed reasonable time depends on the circumstances of each particular case. *Ibid.*

116. Whether a presentment is made within a reasonable time is a question of law, where there is no dispute about the facts. *Ibid.*

117. A demand of payment of a check from the drawee must be shown in an action by the holder against an endorser, although the drawer had no funds in the hands of the drawee, nor any reasonable expectation that his draft would be paid; under such circumstances, in an action against the drawer a demand would not be necessary. *Ibid.*

118. A stipulation by the endorser of a note to waive notice of demand of payment does not dispense with the demand itself. *Baekus v. Shipherd*, 11 Wend. 639.

119. Where, however, the payee transfers a negotiable note, and at the same time guarantees its payment if not collected of the maker by due course of law, and also waives notice of demand; demand as well as notice is waived. *Ibid.*

120. Demand of payment of a check must be made with reasonable diligence, according to the ordinary course of business; what shall be deemed such diligence depends upon the circumstances of each particular case; but is a question of law when there is no dispute as to the facts of the case. The negotiation and cir-

ulation of such a check does not dispense with the necessity of a demand of payment within a reasonable time. *Ibid.* 13 Wend. 13.

121. Where a check drawn upon one bank was received by another on deposit, and kept for twenty-three days before presentment, (the distance between the two banks being only sixteen miles, and a daily mail passing between the places in which they are located;) *it was held*, that the holders, not having used due diligence in making the presentment, were not entitled to sustain an action against the payees who had negotiated the check. *Ibid.*

122. A check on a bank, post dated and negotiated, is payable on demand, on or after the day on which it purports to bear date. *Gough v. Staats*, 13 Wend. 549.

123. A drawer of a check cannot be called on for payment until after demand upon the drawee; and to charge him it is not enough to show such demand and refusal to pay at *any time* before suit, unless it appears that the drawee has failed, or that the drawer has otherwise sustained injury by the delay. *Ibid.*

124. In an action against an endorser of a check, however, it must appear that demand was made within a reasonable time. What shall be deemed reasonable time is a question of law where there is no dispute about the facts; but greater diligence is required in the presentment of checks than of bills of exchange. *Ibid.*

125. Where all the parties reside in the same place, the omission to present a check for six days after it may be presented discharges the endorser. *Ibid.*

126. The endorser of a check for the accommodation of the maker, to enable the latter to obtain a loan, cannot be charged as a guarantor where the declaration contains only the *money counts*, although a copy of the check is served with the declaration. *Ibid.*

127. The defendant, residing in Dutchess county, drew an order, payable on demand, in favour of the plaintiffs, for one hundred dollars, on one Ring, the master of a sloop, by whom he was in the habit of sending his produce to market. The order was not negotiable, nor was it presented until nearly *six years* after its date; and in the mean time various settlements had taken place between the plaintiffs and the drawee; *held*, that if the draft was to be considered as an inland bill of exchange, the drawer was discharged by the *laches* of the holders; but if it were treated as a mere banker's check, then that a presentation for payment at any time before suit brought would be sufficient, unless the drawer could show injury from the delay; *held also*, that the consideration of the order, whether check or bill, could be inquired into, between the original parties; and as the defendant contended that the order was drawn for the mere accommodation of the plaintiffs, the Court ordered that question to be submitted to a jury. *Elting v. Brinkerhoff*, 2 Hall, 459.

(c) *When it will be excused.*

128. Where a bill of exchange has been dishonoured by the drawee, but accepted by third persons *supra protest* for the honour of the draw-

ers, the holder cannot recover against the drawers without showing that payment was duly demanded from the drawees, and notice of non-payment given. *Schofield v. Bayard*, 3 Wend. 458.

129. A bill was payable in London, but by mistake was sent from Birmingham, where the holders resided, to Liverpool, to be presented for payment, and after the discovery of the mistake, the bill was sent to London, where it did not arrive until two days after its maturity, in consequence of the oversight or negligence of the clerks of the post-office in Liverpool; *it was held*, that such mistake or negligence was not a sufficient excuse for not presenting the bill on the day it fell due. *Ibid.*

130. Where an *injunction* from Chancery, under the act to prevent fraudulent bankruptcies by incorporated companies, was served upon a bank half an hour after it opened for business, by which its operations were suspended; *it was held*, that the holder of a check received after banking hours on the preceding day was not bound to show a presentment of the check for payment, to entitle him to recover on the original consideration, although it appeared that the drawer had sufficient funds in the bank to pay the check, and that it would have been paid had it been presented before the service of the injunction. *Lovett v. Cornwall*, 6 Wend. 369.

131. A promise by the drawer of a bill of exchange, after due, to *make an arrangement satisfactory to the holder*, will not subject him to the payment of the bill, when there is no evidence of demand upon the drawee, or notice to the drawer, or knowledge on his part that notice had not been given. *Jones v. Savage*, 6 Wend. 658.

132. Nor is the fact of the drawer including the demand of the holder in an account of his creditors on an application for an insolvent discharge, sufficient to charge him, when it is not shown that at the time of making such account he knew that the necessary steps to charge him as drawer had not been taken. *Ibid.*

133. Where a bill of exchange is given in *payment of goods purchased*, there can be no recovery on a count for goods sold, unless it be shown that the drawer has been legally fixed with the payment of the bill, or has promised to pay it with full knowledge that he was not liable. *Ibid.*

134. Where an endorser, on being called on for the payment of a note, avowed himself legally exonerated from its payment, but declared that he did not wish to take advantage of such exoneration, and promised to pay the note; *it was held*, that the promise was valid, without farther proof of the endorser's knowledge that he had not been regularly charged. *Leonard v. Gary*, 10 Wend. 504.

135. *It seems*, that in such a case the endorser will be allowed to show that no demand had in fact been made of the maker, and that consequently the promise was under a misapprehension of facts; but where, as in this case, sufficient time had elapsed for the demand, and the avowal of exoneration was distinctly made, including in it as well an admission of a demand

as a want of notice, the defendant will be held to strict proof. *Ibid.*

136. It seems that an injunction out of Chancery, under the act to prevent fraudulent bankruptcies by incorporated companies, prohibiting a bank from making any payments whatever, and arresting all its operations, will excuse the holder of a bank check who has received it from another person in the course of their dealings, from presenting it at the bank for payment. *Cromwell and Wing v. Lovett*, 1 Hall, 56.

137. If the maker of a check has no funds in the bank upon which it is drawn at the date of the check, it is not necessary for the holder to present such check at the bank for payment in order to enable him to sustain an action upon it against the maker. *Franklin and Smith v. Vanderpool*, 1 Hall, 78.

138. The drawing of a check under such circumstances is, when unexplained, a fraud which deprives the maker of all right to require presentment and demand of payment. *Ibid.*

VII. Liability of the parties, and how discharged.

139. Where a usurious note was given as a substitute for a valid note which was destroyed by the parties, it was held, that an action lay on the original note. *Hughes v. Wheeler*, 8 Cow. 77.

140. A promise to accept a bill thereafter to be drawn, specifying the amount and time of payment, so as to leave no reasonable doubt as to the identity of the bill intended to be accepted, is, if shown to a third person, who, on the faith of such promise, takes the bill for a valuable consideration, in point of law, an acceptance, binding the person who makes the promise. *Parker v. Greele*, 2 Wend. 545.

141. A promise in these words, "I have no objections to accepting for you at three and four months, for two thousand five hundred dollars, on the terms you propose," contained in a letter, is an absolute and not a conditional engagement; and such promise authorizes a draft for the whole sum at four months.

142. An endorser of a note is not discharged by the acceptance, by the holder, of a bond and warrant of attorney from the maker, for the purpose of entering judgment thereon and increasing his security; the bond and warrant in such case are considered as collateral security. *Mohawk Bank v. Van Horne*, 7 Wend. 117.

143. An endorser of a promissory note, who, before the note falls due, takes an assignment of all the estate of the maker to meet his responsibility, is liable, although no demand of payment is made, and notice of non-payment is not given. *Mechanics' Bank v. Griswold*, 7 Wend. 165.

144. The acceptance, by the holders of a note over due, of a note of a third person payable at a future day, as collateral security, on the terms that such acceptance should not prejudice their claim against the drawer and endorser of the principal note, nor prevent a suit if ordered by the endorser, is not such an agreement to give time to the maker as discharges the endorser. *Bailey v. Baldwin*, 7 Wend. 289.

145. Where a suit was brought against the

endorser of a note given as collateral security for the payment of a sum of money, directed by an order of the Court of Chancery to be paid by the maker of the note on pain of attachment, and the endorser gave notice to the holder of the note that he would require him to exhaust the remedy by attachment previous to proceeding against him; it was held, that such notice did not discharge the surety; it appearing that the creditor had offered to permit to proceed against the principal debtor upon the attachment, and that at the time of giving the note the maker was insolvent. *Warner v. Beardsley*, 8 Wend. 194.

146. In an action against the survivors of two makers of a joint promissory note, unless the plaintiff proceeds in establishing a joint indebtedness, he is not entitled to recover; and it was accordingly held, in this case, that the defendant, sued as the surviving maker of a joint promissory note, might prove payment of the note by his joint debtor, and thus defeat a recovery, although, before transfer of the note to the plaintiff, he acknowledged it to be due, and promised to pay it. *Mott v. Petrie*, 15 Wend. 317.

147. Where the record of a set of three bills of exchange is protested for non-acceptance, and a suit is brought against the endorser, and the plaintiff declares on the first of the set, he is not entitled to recover, unless he produces the record of the set which was protested, or accounts satisfactorily for its non-production; the defendant may require its production, to guard against a subsequent claim by an acceptor *supra protest*. *Wells v. Whitehead*, 15 Wend. 527.

VIII. Notice of non-acceptance and non-payment. (a) When and how to be given.

148. Notice of non-payment of a bill of exchange, &c., must generally be given by an endorser to the endorser next before him by the next post after he himself has received notice of the dishonour; and so on to the drawer. But this rule is not inflexible; it means the next convenient and practicable post, and one dealing in bills or notes is not bound to watch the post-office constantly, for the purpose of receiving and transmitting notices. Reasonable diligence and attention is all that the law exacts. *Mead v. Engs*, 5 Cow. 303.

149. Accordingly, where R., residing at Bristol, Rhode Island, October 21st, sent notice of non-payment of an inland bill to S., his immediate endorser, at Providence, by the post, which reached there on the same day at five, P. M.; and S. received the notice on the morning of the 23d, and put a notice in the post-office in the afternoon of the same day, for his endorser at New York, although a mail had previously left Providence at one, P. M., of the same day for New York; and this letter was post-marked the 23d; and was taken by the post of that day in the morning, and reached the endorser at New York in the due course of the mail, there being no *laches* imputed after this; held, that the drawer was not discharged. *Ibid.*

150. One to whom a bill or note is endorsed merely as agent to collect, (e. g. a bank,) is a holder for the purpose of giving and receiving notice of non-payment, and he is not bound to give notice of non-payment directly to all prior parties; but may notice his next immediate endorser, who is bound to notice his endorser, &c., in the same manner as if the bill or note had been negotiated for a valuable consideration. *Ibid.*

151. If an endorser receive notice from any one who is a party, he is liable to any subsequent endorser, though he may have received no notice from him. Per *Sutherland, J. Ibid.*

152. Notice of the non-acceptance of a bill of exchange cannot be given by a stranger; it must be by a party to it, or by one who, on the bill being returned to him, would have a right of action upon it. *Chanise v. Fowler*, 3 Wend. 173.

153. Where information of the dishonour of a bill of exchange is sent, for the purpose of collection, to an agent who is not a party to the bill either actually or nominally, with a request to give notice to the drawers, and he omits to give such notice until the next day after receiving the request, the drawers are discharged; being a mere agent, he should have given immediate notice. *Swall et al. v. Russell et al.* 3 Wend. 376.

154. Notice to an endorser of the non-payment of a note sent to the place where he resided at the time of the discount of the note, is sufficient to charge him, although intermediate that time and the maturity of the note he has changed his place of abode; if his former residence is at such a distance from the place of payment as to repel any presumption that the removal had come to the knowledge of the holders, and no actual knowledge is brought home to them. *Bank of Utica v. Phillips*, 3 Wend. 408.

155. Where in a notice of non-payment dated on the day that a draft falls due, it is stated that the draft was protested on the evening before for non-payment, and that the holders look to the endorser for payment, it is right and proper to submit the question to a jury, whether or not the defendant has been misled? *Ontario Bank v. Patrie*, 3 Wend. 456.

156. It is not indispensable that notice of protest of a note should be sent to the office nearest to the residence of the endorser, nor even to the town in which he resides; it is sufficient if it be sent to the office to which he usually resorts for his letters. *Bank of Geneva v. Hewlett*, 4 Wend. 328.

157. A mistake in the name of the post-office to which a notice of protest is directed does not render the notice inoperative, where it appears that the office is as well known under the mistaken as under the real name. *Ibid.*

158. Notice of the protest of a note, if sent by mail to the endorser, must be transmitted to the post-office nearest to him, or the one to which he usually resorts. *Cuyler et al. v. Nellis*, 4 Wend. 399.

159. The holder of negotiable paper seeking to charge endorser is bound to make inquiries

as to the proper office to which notice must be sent. *Ibid.*

160. Where the officers of a bank to which a note was presented for discount were told by the person presenting it, that the endorser resided in the town where it was dated, notice of protest of the note sent there was held sufficient, though the endorser had ceased to reside in the town a few weeks previously to the date of the note. *Bank of Utica v. Davidson*, 5 Wend. 587.

161. A notice of protest to an endorser, that the note of A. B., endorsed by him, is protested for non-payment, is sufficient to put him on inquiry, although the amount of the note is erroneously stated in the notice, and its date is not given. *Bank of Rochester v. Gould*, 9 Wend. 279.

162. And if from the facts appearing on the trial, the jury are satisfied that the endorser was not misled by the notice, they are authorized to find a verdict against him. *Ibid.*

163. Where a notice of protest was sent, per mail, to a town designated by the agent who procured the discount of a note at a bank, in answer to an inquiry made by the cashier at the time of the discount, such notice was held sufficient, although there happened to be four post-offices in the town, and the post-office of the name of the town was nine miles distant from the residence of the endorser, while another post-office in the same town was kept at the very place where he resided. *Catskill Bank v. Stall*, 15 Wend. 364.

164. A defendant is not allowed to object to want of diligence in giving notice of non-acceptance, in respect to the place to which the notice is directed, when sent by mail, if the evidence of diligence is *prima facie* sufficient, and there be no proof on his part that the notice was sent to a wrong place. *Wells v. Whitehead*, 15 Wend. 597.

165. It is not necessary, to the support of an action against an endorser of a bill of exchange, that notice of an acceptance should be accompanied with a copy of the bill and protest; notice alone is sufficient. *Ibid.*

(b) *When want of notice or irregular notice will be excused.*

166. If A., in payment of a debt to B., transmit to him the draft of a third person, but without endorsing the paper, A. is not entitled to notice of its dishonour; and B., not having agreed to run the risk of the draft, merely became the agent of A., bound to fulfil that trust with diligence and integrity. Should B., therefore, employ, to present and collect the draft, bankers accustomed to transact business of this description, he will not be responsible for their *laches*. *Van Wart v. Smith et al.* 1 Wend. 312.

167. A drawer is not entitled to notice of the non-acceptance of his draft, if he has no funds in the hands of the drawee, nor any reasonable expectation at the time the bill was drawn that it would be accepted.

168. The holder of a dishonoured note is excused from giving notice of non-payment to the endorser on the fourth of July. *Cuyler et al. v. Stevens*, 4 Wend. 566.

169. Notice of non-payment need not be in writing, a verbal notice is sufficient. *Ibid.*

IX. Action on a bill or note: (a) When and by whom the action may be brought.

170. Where J. and H. endorsed a promissory note for the defendant's accommodation, and on its being dishonoured, paid and took it up, and J. and H. then delivered the note to H. alone, with the original endorsement thereon; *held*, that H. might maintain an action in his own name alone, as endorsee. *Havens v. Huntington*, 1 Cow. 367.

171. An endorsee of a promissory note endorsed after the maker's death may in his own name sue the maker's heirs, &c. under the act. (1 R. L. 316.) *Parsons v. Parsons*, 5 Cow. 476.

172. One holding a check or note payable to bearer as mere agent may yet sue on it in his own name, and it does not lie with the opposite party to object the plaintiff's want of interest. *Maurer v. Lamb*, 7 Cow. 174.

173. An endorser of a promissory note fixed before, but paying money after the insolvent discharge of the maker, may recover against the maker, and is not affected by his discharge, whether under the act of 1813, or the subsequent act discharging the body merely. *Finckle v. Wilson*, 7 Cow. 669.

174. A first endorser may maintain an action on payment to a second endorser, made after the latter has endorsed and taken up the note in *fraudem legis*, with a view to defeat the operation of the maker's discharge. *Ibid.*

175. The three days of grace are allowable, as between the maker and holder of a promissory note. *Hogan v. Cuyler*, 8 Cow. 203.

176. And where three notes were declared on in the same account, on one of which the three days of grace had not elapsed when the suit was commenced; *held*, that the defendant might show this on the trial upon the general issue, and that the plaintiff could not recover upon that note. *Ibid.*

177. An action brought against the maker of a promissory note on the third day of grace is prematurely brought, and advantage may be taken of the error on the trial by nonsuiting the plaintiff. *Osborn v. Moncure et al.* 3 Wend. 170.

178. A surety to a note, made for the purpose of being discounted at a bank for the accommodation of the principals, passed off by them as collateral security for the payment of a judgment, is liable to the payment of the note. *Bank of Rutland v. Buck*, 5 Wend. 66.

179. A negotiable note, the remedy on which, after being barred by the statute of limitations, is revived by a new promise or acknowledgement, may be transferred, and an action maintained on it in the name of the endorsee. *Dean v. Hewitt*, 5 Wend. 257.

180. The holder of a note may maintain an action upon it in his own name, without proving title, where there are no circumstances showing his possession to be *mala fides*. *Ibid.*

181. Where A., for the accommodation of B., endorsed a bill of exchange for \$2500, drawn

by B. on C., payable four months after date, in consequence of being shown a letter from C. to B., saying, "I have no objection, to accepting for you at three and four months for \$2500, on the terms you propose," and A. was subsequently obliged to pay the bill; *it was held*, that he was entitled to recover against C. the amount of the bill, on the acceptance contained in the letter, without shewing what were the terms proposed adverted to in the letter, or a compliance with them. *Gresle v. Parker*, 5 Wend. 414.

182. The holder of a note payable to bearer, of which he became possessed after it was due, cannot maintain an action upon it against the maker, if the payee be a mere agent, and the persons having the beneficial interest in the note forbid its payment to him. *Comstock v. Hoag et al.* 5 Wend. 600.

183. An endorser of a promissory note, given as collateral security for the payment of a sum of money directed by an order of the Court of Chancery to be paid by the maker on pain of attachment, has no right to require the creditor to enforce the attachment previous to calling upon him for payment. *Beardsley v. Warner*, 6 Wend. 610.

184. The principle of law, that a surety is discharged if the creditor on request neglects to proceed against a principal solvent at the time, and who subsequently becomes insolvent, is not applicable to the case of an endorser of a promissory note. *Ibid.*

185. The assignment of part of a demand due on a promissory note gives no right of action to the assignee, as endorsee; either against the maker or payee, the transfer of the note for less than the real sum appearing due, unless the residue has been extinguished, not constituting the assignee an endorsee within the law merchant. *Douglass v. Wilkeson*, 6 Wend. 637.

186. Where a partnership note was made after the dissolution of a firm by one of the late partners, accepted by the payee with a knowledge of the fact, and transferred by him in payment of an antecedent debt, under an agreement that if the note could not be collected, he would be liable for a part of the original debt; *it was held*, that an action on the note could not be maintained by the assignee against the partners. *Bristol v. Sprague*, 8 Wend. 423.

187. The fact that sufficient time to give public notice had not elapsed between the dissolution of a firm and the subsequent making of a note by one of the partners in the name of the firm, will not excuse the partners from their liability to pay such note in the hands of a bona fide holder. *Ibid.*

188. Where a note was endorsed for the accommodation of the maker, with a view of having it discounted at a bank, and the avails applied to the payment of certain demands, for which a third person stood bound as surety to the maker; and the note was delivered to the surety, who, with a knowledge of the facts, offered it for discount at the bank, where it was refused to be discounted, but where, at the request of the surety, it was protested when due; *it was held*, that an action on the note would not lie by the

surety against the endorser. *Kasson v. Smith*, 8 Wend. 437.

189. Where the agent of a manufacturing establishment bought a quantity of dye-stuffs for the use of the factory, without disclosing the name of his principal, and the bill of goods was made out, "Mr. A. B., agent, bought of," &c., and he drew a bill of exchange on a third person, signing it "A. B., agent," and the bill was subsequently protested, and an action to recover the price of the goods was brought against the principal; *it was held*, that the principal could not be charged as drawer of the bill by his agent, the name of the principal not appearing on it, but that the plaintiff was entitled to recover under a count for goods sold, the jury being warranted, under the facts of the case, in saying that the goods were not sold on the exclusive credit of the agent. *Pentz v. Stanton*, 10 Wend. 271.

190. Whether in such a case the goods were sold on the credit of the agent, or on the responsibility of the principal, whoever he may be, is a question for the jury: but where the question was not submitted, and a verdict was found for the plaintiff, and the Court were satisfied of the ultimate liability of the principal to the agent, they refused to set aside the verdict. *Ibid.*

191. A person may draw, accept, or endorse a bill by his agent, and it will be as obligatory upon him as though it was done by his own hand; but the agent in such case must either sign the name of the principal to the bill, or it must appear upon the face of the bill itself, in some way or another, that it was in fact done for him, or the principal will not be bound; the particular form of the execution is not material, if it be substantially done in the name of the principal. *Ibid.*

192. Where a note is made by a debtor, payable to a bank by its corporate name, for the purpose of raising money upon it at such bank to pay and satisfy a particular debt, and the debtor procures a third person to become a joint maker of the note, who signs the same, "A. B., surety," and the bank refuse to discount the note, the creditor for whose benefit the note was made may, with the assent of the bank, maintain an action upon it in the name of the bank against the makers, although the note was not discounted at the bank in pursuance of the original intention. *Utica Bank v. Ganson et al.* 10 Wend. 314.

193. An action of debt on a promissory note may be maintained by an endorsee against the maker. *Willmarth v. Crawford*, 10 Wend. 341.

194. Where the maker of a note promises to pay A. to the order of B. and C., and B. and C. endorse the note, an action may be maintained against them by A. upon such endorsement. *Willis v. Green*, 10 Wend. 516.

195. In the construction of negotiable paper, Courts look to the substance and meaning of the instrument, and if possible give effect to the intent of the parties. *Ibid.*

196. In an action by the endorsee of a note against his immediate endorser, a plea that before the commencement of the action the plain-

tiff transferred the note to third persons, who since then had been and continued to be the true and lawful owners and possessors of the note, is a bar to the recovery. *Waggoner v. Colvin*, 11 Wend. 27.

197. A replication that the suit is prosecuted, in the name of the plaintiff, by or for the benefit of the true holder of the note, would be a good answer to such plea. *Ibid.*

198. Where, upon the execution of a voluntary assignment, by the makers of a promissory note, for the benefit of their creditors, the second endorser of the note executed a release to the makers, and subsequently became fixed with the payment of the note; *it was held*, that the release having been executed before the maturity of the note, the second endorser was not barred by it from maintaining his action either against the makers or first endorser. *Keeler v. Bartine*, 12 Wend. 110.

199. The holder of a bill of exchange, who has taken it for a pre-existing debt, cannot maintain an action upon it against the acceptor, if there exist equities in the case which would prevent a recovery in an action by the drawer against the acceptor. *Ontario Bank v. Worthington*, 12 Wend. 593.

200. Where, on the purchase of goods, the purchaser gives his draft, accepted by a mercantile firm, which acceptance is procured for the express purpose, the vendor is not entitled to maintain an action upon the acceptance against all the members of the firm, unless he shows their knowledge of, or consent to, the giving of the acceptance. *Joyce v. Williams*, 14 Wend. 141.

201. The holder of negotiable paper may bring an action upon it in the name of a person having no interest in it; and it is no defence that the suit be thus brought without the knowledge, assent, or authority of the nominal plaintiff. *Gage v. Kendall*, 15 Wend. 646.

(b) Declaration.

202. Where a note is payable to A. or order, who endorses it as agent for another, this addition of agent is merely a declaration that he will not hold himself liable as endorser, yet it is in effect an endorsement by him, and may be so stated in pleading; and though it turn out in proof that he was agent, and had a right to endorse as such, yet this is no variance, especially where it is stated as mere matter of inducement to an action, brought by the endorser against one who has agreed to indemnify A. against his endorsement. *Mott v. Hicks*, 7 Cow. 513.

203. In declaring on a promissory note, it is enough to allege that the defendant made his certain note in writing, &c., without averring that he delivered it. *Russell v. Whipple*, 2 Cow. 536.

204. Though a promissory note be endorsed long after it fall due, it may be declared on as endorsed when it was due. *Parsons v. Parsons*, 5 Cow. 476.

205. A note being endorsed after the maker's death, the endorsee declared against the maker's heirs; and alleged that the intestate in his life-

time became liable to pay the plaintiff, and by reason of the premises, an action accrued against the heirs. Plea, that the intestate did not owe the plaintiff in his lifetime. *Held*, that this was no variance; that the plea was vicious in denying a debt to the plaintiff during the intestate's lifetime; but that the defendants could not take advantage of the defect. *Ibid*.

206. In declaring on a promissory note payable at a particular time and place, the plaintiff need not aver a demand at the time and place. *Caldwell v. Cassidy*, 8 Cow. 271.

207. A promissory note imports a consideration, and it is unnecessary that any should be stated in pleading, or in the first instance proved on the trial. *Bank of Troy v. Topping*, 13 Wend. 557.

208. A plaintiff, in an action under the statute against the maker and endorser of a note, is not limited in his declaration to the money counts; other counts may be inserted. *Steuben County Bank v. Stephens*, 14 Wend. 243.

(c) *When a bill or note may be given in evidence under the money counts.*

209. A promissory note against the defendant and another is evidence under the money counts against the defendant alone. *Williams v. Allen*, 7 Cow. 316.

210. Payment of a money debt as surety or endorser, by conveying land which is received at the time as payment, will support the count for money paid, laid out, and expended. *Ansley v. Wilson*, 7 Cow. 662.

211. A promissory note is conclusive evidence of a pecuniary consideration under the common money counts. *Ibid*.

212. Hence, where a note was given in evidence under those counts, in an action by the payee against the maker; *held*, to be no defence; that the note was not given for a pecuniary consideration, but for land purchased by the maker's brother. *Hughes v. Wheeler*, 8 Cow. 77.

213. A promissory note made by one of two partners, in the name of the firm, is admissible in evidence in an action against both partners, under a count for money lent, although there be no averment of partnership in the declaration. *Mack v. Spencer et al.* 4 Wend. 411.

214. A note payable to A. or B. cannot be declared on as a promissory note within the statute, but it may be given in evidence under the money counts. *Walrad et al. v. Petrie et al.* 4 Wend. 575.

215. The holder of a negotiable note transferred by delivery or endorsement may recover on it under the money counts. *Olcott v. Rathbone*, 5 Wend. 490.

216. An instrument for the payment of money, not payable to any particular person or to bearer, is not negotiable; and it was accordingly *held*, that a memorandum, made by a payee of a note for \$2500, on the back thereof, in these words: "Mr. Olcott, pay on within \$750;" did not authorize a recovery on the money counts, by the holder against the payee. *Douglas v. Wilkeson*, 6 Wend. 637.

217. In a suit against three persons, two of whom are alleged to be partners, a promissory note signed by one in his proper name, and by the second in the name of his firm, may be given in evidence in support of a count on a note alleged to be made by the defendants, *their own proper hands being thereunto subscribed*; and on proof of the partnership, such note may be given in evidence under the money counts. *Porter v. Cummings*, 7 Wend. 173.

218. A note payable in specific articles is admissible in evidence under the money counts. *Crandall v. Bradley*, 7 Wend. 311.

219. Where, on a sale of goods, the purchaser, instead of giving his own note for the goods, transfers the note of a third person, and guarantees the payment thereof, if the note be not paid when due, the vendor may recover on a count for goods sold; and the note and guarantee may, in such case, be given in evidence under the money counts. *Buller v. Haight*, 8 Wend. 535.

220. Where the plaintiff includes the maker and endorser of a note in one action, and declares pursuant to the statute on the money counts, he cannot give the note in evidence under such counts, unless he proves upon the trial that a copy of the note was served with the declaration. *Steuben County Bank v. Stephens*, 14 Wend. 243.

221. It is, however, too late to make the objection of want of such proof, after evidence of the signatures of the parties, protest, and notice of nonpayment. *Ibid*.

X. Damages and costs.

222. Payment of the principal and interest of a protested bill of exchange by a surety in discharge of his liability, with a reservation of the right by the holder to demand payment of damages from the drawer, is no bar to an action against the drawer for the recovery of such damages, where the obligation of the surety is distinct and independent of that of the principal; as in this case, where the surety was a guarantor. *Turnbecke Bank v. Stratton*, 7 Wend. 439.

223. Notary's fees on protest of note, where but one notice is given, are seventy-five cents; for every other notice an additional charge of twenty-five cents may be made. *Campbell v. Cook*, 9 Wend. 492.

224. In an action against the endorser of a promissory note, the fees of protest are a proper item in the assessment of damages. *Merritt v. Benton*, 10 Wend. 118.

BOND.

1. An agreement under seal, that on payment of a less sum than the real debt (mentioned in the condition of a bond and warrant of attorney to confess judgment) by a given day, the bond shall be void, will not operate as a defeasance or discharge of the debt; especially, if the less sum be not be paid at the day stipulated. *Jerman v. Griswold*, 1 Cow. 189, and 303, note (c).

2. The judgment and proceedings in entering up a judgment in one term cannot be made to relate to and be entitled as of a term proceeding; and where a bond and warrant of attorney to confess judgment were executed by two on the 10th of April, 1824, and one of them died on the 14th of April, a judgment entered thereon during the subsequent May term as of the preceding February term was set aside as irregular. *Bennett v. Davis*, 3 Cow. 68.

3. A bond to save harmless and indemnify against the costs and expenses of a certain act, extends to the costs of defending a groundless suit for the act, in which the obligee succeeded. *The Trustees of Newbury v. Galatina*, 4 Cow. 340.

4. The obligors have notice of the suit in which the expenses are incurred, are bound to defend it, and if they do not, the recovery is conclusive against them. *Ibid*.

5. So, if the costs are incurred by another who sues the obligee for them, who gives notice

to the obligor to defend; the recovery against the obligee is conclusive against the obligor as to the amount of damages. *Ibid.*

6. The rule that a covenant for quiet enjoyment is not broken until a lawful suit and eviction is technical, applying to that particular covenant, and does not extend to a bond of indemnity. *Ibid.*

7. A bond of indemnity against an act palpably illegal is void; otherwise of an act *prima facie* legal and *bona fide*. *Ibid.*

8. The executors of V. divided certain moneys, stock, and securities of their testator into two parts; and on petition of certain legatees, claiming one part, the Court of Chancery made a decretal order, in a suit wherein the executors, petitioners, and others were parties, that the executors should assign that part to L., for the use of the legatees, L. first giving a bond with two sureties, that when required by order or decree, he should account for that part; and if that, or any portion of it, should be decreed to any parties other than the petitioners, or those whose interest they represented, he should pay what he might have received to such parties, &c., as should be designated by order or decree. Accordingly L., with two sureties, gave bond to the executors, which, instead of being conditioned to "pay to such parties, &c., as should be designated by order or decree," was "to pay to such person or persons as then were, or thereafter should be designated by order or decree, &c., according to the true intent and meaning of the decretal order, or any other order or decree of the said Court, touching or concerning the premises." The executors brought a suit upon this bond, against one of the sureties, wherein it appeared upon the pleadings that an order of the Court of Chancery had been made, that L. should pay a certain balance of the part assigned to him to the register of the Court of Chancery, for the use of his *cestui que trust*; and that he had not complied with this order; *held*, that this was not a breach of the bond to the executors; that this bond was no wider than the decretal order under which it was executed; that it was intended merely to indemnify the executors, not the *cestui que trust*; and the former showing no damage to themselves, no action would lie. *Elmendorf v. Lanning*, 5 Cow. 468.

9. No action lies on a bond till condition broken. *Per Jordan, S. Rockefeller v. Donnelly*, 8 Cow. 623.

10. A bond to indemnify and save harmless the mayor, aldermen, and commonalty of the city of New York, from all expense and charge which may be incurred for the maintenance and support of passengers brought from a foreign country in a ship or vessel, is valid, and not repugnant to the constitution of the United States. *Candler et al. v. The Mayor, &c. of New York*, 1 Wend. 493.

11. Where a bond of indemnity is given to save harmless a city or town from the support or maintenance of any persons who may become chargeable to such city or town, and such support is afforded by the overseers of the poor, in a proper case, an action may be maintained on the bond, although a previous order for such

support has not been given by the proper authority. *Ibid.*

12. The making of orders for the support of paupers is inapplicable to the alms-house establishment in the city of New York. *Ibid.*

13. In ascertaining the amount which ought to be recovered in an action on such bond, it is not correct to average the whole expenses of the alms-house establishment amongst its inmates, but an allowance should be made for what the pauper's support was reasonably worth. *Ibid.*

14. A bond and warrant of attorney executed by a defendant in close custody, without the presence of an attorney on his part, is void. *Evans v. Begleys*, 2 Wend. 243.

15. Where a suit upon a joint and several bond has been commenced against four of the nine obligors, one of the remaining five is a competent witness to prove that the bond was executed by all the obligors upon certain terms and conditions, but that it was subsequently delivered by these five, without the knowledge or consent of the defendants, upon terms and conditions different from those originally stipulated, and proof of such facts would constitute a good defence to the action. *Lovett et al. v. Adams et al.* 3 Wend. 380.

16. A bond by a physician that he would not settle and practise in his profession within prescribed limits, and in case he should so settle or practise, that he would pay the obligor a certain sum for each and every month that he should so practise, is forfeited if he practise within, though he reside without the prescribed limits; and his so doing may be well assigned as a breach of the bond. *Smith v. Smith*, 4 Wend. 468.

17. A fraudulent representation made by the obligee to the obligor of a bond, as an inducement to the latter becoming bound, is no defence at law to an action on the bond. *Stevens v. Judson et al.* 4 Wend. 471.

18. One of two obligees cannot maintain an action on a bond in his own name, without averring the death of his co-obligee. *Ehle v. Purdy*, 6 Wend. 629.

19. Where the *oyer* varies from the instrument declared on, the defendant may set it forth in his plea and *demur*, or he may, without setting it forth, plead *non est factum*, and avail himself of the variance on the trial. *Ibid.*

20. Where a *grantee*, on obtaining a conveyance of land, entered into a bond, binding himself not to suffer or permit a canal or ditch to be cut or dug across the premises conveyed to him, for the accommodation of a grist mill thereafter to be erected, and he subsequently conveyed the premises to a third person, who did cut a canal across the premises for the accommodation of a grist mill; it was *held*, that such a canal must be considered as cut by the permission of the obligor, he having conveyed the land without any reservation or restriction, and that he was liable for a breach of his bond. *Bennet v. Kennedy*, 7 Wend. 163.

21. In an action on a bond requiring the assignment of breaches of the condition, the plaintiff, since the revised statutes, is bound to assign his breaches in the declaration, and can no longer, as was the former practice, assign

them in the replication or upon the record. *Reed v. Drake*, 7 Wend. 345.

22. In this case, upon a writ of error after verdict, the Court refused to grant an amendment allowing an assignment of breaches to be inserted in the declaration, or to consider the amendment as made, although upon defective pleadings the whole merits of the case had been gone into on the trial in the Court below. *Ibid*.

23. Where an obligor signs his name and affixes his seal in the space between the penal part of the bond and the condition thereof, the condition is as much a part of the instrument as if the signature was at the foot of it. *Ibid*.

23*. Leave to prosecute a bond given as security for costs is not necessary previous to the commencement of the suit. *Higley v. Robinson* 7 Wend. 482.

24. Where a bond is given as a bond of indemnity, but contains a covenant that the obligor will pay certain debts, for the payment of which the obligee is liable, and the obligor fails to perform, an action lies for the breach, and the obligee is entitled to recover the sums agreed to be paid, although it is not shown that he has been damaged, unless from the whole instrument it manifestly appears that its sole object was a covenant of indemnity. In the matter of *Negus*, 7 Wend. 499.

25. Where a bond was given to indemnify the obligee, his heirs, &c., against all damages, costs, &c., which he or they might be subjected to, or become liable for, by reason of the reversal of a certain judgment in favour of a defendant who had been sued on a promissory note to which the obligee was a party; and also to indemnify him against the note, and any judgment or proceeding which might be had against him as endorser thereof; and the judgment was reversed, and an action brought against the administrator of the obligee, charging the intestate as endorser, in which suit the administrator gave a *cognovit* and pleaded *plene administravit*, which plea was confessed, and judgment taken for assets *quando acciderint*; it was held, notwithstanding the plea of *plene administravit*, and although there was no evidence that assets had since the plea put in come to the hands of the administrator, or probably ever would, that he was entitled to recover the amount of the judgment obtained against him. *Chace v. Hinman*, 8 Wend. 452.

26. And it was further held, that the defendant was not entitled to notice of the pendency of the suit against the administrator, and that the latter was not bound, under the circumstances of the case, to interpose a defence founded upon the illegality or usurious character of the original transaction. *Ibid*.

27. Where a party, three days after the purchase of a lot of land at a sheriff's sale, entered into a bond that within a month thereafter he would give the obligee peaceable and quiet possession of the premises, and would indemnify and save him harmless against the claims which the defendant in the execution might have to the lot, excepting the right to redeem, and the obligee entered and remained in possession of the lot for fourteen months, and then the defendant in the execution sued him for the use and occupation of the land during that period, and recovered a verdict for \$140; it was held, that the bond was forfeited, and that the obligor, having had notice of the suit, was responsible

for the amount of the recovery, and for the costs of the prosecution and defence of the suit. *Holdgate v. Clark*, 10 Wend. 215.

28. It is no defence to an action on a bond to indemnify special bail, that the bail, after the commencement of the suit against him, surrendered the principal, where it appears that notice of the suit against the bail was forthwith given to the obligors of the bond. *Beers v. Pinney et al.* 12 Wend. 309.

29. Where a bond, dated in October, 1827, was conditioned for the payment of a sum of money in three instalments, to wit: on the 1st May, 1830, 1st May, 1832, and 1st May, 1834, and followed these words, "or of the interest thereof, or any part thereof, to be paid yearly and every year on the first day of May in each year, after the same commences, then," &c. It was held, that the interest must be deemed to have commenced on the first day of May, 1828, and that consequently a plea of payment of the instalments due in 1830 and 1832, without alleging payment of the interest accrued previous to the seventh day of May, 1832, when the suit was commenced, was no bar to the action. *Fuke v. Eddy's Executors*, 15 Wend. 76.

30. If performance of the condition of a bond be prevented by the omission of the obligee, the obligor is discharged. *Whitney v. Spencer*, 4 Cow. 39.

31. A bond given by a debtor to his creditor is *prima facie* evidence of his indebtedness even as against third persons. *Hawley v. Cramer*, in the 4th Circuit in Equity, 4 Cow. 717.

32. The right to proceed at law upon a bond against both principal and surety is not taken away under the revised statutes by the creditors also holding a mortgage. *Loud v. Sergeant*, 1 Edw. 164.

33. If a surety is resorted to in any case and compelled to pay, an equity arises in his favour to be substituted in the place of the creditor, and to have the benefit of all securities which he holds. *Ibid*.

34. When N. sells out a newspaper establishment to W. and T., and by bond and covenant stipulates not to set up another paper within a certain time and distance, and N. afterwards buys T.'s moiety, and becomes joint proprietor with W.; the remedy at law against N. upon the bond and covenant is gone. *Noah v. Webb*, 1 Edw. 604.

35. Bonds and covenants which have been fairly made, and are founded upon sufficient consideration, but have become defective or unavailable at law, will be sustained in equity. *Ibid*.

36. A party who claims to have a bond or covenant given up should clearly show not only that the instrument is void in law, and can never be enforced, but also that in equity it never ought to be made use of or enforced. *Ibid*.

37. The bond required by the 12th section of the judiciary act of 1789, upon the removal of a cause from a State Court into the Circuit Court of the United States, is a joint and several bond, which must be offered at the time pointed out in the act. *Roberts v. Carrington*, 2 Hall, 658.

CANALS AND CANAL COMMISSIONERS.

1. The completion of the canal does not divest the owner of the fee of the land occupied for the canal; the fee passes on the payment of the damages assessed, and not before. *Brinckhoff v. Wemple*, 1 Wend. 470.

2. The canal commissioners have no right to levy a toll upon passengers on the Erie and Champlain canals within the statute. (Sess. 43, ch. 202, s. 17 and 20.) *Myers v. Foster*, 6 Cow. 567.

3. But the act was amended and extended to persons by the statute of April 18th, 1827. *Vide note (a)* at the end of this case. *Ibid*.

4. In passing on the Erie and Champlain canals, freight boats are bound to afford every facility for the passage of packet boats, as well through the locks as elsewhere on the canal. And where a freight boat, passing west on the Erie Canal, was waiting for the emptying of a lock, when a packet boat overtook her, *held*, that the packet boat should pass first. *Farnsworth v. Groat*, 6 Cow. 696.

5. On request, the master of the freight boat refusing to consent to this, the master of the packet may use all necessary means to obtain the preference due to him, short of a breach of the peace; as by pulling back the freight boat, and forcing his own forward; for which no action of trespass will lie, no unnecessary damage to the freight boat being done. *Ibid*.

6. If the freight boat be detained or injured through the obstinate resistance of the master to the exercise of the right of preference of the packet; this is the fault of the former, for which he cannot recover damages against the master of the latter. *Ibid*.

7. An appraisal of damages done by the canal, made by the two canal appraisers, appointed pursuant to the act of 1825, (Sess. 48, ch. 274.) is valid, provided one of the canal commissioners be associated with them in hearing and conferring on the merits of the claim, though he finally dissent from the appraisal, and declares himself absent, and not a member of the board. *Ex parte Rogers*, 7 Cow. 526.

8. The canal commissioners are bound to pay assessments made under the statute, (Sess. 48, ch. 275.) and if they refuse, a mandamus is the proper remedy. *Ibid*.

9. The agents of the state, under the act of 1817, are authorized to enter on the lands of individuals to take materials for the construction of the canals mentioned in that act. *Wheeler v. Young et al.* 4 Wend. 647.

10. Under that act an appraisal of damages may be made, as well for the temporary use of lands adjacent to the line of the canals, for the destruction of crops in consequence of the removal of fences, and for materials taken, as for lands permanently appropriated, the fee of which vests in the state. *Ibid*.

11. Parol evidence is not admissible to show an appropriation of lands to the use of the public in the construction of the canals, where such lands do not in fact form a part of the canals, but are only connected with them by means of

a cut or ditch. *Jackson v. Daley et al.* 5 Wend. 526.

12. An engineer employed by the canal commissioners, to whom is given the superintendence of the construction of a portion of the canal, is authorized to enter upon the lands of individuals, and take materials for the furtherance of the work, without any express orders or direction from the commissioners. *Lyon v. Jerome*, 15 Wend. 569.

CAYUGA BRIDGE COMPANY.

1. The amendment to the act to incorporate the Cayuga Bridge Company provides, that it shall not be lawful for any person to cross the lake within three miles of the bridge without paying toll; *held*, that embarking upon one side of the lake six miles from the bridge, and crossing in such a direction as to leave the lake within sixty rods of the bridge on the other side, is not such a crossing within the three miles as is contemplated by the act. *Sprague v. Bridgwell*, 2 Cow. 419.

2. The act farther provides, that any person may pass with his own boat within three miles; *held*, that any one may cross in his sleigh on the ice, within the principle of this proviso, and according to the general intent of the act, which is, that all persons who are compelled to resort to others to assist them in passing should cross the bridge; otherwise as to those who have the means of passing independent of the bridge. *Ibid*.

3. Yet where one crosses the lake in such a manner as not to subject himself to the payment of toll, but on its being demanded, voluntarily pays it, he cannot maintain an action to recover it back. *Ibid*.

4. Any person crossing the Cayuga lake on the ice within three miles of the Cayuga bridge, is liable to pay toll to the Cayuga Bridge Company, the same as if he crossed the bridge, within the statute. (Sess. 21, ch. 21, s. 2, 3, W. 462. 3.) *The Cayuga Bridge Co. v. Stout*, 7 Cow. 33.

5. So far as the opinion expressed in *Sprague v. Bridgwell*, 2 Cow. 419. conflicts with this proposition, it is not law; though the decision of that case was right. *Ibid*.

6. Accordingly when one who crosses on the ice does not enter on the lake within three miles of the bridge, he is not liable for toll, unless his course is intended as an evasion of the statute. *Ibid*.

7. Where a company, incorporated for the purpose of erecting a bridge, were authorized to erect the same across a lake, or the outlet thereof, and to rebuild it if destroyed or carried away by ice, and all other persons were prohibited from erecting a bridge within three miles of the place where the bridge should be erected by the company, and the company proceeded and built a bridge across the lake which lasted about eight years, when it was destroyed by ice, and the company then erected another across the outlet, about two miles from the site of the first bridge; it was *held*, that the building of

making an affidavit to obtain a *certiorari* to a Justice's Court, must be shown to the commissioner who allows it, or may be shown for the first time against an application to set aside the writ? *Quære. Clark v. Lavortace*, 1 Cow. 48.

5. Paying or settling a judgment before a justice does not prevent the bringing a *certiorari* to reverse it; nor supersede one already brought. *Clark v. Ostrander*, 1 Cow. 437.

6. It is not essential, that affidavit for a *certiorari* to a Justice's Court state the verdict or judgment. *Philips v. Brainard*, 2 Cow. 440.

7. The omission may be supplied by an affidavit made after the thirty days. *Ibid.*

8. The ninety days, within which the affidavit is to be laid before the judge for allowance, are computed from the time of making the affidavit. *Ibid.*

9. On a *certiorari* the defendant cannot compel a return. *Marsh v. Eastman*, 3 Cow. 58.

10. His course is to *non pros* the plaintiff in error, if he does not cause a return to be made. *Ibid.*

11. A *certiorari* removes, in contemplation of law, the record itself; and where the plaintiff appeared in the Common Pleas by guardian, and the defendant appeared there, and the plaintiff had filed a declaration; *heh*, that he might proceed against the defendant in the Supreme Court on the removal of the cause by *certiorari*, by immediately taking out rule against him to plead, and for want of a plea take a default. *Blake v. Hull*, 5 Cow. 37.

12. The affidavit to obtain the allowance of a *certiorari* may be taken before the attorney who commences the suit. *Vary v. Godfrey*, 6 Cow. 587.

13. Under the fifty dollar act, (Sess. 47, ch. 238,) the affidavit for a *certiorari* need not be made within thirty days after the judgment before the justice; nor within any particular time. *Finch v. M'Dowell*, 7 Cow. 537. *Williams v. Quinn*, 7 Cow. 539. S. P.

14. But at common law, an affidavit is necessary to warrant a *certiorari* in civil cases. *Finch v. M'Dowell*, 7 Cow. 537.

15. A *certiorari* to remove a judgment of a justice of the peace may issue from the Court of Common Pleas in which it is made returnable. *The People v. Onondaga C. P.* 4 Wend. 212.

16. Notwithstanding the provisions of the revised statutes authorizing the removal of a justice's judgment by *certiorari* into the Common Pleas, such judgment may be removed into the Supreme Court by the same writ. *Comstock v. Porter*, 5 Wend. 98.

17. But the right to the writ to remove such judgment into the Supreme Court by *certiorari* not being *ex debito justitiæ*, it cannot issue without leave obtained from the Court on special application founded on affidavit. *Ibid.*

18. A *certiorari* to remove a justice's judgment into the Common Pleas must be *allowed* by an officer residing within the county where the judgment was rendered. *The People v. Seneca C. P.* 6 Wend. 517.

19. In an affidavit to found a *certiorari*, a statement of the points relied on for error, besides setting forth the testimony and proceedings

before the justice, is not necessary when the alleged errors consist in the proceedings set forth. *The People v. Columbia C. P.* 6 Wend. 544.

20. In a case of *certiorari* to the Common Pleas, a defendant in error, after proceeding to argument, cannot object that the affidavit on which the *certiorari* was obtained was not served on the justice within ten days. *The People v. Erie C. P.* 6 Wend. 549.

21. Where a *certiorari* is allowed by the proper officer, although his allocatur be not endorsed upon the writ, and the justice makes return, the Common Pleas have jurisdiction of the cause. *The People v. Onondaga C. P.* 7 Wend. 516.

22. An affidavit to found a *certiorari* may be made either by the party or his attorney. *Ibid.*

23. It is not necessary in such affidavit, after stating the proceedings before the justice, distinctly presenting the points relied on for error, to state specifically at the close of the affidavit the precise grounds upon which the allegation is founded. *Ibid.*

24. Where a *certiorari* has been allowed upon an insufficient affidavit, the defendant in error should stay the plaintiff in error from bringing the cause to argument, and move to quash the *certiorari*; if, instead of doing so, he permits the argument to be brought on, and then objects to its being proceeded in, on the ground of the insufficiency of the affidavit, and the Common Pleas overrule his objection and direct the argument to proceed, the Supreme Court will not inquire whether a *mandamus* ought to issue directing the Common Pleas to quash the *certiorari*; the remedy of the party, if any, is by writ of error, and not by *mandamus*. *The People v. Cayuga C. P.* 10 Wend. 632.

25. Where a *certiorari* is sued out to remove a justice's judgment into the Common Pleas, and the instrument intended as a bond, in compliance with the statute, is without seal, the Common Pleas, on an offer to amend by affixing seals, should permit the amendment to be made. *The People ex rel. Reynolds v. Rensselaer C. P.* 11 Wend. 174.

26. One of two defendants cannot alone sue out a *certiorari*, and the writ will be quashed, unless the party prosecuting it shows that his co-defendant is incapable of consenting to join, or is absent from the state, or takes measures to compel him to join, by a rule requiring him to appear and join, or be precluded from bringing error. *Ibid.*

27. A party intending to remove a justice's judgment by *certiorari* must present the writ for allowance, as well as an affidavit setting forth the testimony, &c., within twenty days after the rendition of the judgment. *The People v. Albany C. P.* 12 Wend. 263.

28. A supplemental affidavit, made after the time limited by statute, ought not to be received, except for the purpose of establishing some collateral matter; if it affects the merits of the case, it should be rejected. *Ibid.*

29. It seems, that the making of the affidavit, and the allowance and service of the *certiorari* on the justice, should all be accomplished within thirty days after the judgment. *Ibid.*

(b) *What the justice may be required to return, and how the return must be made.*

30. A justice must return to a *certiorari* as to all the facts stated in the affidavit upon which it is founded, that they are true or untrue, according to the best of his recollection and belief; and he will not be excused on his affidavit that he has no minutes, and remembers nothing by which he can so return. *Schuyler v. Warner*, 1 Cow. 59.

31. A justice's return to a *certiorari* need not be under seal. *Scott v. Rushman*, 1 Cow. 212.

32. It is enough that it is under his hand. *Ibid.*

33. An action for a false return will lie upon it though not sealed. *Ibid.*

34. The Court will not order a justice to return that such a thing is so, but whether it be so or not. *Palmer v. Peck*, 2 Cow. 461.

35. A return to a *certiorari* will be set aside, if it be drawn by the attorney for the plaintiff in error. *Fix v. Johnson*, 3 Cow. 20.

36. The return to a *certiorari* must contain a complete history of the proceedings in itself, not by reference to the affidavit on which it is founded. *Mann v. Swift*, 3 Cow. 61.

37. An affidavit for a *certiorari* must not be entitled in this Court. *Nichols v. Conoles*, 3 Cow. 345.

38. The return to a *certiorari* will not be set aside because the attorney for the plaintiff in error wrote it, if he acted as the mere amanuensis of the justice. *Phillips v. Carwell*, 4 Cow. 505.

39. A return to a *certiorari* will not be set aside merely on the ground that it was drawn by the attorney for the defendant in error; *aliter* if drawn by the plaintiff's attorney. *Hunter v. Greaves*, 4 Cow. 537.

(c) *How the want of the return may be remedied.*

40. On *certiorari* the justice dying before he makes return, the Court will hear the cause on affidavit. *Seymour v. Webster*, 1 Cow. 168.

III. Joinder and subsequent proceedings.

1. The irregular conduct of a jury in a Justice's Court is properly assignable as an error in fact upon *certiorari*. *Roberts v. Fusilis*, 1 Cow. 239.

IV. Amendment: (a) *Of the certiorari.*

42. Where a writ of *certiorari* recited that B.impleaded G. before the justice, and by mistake recited that judgment was given against B., whereas it should have been for B., and then commanded the justice to certify the said proceedings and judgment with the process, pleadings, and other things touching the same, &c., and the judgment was correctly stated in the affidavit on which the *certiorari* was allowed; *held*, that this was not such a misdescription as warranted the justice in returning that there was no such cause before him as was stated in the writ, but the Court said the plaintiff might amend if he chose. *Bird v. Silber*, 1 Cow. 502.

43. The title of the cause in the Court below amended both in the *certiorari* and the affidavit on which it was grounded. *Dexter v. Hoover*, 2 Cow. 526.

(b) *Of the return.*

44. On moving to amend a justice's return to a writ of *certiorari*, the return and affidavit on which the writ of *certiorari* was founded, or copies thereof, must be produced. *Durando v. Mooney*, 1 Cow. 588.

45. A motion to amend a justice's return to a *certiorari*, made by the defendant in error, will not be granted, if it appear by opposing affidavits that the amendment sought will be incorrect in point of fact. *Wightman v. Clapp*, 2 Cow. 517.

46. Nor will it be granted where it appears that, notwithstanding the amendment, the judgment must be reversed. *Ibid.*

47. On moving to amend a justice's return to a *certiorari*, the Court require the production of the return or a copy of it, though the application be made by the defendant in error. *Huntington v. Goodwin*, 2 Cow. 521.

V. Costs.

48. Under the fifty dollar act of 1824, (Sess. 47, ch. 238.) the reversal of a judgment on *certiorari* carries no costs whatever; but each party must pay his own costs. *Wheeler v. Roberts*, 7 Cow. 536.

CHAMPERTY AND MAINTENANCE.

- I. *Champerty.*
- II. *Maintenance.*
- III. *Buying a pretended title.*

I. *Champerty.*

1. After the payment of a mortgage debt, the possession of the mortgagor is adverse to the mortgagee, so as to subject him to the penalties of the act to prevent and punish champerty and maintenance, if he sells a pretended title to the property; especially after he has conveyed it to the mortgagee, though but a few days before the sale, even if the legal estate may have remained in the mortgagee (for several years) until such conveyance. *Lane v. Shears*, 1 Wend. 433.

2. A seller of land is presumed to be conversant of the situation of it as to adverse possessions. *Ibid.*

3. The penalty given by statute to punish *champerty* and *maintenance* does not attach for *purchasing* title to land in possession of others than the grantor, unless such possession be *adverse*; nor even then, unless *knowledge* of such adverse holding be brought home to the purchaser. *Preston v. Hunt*, 7 Wend. 53.

4. A party is not liable to the penalty given by the eighth section of the act to prevent and punish *champerty* and *maintenance*, if he can show that at the time of his conveyance he was ignorant that the lands were held or claimed adversely, although he knew that he himself had no title. *Etheridge v. Cromwell*, 8 Wend. 629.

5. Every presumption and intentment is against him who conveys land, knowing that he does not own it; but if he can satisfy the jury that he did not know it was held adversely,

he does not incur the penalty of the statute. *Ibid.*

6. A purchaser of land by contract, who by the terms of the contract has the right to take possession, and has day for payment of the purchase money, and who accordingly enters into possession, makes valuable improvements, pays the purchase money, and obtains a deed, is not affected by the rule that a conveyance obtained *pendente lite* is void, although such purchase money be paid and deed obtained subsequent to the commencement of a suit in Chancery against his vendor, to avoid the title of his vendor, as fraudulently obtained, and in which suit a decree is made adjudging the deed of his vendor to be void in law, such purchaser having entered into the contract under which he took possession previous to the filing of the bill, without actual notice of the fraud of his vendor, not having been made a party in the Chancery suit, and independent of the decree, his vendor having the legal title. *Parks v. Jackson*, 11 Wend. 442.

7. Had there been no previous contract, &c., the deed obtained *pendente lite* would have been adjudged void. *Ibid.*

II. Maintenance.

8. H. T., who claimed land as heir at law of his father, and who was about to commence suits to recover the possession of it, entered into an agreement with the plaintiff, who had married his sister, by which he covenanted, in consideration of the premises, &c., to convey to the plaintiff the one-fourth part of the property which should be recovered; and the plaintiff, in consideration of such covenant, &c., promised H. T. to pay, bear, and sustain the one-half of all the expenses which might occur in the prosecution of the intended suits, &c. The defendant, who drew the agreement, and subscribed it as a witness, as attorney of H. T., and the plaintiff brought actions of ejectment against the persons in possession of the land; and afterwards, by virtue of a power of attorney from H. T., for that purpose, but without the knowledge of the plaintiff, compromised with the tenants, and received from them a large sum of money. In an action of *assumpsit* for money had and received to the use of the plaintiff, brought by him to recover one-fourth part of the money so received by the defendant; *held*, that the agreement between the plaintiff and H. T. was valid, and not illegal and void within the provisions of the act to prevent and punish champerty and maintenance, (Sess. 24, ch. 87. 1 R. L. 172.) and that the plaintiff could, therefore, recover against the defendant. *Thalkimer v. Brinckerhoff*, 3 Cow. 623.

9. *Held*, also, that the general *indebitatus assumpsit* for money had and received was the proper form of action. *Ibid.*

10. *Held*, also, that the non-joinder of H. T. was no objection. *Ibid.*

11. The relation of landlord and tenant, master and servant, acts of charity to the poor, and the exercise of the legal profession, are also cases in which it is not unlawful to maintain. *Ibid.*

12. An agreement to aid in defending a suit one who is not licensed as attorney of

counsel, is illegal and void for maintenance. *Burt v. Place*, 6 Cow. 431.

13. And where B. sold and conveyed land to P., who was not of the legal profession, upon an agreement that the latter should pay part in specific articles, and part in defending a law suit before a justice; *held*, that the whole agreement was illegal and void; and though the latter had sold the land, and received the money for it, the former could recover nothing. *Ibid.*

14. The statute of champerty and maintenance cannot be alleged in bar of a recovery on a bond executed by a step-son of one lessee of the plaintiff in an action of ejectment to another, to indemnify him against the costs of such suit, where it appears that the obligee refused to permit his name to be used without such indemnity. *Campbell v. Jones*, 4 Wend. 306.

15. But the party indemnified can only recover the amount of costs which he has actually paid, and not what he has become obligated to pay. *Ibid.*

III. Buying a pretended title.

16. The statute against buying and selling pretended titles does not apply to judicial sales. *Tuttle v. Jackson*, 6 Wend. 213.

CHANCERY.

I. Account.

II. Agreement.

III. Appeals.

IV. Assignment.

V. Banking.

VI. Bankrupt.

VII. Chancellor.

VIII. Constitutional Law.

IX. Contribution.

X. Corporation.

XI. Costs.

XII. Debtor and Creditor.

XIII. Deed.

XIV. Descent.

XV. Devise.

XVI. Evidence.

XVII. Execution.

XVIII. Executors and Administrators.

XIX. Fraud.

XX. Gift.

XXI. Guardian and Ward.

XXII. Heir.

XXIII. Highways.

XXIV. Husband and Wife.

XXV. Infant.

XXVI. Injunction.

XXVII. Interest.

XXVIII. Judgment.

XXIX. Jurisdiction of Chancery.

XXX. Lease.

XXXI. Legacy.

XXXII. Limitations.

XXXIII. Loan Officers.

XXXIV. Lunatics and Idiots.

XXXV. Master's Office and Sale.

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XXXVII. Ne Exeat.

XXXVIII. Nuisance.

XXXIX. Parent and Child.

XL. Partition.

XLI. Partnership.

XLII. Payment.

XLIII. Patent.

XLIV. Pleading.

XLV. Power.

XLVI. Practice.

XLVII. Principal and Agent.

XLVIII. Principal and Surety.

XLIX. Promissory Note.

L. Receiver.

LI. Release.

LII. Solicitor and Counsel.

LIII. Scire Facias.

LIV. Set-off.

LV. Sheriff.

LVI. Ships and Ship Owners.

LVII. Statutes.

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- LIX. Taxes.
 LX. Tenant in common.
 LXI. Tenant for life.
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 LXIII. Trusts.
- LXIV. Vendor and Purchaser.
 LXV. Vice-chancellor.
 LXVI. Water and water rights and title.
 LXVII. Will.

I. ACCOUNT.

- A. When and against whom an account lies, and how far it will be opened.
 B. What is a good bar to an account.
 C. Of the manner of accounting, and what allowances shall be made to the party.

- A. When and against whom an account lies, and how far it will be opened,

1. Where it is sought by bill in Chancery to open an account which has been settled, the complainant must distinctly charge the error, imposition, or fraud relied on, specifying the particulars; if he does not do so, but files a bill generally for an account, and the defendant pleads a settlement as to a portion of the accounts, and the plea is ordered to stand for an answer, the complainant cannot, by an amended bill charging specific errors, compel an answer to so much of the bill as is covered by the plea, if in the second answer all errors in the accounts covered by the plea are denied. *Learycraft v. Dempsey*, 15 Wend. 83.

2. Where one is enjoying a right adversely to another, but the latter tacitly consents and acquiesces, no account shall be had beyond the time of filing the bill. This rule applies wherever there has been a mere adverse possession, and the delay in asserting the right and calling for an account is attributable to the complainant's own negligence or laches. *Roosevelt v. Post*, 1 Edw. 579.

3. Therefore when the defendants were suffered to take the whole of the wharfage of a bulk head for some years, upon the supposition of its belonging to them, and this was induced by long acquiescence or remissness on the part of the complainant, who now, for the first time, asserted and proved his right; *held*, that he was entitled to an account only from the time of filing his bill. *Ibid*.

4. If, however, there has been any fraud or wilful act on the part of a party in possession, or he be confessedly a trustee, guardian, bailiff, or agent, then the above rule does not apply. *Ibid*.

B. What is a good bar to an account.

5. Where a bill was filed to settle the accounts of a joint adventure more than twenty years after the whole subject of the controversy had arisen, and where the justice of the claim had not been admitted during that time, the staleness of the demand was considered a good reason for refusing any relief to the complainant. *Kingland, Assignee, &c. v. Roberts*, 2 Paige, 193.

- C. Of the manner of accounting, and what allowances shall be made to the party.

6. An association for carrying on a manufacture having failed while their buildings were in progress, one of their partners and *cestui que* trust made advances, without the consent of the others, to preserve the buildings, which were afterwards sold for the common benefit. *Held*, that he could not be credited for these allowances in taking the accounts of the concern. *Skinner v. White*, 1 Hopk. 107.

7. Accounts having been stated between the parties at different times without fraud or coercion, and the statements being accompanied with written agreements showing how far they should be binding, and for what cause they should be varied, the party was held to the terms of such written agreements; and the accounts were opened so far only as the terms of those agreements extended. And though one of those agreements made provision for the allowance of other items not embraced in the account, and the other for correcting the amounts of the items, to which allowances therefore the party is entitled, yet the former were not allowed by way of set-off in the suit, for a foreclosure of the mortgage. *Troup v. Haight*, 1 Hopk. 239.

8. But such other claims may be pursued by the parties respectively, in other forms of proceeding. *Ibid*.

9. The accounts being sent back to the master for correction, upon the terms of one of the special agreements, the Court would not impose on either party exclusively the burden of proof. *Ibid*.

II. AGREEMENT.

- A. What agreements will be enforced in equity.
 B. Performance of an agreement: (a) Where a specific performance will be decreed: (b) Where not.
 C. Parol agreements within the statute of frauds.

- A. What agreements will be enforced in equity.

10. Where there is a covenant by one party with another, to pay the one-half of what shall be recovered in a suit against an insurance company on a policy of a cargo of a vessel which has been captured, and the indemnity is received under a treaty with the government of the captors, a Court of Equity will enforce the agreement, and compel the payment of the one-half of the sum received. *Wood v. Young et al*, 5 Wend. 620.

11. W., a lieutenant in the army, enters into an agreement with the owner of the merchant ship America, representing that Commodore S., captain of the Franklin ship of war, being about to proceed to the Pacific, and being a friend of W., would afford particular protection to a ship and cargo in which W. might be interested; and in consideration of the protection to be given by Commodore S., and of the services of W., the owners of the ship America agree to put on board a cargo, and send her to the Pacific, to rendezvous with the Franklin, and to give W. certain commissions and profits. W. was to put on board a quantity of

stores belonging to the Franklin, and to go in the America, and represent her as a navy store-ship, and himself as an American officer in charge of the stores; and it was stipulated that W. and Commodore S. were to render protection and facility to the master of the America. This agreement is corrupt, and cannot be enforced. *Weaver v. Whitney*, 1 Hopk. 11.

12. A person who sells land, as containing a certain quantity more or less, when he knows from an inspection of the title deeds in his possession, or otherwise, that it contains a much less quantity, in equity is bound to make good the difference. *Veeder v. Funda*, 3 Paige, 94.

13. But where a contract has been consummated without any fraud, misrepresentation, or concealment as to the real quantity of land sold, Courts will not inquire whether there has been an actual mistake as to the supposed quantity. *Ibid*.

14. If there has been either fraud or concealment, or any thing beyond a mere mistake on both sides as to the quantity of land, the contract will not be enforced against the party who is deceived. *Ibid*.

B. Performance of an agreement; (a) Where a specific performance will be decreed.

15. Where a person contracts with the members of a religious community to convey land as the site of a church, and the society are afterwards regularly incorporated under the act, and the church is built on the premises, the Court will decree a conveyance of the property to the corporation according to the agreement previously entered into with the individual members of the society. *The Canajoharie and Palatine Church v. Leiber and others*, 2 Paige, 43.

16. But where the person holding the legal estate has expended his own money in building the church previous to the incorporation of the society, the Court will not compel him to give up his legal claim to the estate until his equitable claim is satisfied. *Ibid*.

17. In a suit for a specific performance of a contract in relation to land, if the defendant in his answer admits the agreement, and does not afterwards insist upon the statute of frauds as a bar, he cannot make the objection; and no proof of the agreement will be necessary. *Coxine v. Graham and Bleeker*, 2 Paige, 177.

18. Where the vendor of a lot of land secretly intended to sell only a part of the lot, but succeeded in making the vendee understand that he was buying the whole lot, and only a part of the lot was included in the deed of conveyance, for which the vendee paid the vendor the whole consideration intended by him to be given for the whole lot, the Court decreed that the vendor execute to the vendee a conveyance for the whole. *Winsall v. Hall*, 3 Paige, 313.

19. The wife of the vendor having united with him in the deed, but not being privy to the fraud attempted to be practised upon the purchaser, the Court refused to compel her to join in the conveyance. *Ibid*.

20. The Court may, in proper case, where there is a covenant on one side, and no mutuality, decree a specific performance. *Matter of Hunter*, 1 Edw. 1.

21. A bond or agreement which creates a partial or particular restraint of trade is good, if founded upon an adequate consideration; and specific performance will be decreed. *Noah v. Webb*, 1 Edw. 604.

22. Purchasers of real estate cannot suggest their own alienism as a bar to a specific performance. *Scott v. Thorpe*, 1 Edw. 512.

(b) Where not.

23. A specific performance of a contract will not be decreed, on the ground of its admission in the answer to the bill, where there is a variance between the terms of the contract as set forth in the bill and as admitted by the answer, essentially affecting the contract. *Harris v. Knickerbocker*, 5 Wend. 638.

24. The statute of frauds may be relied on in defence to a bill for specific performance, although the defendant admits the agreement, if he insists upon the statute in his answer; but where he admits the agreement, and neither pleads the statute nor insists on it in his answer, he is deemed to have renounced the benefit of it. *Ibid*.

25. A. B. and wife executed a deed to C. D., conveying lands belonging to the wife; and C. D. paid the consideration money; but the wife refused to acknowledge the deed pursuant to the statute. Held, that this deed was not such an agreement to convey as would be enforced against the heirs at law of the wife, by a decree for specific performance. *Martin v. Dwelly*, 6 Wend. 1.

26. The Court of Chancery will not compel a specific performance of a contract, if the complainant intentionally concealed a material fact from the defendant, the disclosure of which would have prevented the making of the contract. *Livingston v. The Penn Iron Company and others*, 2 Paige, 391.

27. Where an agreement cannot be carried into effect, according to the intention of the parties, in consequence of the act of God, or something over which the parties could have no control, the utmost that a Court of Equity can do is to decree such an equitable arrangement as the parties would probably have provided in the agreement, if they had foreseen the probability of such an event. *Chase v. Barrett*, 4 Paige, 146.

28. The Court of Chancery will not aid a party who is seeking the specific performance of a mere voluntary agreement, which is neither founded on a good or valuable consideration. *Acker v. Phoenix*, 4 Paige, 305.

29. A Court of Equity does not decree the specific performance of a contract for the sale of land, if the vendor cannot make a good title, although the contract contains no agreement for covenants of warranty; except in those cases where the vendee assumes the risk of the title, or agrees to take such a title as the vendor is able to give. But where the sale has been consummated by a conveyance without any covenants of warranty as to the title, and there has been neither fraud nor misrepresentation on the part of the vendor, the vendee has no remedy to recover back his purchase money upon a subsequent failure of the title. *Bales v. Delavan*, 5 Paige, 299.

30. The Court will not decree the performance of a contract for the sale of land when there is a failure of title as to an undivided portion thereof, which the vendee has not agreed to take at his own risk. But if the vendor has executed a conveyance of the land, with warranty, the Court of Chancery will not rescind the sale, but will leave the grantee to his legal remedy upon the covenants in his deed. *Ibid.*

(c) *Parol agreements within the statute of frauds.*

31. Where G. and W., two brothers, were jointly interested in the real estate of their father as tenants in common, and G. agreed to relinquish his interest in the property in exchange for a quantity of medicines and the good-will of his brother's business as a physician, in consequence of which agreement W. took possession of such real estate, and made improvements thereon, and afterwards sold the same to T., who also made valuable improvements upon the property; *held*, that this was sufficient in equity to take the case out of the statute of frauds, and that T. was entitled to a conveyance of G.'s interest in the property, and to a perpetual injunction against a suit which had been instituted by G. for the recovery of the premises. *Town v. Needham*, 3 Paige, 545.

III. APPEAL.

I. Appeal to the Court of Errors.

- (a) *When an appeal lies, and by whom.*
- (b) *Of the effect of an appeal as to the proceedings in the Court of Chancery; and proceedings thereon; and the decree of the Court of Errors.*
- (c) *Costs on appeal.*

II. Appeal to Chancery.

- (a) *When and upon what appeal lies.*
- (b) *Within what time an appeal may be brought, and service of notice.*
- (c) *What papers can be used on the hearing of the appeal; duty of clerk of entering in minutes of the papers read; what is evidence of the reading of papers before vice-chancellor; what solicitor may prosecute an appeal, &c.*
- (d) *Of the hearing of appeals and proceedings thereon, default of parties on hearing, decree, &c.*
- (e) *What questions are brought up on an appeal; distinction between appeals from final decrees and from interlocutory orders.*
- (f) *Of the effect of death of one of the parties before the hearing of the appeal; entering decree nunc pro tunc.*
- (g) *Of the appeal bond.*
- (h) *Of appeals from surrogates.*

(a) *When an appeal lies, and by whom.*

32. An order or decree in Chancery entered by consent is not the subject of an appeal or rehearing. *Atkinson v. Manks et al.* 1 Cow. 691.

33. So of an order of reference upon which the party appealing has acted, by prosecuting the reference upon the principles prescribed by the order. *Ibid.*

34. If one have an interest at the commencement of a suit, and that interest ceases, the right to prosecute the suit or to appeal also ceases. *Reid v. Vanderheyder*, 5 Cow. 719.

35. The declaration or order of a surrogate, on making a decree establishing a will, that each party shall pay his own costs, is not the subject of an appeal; 1. Because this is not a decree in form; 2. Because a surrogate having no power in such case to award costs, a decree in form for costs is *coram non jndice*, and void without reversal by appeal. *Ibid.*

36. An appeal lies from that part of a decree which relates to the costs only. *Disbrow v. Henshaw*, 8 Cow. 349.

37. An appeal will lie from an order of the Court of Chancery refusing to open the proofs in a cause for the purpose of re-examining a witness, who since his examination has disclosed facts material and pertinent to the issue depending in Chancery, which he did not disclose when under examination. *Beach et al. v. Fulton Bank*, 2 Wend. 229.

38. An appeal from an order refusing a rehearing of a motion for instructions to a master as to the examination of a witness will not be entertained. *Williamson v. Hyer*, 4 Wend. 170.

39. An appeal does not lie from an order of the chancellor directing the sale of property, the subject of contest between the parties litigant, and ordering the money to be brought into Court to abide the final order to be made upon the rights of the parties. *Chapman v. Hammersley et al.* 4 Wend. 173.

40. Where in a suit in Chancery on a bill filed charging a deed conveying lands, *absolute in its terms*, to be a mortgage, a decretal order is made adjudging the deed to be a mortgage, and making a reference to a master to take and state an account, such order is not final within the meaning of the statute limiting appeals; but to give a party the benefit of an appeal from such order, he must prosecute the same within fifteen days after the making of the order. *Kane v. Whitlick*, 8 Wend. 219.

41. If, in such case, on the coming in of the master's report, the defendant suffers a decree confirming the report, and awarding execution for the amount certified to be due, to pass against him by default, and then files an appeal, as well from the order adjudging the deed to be a mortgage, as from the decree confirming the master's report and awarding execution, the appeal will be dismissed, it being inoperative as to the first order, because not made within fifteen days, and as to the second, because permitted to be entered by default. *Ibid.*

42. Where a demurrer to an original bill was allowed, but with liberty to the complainant to apply to the vice-chancellor to amend the original bill within sixty days, and an application was thus made by the complainant, which was allowed by the vice-chancellor, but the complainant, instead of availing himself of the order, appealed to the Court of Errors; it was held, that the complainant, having applied for and obtained leave to amend the original bill, had consummated his election of remedies, and could not exercise the right of appeal. *M'Elwin v. Willis*, 9 Wend. 553.

43. A party aggrieved by one branch of a decree does not thereby acquire a right to call in question another portion thereof, which has no bearing or effect upon his rights or interests; he can appeal only from such parts of the decree as affect him. *Idley v. Bowen*, 11 Wend. 247.

44. The refusal of the chancellor to grant a feigned issue in a proper case, when directly applied for, and where, in the exercise of a sound discretion, an issue should have been directed, is good ground of appeal. *Townsend v. Graves*, 3 Paige, 453.

45. It seems, that a party who has not asked for an issue in the Court below cannot sustain an appeal on the ground that such issue would have been proper. *Ibid.*

46. The omission of the Court below to award an issue to settle a disputed claim of right between the parties is not a ground of appeal, if neither party asked for such issue on the hearing of the cause. *Belknap v. Trimble*, 3 Paige, 577.

47. If the decree of the Court below is affirmed, the respondent cannot have it corrected as to a point decided against him in the Court below, and as to which no cross appeal has been brought by him. *Townsend v. Graves*, 3 Paige, 454.

(b) *Of the effect of an appeal as to the proceedings in the Court of Chancery; and proceedings thereon; and the decree of the Court of Errors.*

48. If an order or decree appealed from purport on its face to have been taken by consent of the party appealing, it will be deemed by the Court above, on appeal, to have been so taken. *Atkinson v. Manks*, 1 Cow. 691.

49. And they will not hear evidence upon the question whether it was so taken. *Ibid.*

50. If it was, in fact, not taken by consent, the party should have applied to the Court below to have the mistake in the entry corrected. *Ibid.*

50*. An order of the Court of Chancery was, as to part of the right, against the appellants, from which they appealed; and as to another part, in their favour, from which neither party appealed; *held*, that though the respondent could not question that part of the order which was for the appellants, yet he might argue against the reasons and grounds upon which it was made, it appearing that if they failed there could be no foundation for the appeal. *North River Steamboat Company v. Livingston*, 3 Cow. 713.

51. J. C. V., a brother of the half blood to S. V., who died without issue, leaving his wife *en ventre*, filed a caveat against the proof of the will of the deceased. Whereupon the surrogate caused the parties interested to be cited; proceeded to take proofs, and four days after the birth of the child, made a decree establishing the will. J. C. V. appealed to the chancellor, before whom a motion was made to quash the appeal, on the ground that, his interest having ceased, he was no longer a proper party in the cause. This motion was overruled; and the chancellor afterwards awarded an issue to try the sanity of the testator, more than fifteen days having elapsed from the time of making the first order. On appeal to the Court of Errors from the last order, *held*, that the first order, being connected with it, was examinable by that Court, notwithstanding the lapse of time. *Reid v. Vanderheyden*, 5 Cow. 719.

52. *Held*, also, that the chancellor should have quashed the appeal. *Ibid.*

53. A person having no interest in the subject-matter of a suit cannot be a party in any Court. *Ibid.*

54. The Court of Errors can, in general, make no order in a cause on appeal to that Court, till there be a return to the appeal. *Scott v. Roosevelt*, 9 Cow. 526.

55. *Semble*, the Court of Chancery has at least a concurrent power with the Court of Errors to determine whether an appeal shall stay proceedings or not. *Ibid.*

56. But the effect of an appeal is now regulated, in most respects, by the new revised statutes. *Ibid.*

57. An order to answer a petition of appeal from the Court of Chancery is irregular if entered before the petition of appeal, with the transcript annexed, is actually returned and filed in the Court of Errors. *Irving v. Duncomb*, 2 Wend. 205.

58. The Court of Errors is not possessed of a cause until the petition of appeal, with the transcript annexed, has been returned and filed. *Ibid.*

59. A decretal order of a Court of Chancery, directing an issue of *devise vel non*, will not be reversed, where the proofs taken, leave the question of the competency of the testator to make a will involved in doubt; a party seeking to reverse such an order must show that, upon the evidence taken in the Court of Chancery, he was clearly entitled to a decree in his favour. *Idley v. Bowen*, 11 Wend. 227.

60. A will proved to have been in existence, but not found at the death of the testator, is presumed to have been destroyed by him *animo revocandi*, and it is incumbent upon a party who seeks to establish such will to repel that presumption, and show that it was improperly destroyed, and a decretal order for a feigned issue, directing an inquiry as to the revocation of such will, will not be reversed, although it also direct an inquiry as to the competency of the testator to make the will, notwithstanding that in relation to such competency there is no dispute. *Ibid.*

61. A step-mother, against whom a bill in Chancery is filed by her son-in-law in the name of himself and wife, and of an infant sister of his wife, he appearing as the *prochein ami* of the infant, to annul a last will and testament, and establish a previous will made by the same testator, cannot, on an appeal from a decree in equity, object that the infant is improperly made a complainant in the cause, and that placing her in that position is injurious to her rights, when such step-mother is not the guardian of the infant. *Ibid.*

62. An appeal from the decision of the chancellor, denying an application for an injunction, or for an order to stay proceedings in another suit, does not operate as an injunction on a stay of such proceedings pending the appeal. *Hart v. Mayor, &c. of Albany*, 3 Paige, 381.

63. Neither does an appeal from an order dissolving an injunction suspend the operation of the order, so as to entitle the appellant to stay the proceedings pending the appeal as a matter of right. *Ibid.*

64. Where an appeal from an order dissolving an injunction involved an important question of right between the parties, and there was probable cause for appealing, and no particular

injury could arise to the respondents from the delay, the Court, after hearing both parties upon the application for such relief, granted a temporary injunction, restraining the further proceedings of the respondents in relation to the subject-matter of the first injunction, until the appellants had a reasonable time to be heard before the Appellate Court. *Ibid.*

(c) *Costs on appeal.*

65. Costs are not allowed on the reversal of a decree of the Court of Chancery by the Court of Errors. *Murray et al. v. Blatchford et al.* 2 Wend. 221.

II. *Appeal to Chancery.*

(a) *When, and upon what an appeal lies.*

66. Where a party has released all his interest in a suit, he has no right to appeal from an order made therein which cannot prejudice him, although it may be wrong as against other parties. *Steel v. White*, 3 Paige, 478.

67. An appeal cannot be sustained by a person who cannot be injured by the alleged error of the judge *quo*, unless he is the legal representative of a party who may be injured thereby. *Ibid.*

68. An appeal will not lie from a decision of a vice-chancellor as to the costs of an interlocutory proceeding, where such costs rest in discretion. *Winslow v. Collins*, 3 Paige, 88.

69. But where costs are disposed of as matter of relief, or are given or refused contrary to a statute, or to the settled practice of the Court, an appeal may be sustained as to such costs. *Ibid.*

70. The revised statutes authorize an appeal from a decree as to the general costs in a cause, provided the appeal is entered within fifteen days after notice of the decree. *Ibid.*

71. An appeal lies from an order of the Court of Chancery directing a suit to stand revived against the representatives of the deceased party, if the rights of the appellant are in any way affected by such revival of the suit. *Rogers v. Patterson*, 4 Paige, 450.

72. An appeal lies from an interlocutory order charging the appellant with costs, if such costs are given contrary to statute, or to a standing rule of the Court, and do not rest in discretion merely. *Buloid v. Miller*, 4 Paige, 473.

73. So where a party is entitled to costs as a matter of strict right, if the Court below refuses to give costs, the erroneous decision as to such costs may be corrected on an appeal. *Ibid.*

74. No appeal lies from a mere initiatory order, as for an attachment to bring a party into Court to answer for an alleged contempt; but if the order for an attachment contains a final determination, or adjudication, that the defendant is in contempt, he may appeal therefrom. *McCredie v. Senior*, 4 Paige, 378.

(b) *Within what time an appeal must be brought, and service of notice.*

75. The time for bringing appeals from the equity Courts being regulated by rule, the chan-

cellor, on sufficient cause being shown, may dispense with the rule, and enlarge the time. *Smith v. Smith*, 1 Paige, 391.

76. This Court alone has the power to suspend the operation of the rule, and give relief in such a case. *Ibid.*

77. Where an interlocutory decision has been made, the Court has no power to extend the time for appealing, it being fixed by statute. *Townsend v. Townsend*, 2 Paige, 413.

78. Nor can the Court, to enable a party to appeal, vacate the order, and cause it to be entered as of a more recent date. *Ibid.*

79. An appeal from the final decree of a vice-chancellor must be perfected within six months from the time of entering the decree; but the time of appealing from an interlocutory order or decree is to be computed only from the time of the receipt of notice thereof. *Eldridge v. Howell*, 4 Paige, 457.

80. The time allowed for appealing from an interlocutory order or decree being fifteen days after notice of the same, the time does not begin to run against the party entering the order until the actual entry thereof, although the caption of the order bears date as of a previous day. *North America Coal Co. v. Dyott*, 4 Paige, 273.

81. Where the appellant draws and enters the order, he is deemed to have had notice of such order from the time it is actually entered by him. *Ibid.*

82. There can be no legal notice of an interlocutory order or decree, so as to limit the right of appealing therefrom, until such order or decree is drawn up and settled, or passed by the register or clerk with whom it is to be entered. *Eldridge v. Howell*, 4 Paige, 457.

83. An appeal from a final decree of a vice-chancellor, as to the general costs in the cause, may be made to the chancellor at any time within six months from the time of entering the decree; but an appeal to the Court for the correction of Errors from a decree of the chancellor as to such costs, must be made within fifteen days after notice of the decree. *Fulton Bank v. N. Y. and Sharon Canal Company*, 4 Paige, 127.

84. Upon an appeal from a vice-chancellor to the chancellor, the appellant must, within the time allowed by law for appealing, serve a notice of the appeal upon the solicitors of the several parties, whose interests as to such appeal are adverse to that of the appellant; a mere constructive notice is not sufficient. *Potter v. Baker*, 4 Paige, 290.

85. Upon an appeal from a vice-chancellor to the chancellor, the notice of the appeal must be served on the solicitor of the adverse party, as well as upon the register or clerk, within the time limited by law for appealing. *Eldridge v. Howell*, 4 Paige, 457.

86. The last clause of the 117th rule, which requires notice of the appeal to be served on the solicitor of the adverse party within eight days after the entering of the appeal, is only applicable to appeals from the chancellor to the Court of Errors. *Ibid.*

87. If the party in whose favour an interlocutory decision of a vice-chancellor is made

wishes to limit the time for appealing, he should have the order entered, and give notice thereof to the adverse party without delay; as the latter has fifteen days after the receipt of notice of such order to appeal from the decision. *Studwell v. Palmer*, 5 Paige, 57.

(c) *What papers can be used on the hearing of the appeal; duty of clerk of entering in minutes of the papers read; what is evidence of the reading of papers before vice-chancellor; what solicitor may prosecute an appeal, &c.*

88. Upon an appeal from a decree of a vice-chancellor, it is not necessary to obtain an order for the transfer of the papers in the cause to the register's office, except in cases where the inspection of some original exhibit, or other paper or file, will be necessary on the hearing of the appeal. *Eames v. Savage*, 3 Paige, 556.

89. Where upon an appeal a transfer of the papers is necessary, the party applying for the transfer must, in the affidavit upon which such application is founded, state the particular reasons which render a removal of the papers necessary. *Ibid.*

90. Upon an appeal from a decree or order of a vice-chancellor, the appeal must be decided upon the papers which were read or used before the Court below; and where a question arises upon the hearing of the appeal as to what papers were before the Court below, if such papers are not referred to in the order or decree appealed from, resort must be had to the minutes of the clerk, and to the papers marked by him as read, to ascertain what papers were read or used before the vice-chancellor. *Bloodgood v. Clark*, 4 Paige, 374.

91. Where a party opposing a motion or petition has papers to read in opposition thereto, and the application is decided in his favour, upon the opening of the case, on the papers of the adverse party, if he desires to have the benefit of his papers in opposition to the application upon an appeal from the decision, or wishes to be allowed thereof, upon the taxation of his costs, he should have such papers entered in the minutes of the Court below, and marked as read. *Ibid.*

92. Upon hearing of a cause before the vice-chancellor, it is the duty of the clerk to enter in the minutes of the Court all the papers read, or which are agreed to be considered as read, or which are offered in evidence and overruled by the Court, and a certified copy of the clerk's minutes is the proper evidence of those facts upon the hearing of an appeal to the chancellor. *Studwell v. Palmer*, 5 Paige, 166.

93. The party whose duty it is to furnish the papers on the hearing of an appeal should be prepared with the proper evidence to show what papers were read before the vice-chancellor, and, if required, to show that the papers furnished by him are correct copies. *Ibid.*

94. If the clerk, by mistake, neglects to enter in his minutes any paper which was read, or considered as marked and read before the vice-chancellor, the proper course is to apply to the Court below to correct the minutes. But no paper which was not before the vice-chancellor,

or offered and rejected, can be used on the hearing of an appeal from his decision. *Ibid.*

95. On an appeal to the chancellor from the decision of a vice-chancellor, the appellant may prosecute his appeal by a new solicitor, without any order of the Court below to change the solicitor; and where such new solicitor is employed on the appeal, the service of papers in the appeal cause while it is pending before the chancellor need not be made on the solicitor on record in the original cause before the chancellor. *M'Laren v. Charrier*, 5 Paige, 530.

(d) *Of the hearing of appeals and proceedings thereon; default of parties on hearing decrees, &c.*

96. On an appeal to the chancellor from a decree of the vice-chancellor, the cause must be heard on the pleadings and proofs as they existed in the Court below, and no new testimony can be introduced. *Mitchell v. Lenox*, 14 Wend. 668.

97. According to the course of the civil law in cases of appeal, the cause is reheard at large, and new testimony may be introduced. *Vanderheyden v. Reid*, 1 Hopk. 408.

98. Where, in consequence of the decision of this Court upon an appeal from a Circuit Court, farther proceedings become necessary, the cause will be remanded, whether the appeal is from an interlocutory or a final decree. *Wescott v. Woodworth*, 1 Hopk. 568.

99. Appellate Courts which proceed according to the course of the civil law may allow the parties to introduce new allegations or further proofs. *Scribner v. Williams and others*, 550.

100. But it is not a matter of course to receive further proof upon an appeal. *Ibid.*

101. If the appellant wishes to offer new evidence, he should in his petition of appeal ask leave to produce further proofs, and state his excuse for not producing such evidence in the Court below. *Ibid.*

102. After a decree by a vice-chancellor awarding a perpetual injunction against a writ at law, the chancellor will not, pending an appeal from that decree, modify the injunction so as to permit the appellant to proceed to trial and judgment without prejudice to the rights of the complainant. *Fulton Bank v. N. Y. and Sharon Canal Company*, 3 Paige, 31.

103. Where a bill is filed before a vice-chancellor for an injunction, and after hearing both parties thereon, he refuses to allow the injunction, it is irregular to bring the same question before the chancellor by a new bill, while the former suit is pending before the vice-chancellor. *Winship v. Pitt*, 3 Paige, 259.

104. Upon the hearing of an appeal, the appellant's counsel should deliver to the Court a copy of the notice of the appeal, in addition to the papers required to be furnished by the 93d rule. *Eames v. Savage*, 3 Paige, 556.

105. Upon an appeal from the decision of a vice-chancellor, if the appellant makes default at the hearing, the decrees or order appealed from will be affirmed with costs. But if the respondent makes default, the cause must be

heard *ex parte*, and the decree or order will not be reversed or modified until it is shown to be erroneous. *Stiles v. Burch*, 5 Paige, 139.

106. The only effect of the respondent's default at the hearing of the appeal is to deprive him of costs, if the decision of the vice-chancellor is affirmed, or to preclude him from the right of appealing to the Court of dernier resort, if such decision is reversed. *Ibid.*

(e) *What questions are brought up by the appeal; distinction between appeals from final decrees and from interlocutory orders.*

107. All decrees and orders of the Court of Chancery, not capable of enrolment, are interlocutory within the meaning of the statute limiting appeals. *Jenkins v. Wild*, 14 Paige, 639.

108. The party conceiving himself aggrieved has fifteen days after notice to appeal from an interlocutory decree or order; and the notice, to be effectual, must be a regular, formal, written notice. *Ibid.*

109. Where a case is brought to a hearing before a vice-chancellor upon pleadings and proofs, and there is an appeal from the whole decree, or decretal order, made on such hearing, the cause is before the chancellor until the decision upon the appeal; and an application to appoint a receiver in the cause may be made to the chancellor. It is otherwise when there is an appeal from the decision of a vice-chancellor as to a collateral matter, not embracing the whole cause. *Jenkins v. Hinman*, 5 Paige, 309.

110. An appeal from the final decree only does not bring before the Appellate Court, for review, a question which has been definitively adjudicated and disposed of by an interlocutory decree or order previous to such final decree. *Mapes v. Coffin*, 5 Paige, 296.

111. When the Appellant does not succeed in reversing any part of the decree, and the respondent has not brought a cross appeal, the Appellate Court cannot reverse or modify the decree in a part thereof which is erroneous as to such respondents. *Ibid.*

(f) *Of the effect of death of one of the parties before the hearing of the appeal, entering decree nunc pro tunc.*

112. When the complainant died after the entry of an appeal from the decision of the vice-chancellor, and after the cause was ready for a hearing on the appeal, but the fact of his death being unknown to the counsel, the cause was afterwards heard and decided by the chancellor upon the appeal; *held*, that the decree upon the appeal might be entered *nunc pro tunc*, as of a day previous to the death of the complainant, and after the entering of the appeal. *Vroom v. Ditmas*, 5 Paige, 528.

113. The Appellate Court ought not to proceed to the hearing of a cause upon appeal, after the fact of the death of one of the parties is known, until the suit is revived, unless it is heard with the consent of those who have succeeded to the rights of the deceased party. *Ibid.*

(g) *Of the appeal bond.*

114. Where two orders are made and entered in a cause on the same day, one of which sub-

stantially embraces the other, and the defendant appeals from both orders; only one appeal and one appeal bond are necessary. *Gregory v. Dodge*, 3 Paige, 90.

115. The practice of entering distinct orders in a cause, where several directions are given at the same time, with a view of increasing the costs, or rendering several appeals necessary, is not to be encouraged. *Ibid.*

116. A suit brought to compel the defendant to account for, and pay over to the complainants, a balance alleged to be due on certain joint dealings, comes within the eighty-seventh section of the title of the revised statutes relative to writs of error and appeals; and upon an appeal from an interlocutory order in such suit, the Court may require the doing of such other acts and things by the appellant as is specified in that section, to make the appeal operate as a stay of proceedings. *Ibid.*

117. In all the cases coming within that section of the statute, the making the deposit or giving the bond as required by the eightieth section, and the filing the certificate of the vice-chancellor, as required by the one hundred and sixteenth rule, will stay the proceedings under the order appealed from in the first instance; but the respondent may afterwards apply to the Court for an order requiring the appellant to give the further security specified in the eighty-seventh section. *Ibid.*

118. On an appeal from a decree or order of a vice-chancellor to the chancellor, or from the Court of Chancery to the Court of Errors, if a bond is given instead of a deposit of money, two responsible sureties at least must unite with the appellant in the bond. *Van Wezel v. Van Wezel*, 3 Paige, 38.

119. If the officer who approves of the security does not know that the sureties offered are responsible, it is his duty to examine them as to the nature of their property and the place of their residence, and to require them to justify in at least double the penalty of the bond; and he should also annex the affidavit of justification to the bond, and require it to be filed therewith. *Ibid.*

120. Upon an appeal from the chancellor or vice-chancellor, it is not necessary that the appellant should himself execute the appeal bond; it is sufficient if the bond is executed by two sufficient sureties. *North American Coal Company v. Dyett*, 4 Paige, 273.

121. The sureties in an appeal bond must each be worth double the amount of the penalty of the bond. And the officer approving the bond should in his certificate of approval certify that he approves of the sureties named in the bond, and that each of them is worth double the penalty of the bond over and above all debts and responsibilities. *Eldridge v. Howell*, 4 Paige, 457.

122. Upon an appeal from an order or decree of a vice-chancellor, the chancellor may authorize an amendment of the appeal bond either as to the amount or as to the approval thereof. *Ibid.*

123. The Appellate Court, under the provisions of the revised statutes, with the assent of the obligors, may amend the appeal bond in matters

of substance, as by adding the names of other sureties, where, by mistake or through inadvertence, the requisite number of sureties have not joined in bond. *Potter v. Baker*, 4 Paige, 290.

124. The assistant register, or a clerk of the Court, is not authorized to approve of the appeal bond, upon an appeal entered with the register. The bond must be approved of by a vice-chancellor or injunction master, or by the officer of the Court in whose office the appeal is entered. *Rogers v. Patterson*, 4 Paige, 450.

125. When the whole fund which is the subject of litigation is in Court, and a decree is made directing its payment to one of the parties, from which decree the adverse party appeals, it is not necessary for the appellant to give security for the payment of the money which is in Court, in order to make the appeal a stay of proceedings. *City Bank v. Bangs*, 4 Paige, 285.

126. A decree or order, directing the appellant to pay costs to the adverse party, is a decree directing the payment of money within the meaning of the statute; and to make the appeal a stay of proceedings so far as relates to the collection of such costs, a bond must be given to the adverse party in double the amount of the costs, either separately, or in connexion with the usual appeal bond. *Ibid.*

127. Where the costs awarded to the adverse party have not been taxed at the time of entering an appeal, if the appellant wishes to stay the proceedings for the collection of such costs, the officer who approves the bond for the stay of proceedings should fix the penalty at such sum as he shall consider to be at least equal to double the probable amount of the costs. *Ibid.*

128. It is no objection to the validity of an appeal bond, that one of the sureties therein is the solicitor of the appellant. *Studwell v. Palmer*, 5 Paige, 57.

129. The form of a security to be given upon an appeal from a vice-chancellor being regulated by a rule of the Court, and not by statute, the approval of the appeal bond by the register, instead of the clerk of the vice-chancellor with whom the appeal is entered, is a mere irregularity, which will be considered as waived, if the adverse party does not apply to the chancellor to dismiss the appeal within a reasonable time after notice of such irregularity. *Hawley v. Bennett*, 5 Paige, 104

(c) *Of appeals from surrogates.*

130. Upon appeals from surrogates under the act of the 21st of March, 1823, this Court is to proceed as the late Court of Probates might have proceeded, and as right and justice shall require. *Vanderheyden v. Reid*, 1 Hopk. 408.

131. There are no records of the late Court of Probates, showing what course that Court would or might have taken, in the case of a contested and doubtful question of the sanity of a testator. *Ibid.*

132. Both the Court of Probates and the Prerogative Court of the colony were formed upon the model of the Ecclesiastical Courts of England as to the subjects of their jurisdiction; but it does not appear that they were bound to follow the practice of those Courts. *Ibid.*

133. This Court, having the like jurisdiction, may exercise it by such methods of proceedings as are usual, and not forbidden by the constitution and laws. *Ibid.*

134. The constitution does not prohibit a common law proceeding in aid of those Courts which are not bound to proceed according to the common law. *Ibid.*

135. According to the course of the civil law in cases of appeal, the cause is reheard at large, and new testimony may be introduced. *Ibid.*

136. If this appeal had been to the Court of Probate, the judge of that Court might either have decided the facts himself, or have called to his aid the verdict of a jury. *Ibid.*

137. This Court, on such appeals, must be governed by the laws and principles of decision which governed the Court of Probates; but as to methods of proceeding, it may follow its own practice. *Ibid.*

138. This Court, now having jurisdiction of wills of personal goods, and also of wills of lands, may most fitly proceed in the same manner in both cases. *Ibid.*

139. In an appeal from a surrogate's decree to the late Court of Probates, the judge of that Court might either have decided the facts himself, or have called to his aid the verdict of a jury. *Ibid.*

140. The Court on such appeals must be governed by the laws and principles of decision which governed the Court of Probates; but as to the methods of proceeding, it may follow its own practice. *Ibid.*

141. When a decree of a surrogate is reversed by this Court for particular errors, and a just cause of action nevertheless appears, this Court will retain the cause, and proceed as may be requisite to attain the justice of the case. *Van Wyck v. Alley*, 1 Hopk. 552.

142. The thirty days within which an appeal from the decree or sentence of a surrogate to the Court of Chancery must be entered, is to be computed from the time the same is pronounced, and not from the service of a copy thereof. *Boy v. Van Rensselaer*, 1 Paige, 423.

143. Upon an appeal from the sentence of a surrogate disallowing a will, the Court of Chancery will not change the appellant, he being the executor who propounded the will before the surrogate, by substituting the legatee, in order to give the legatee the benefit of the executor's testimony in favour of the will. *Scribner v. Williams*, 1 Paige, 550.

144. A decree of a surrogate upon an account taken against an administrator, made on the application of one or more creditors of the estate, but without citing the next of kin of the intestate, is not a decree for the final settlement of the account of the administrator; and an appeal therefrom must be made within thirty days after the entry of the decree. *Bronson v. Ward*, 3 Paige, 189.

145. Where an appeal from a sentence or decree of a surrogate is not entered within the time limited for that purpose by the statute, the Court of Chancery, acting as an Appellate Court, can afford no relief to the appellant. *Ibid.*

146. If the appellant from a surrogate's decision neglects to file his petition of appeal, and to procure the transcript within the time prescribed by the 118th rule, the appeal will be dismissed, unless the delay is satisfactorily accounted for. *Ibid.*

147. An appeal from the sentence or decree of a surrogate, duly entered in the Court below, suspends all proceedings by the surrogate upon such sentence or decrees until the Appellate Court authorizes proceedings thereon, although the appellant neglects to file his petition of appeal in the Court of Chancery within the fifteen days allowed for that purpose by the 118th rule. *Halsey v. Van Amringe*, 4 Paige, 279.

148. If the appeal is waived by the neglect of the appellant to file his petition of appeal, or if a party who is interested in the sentence or decree appealed from is not made a party to the petition of appeal, the proper remedy is by an application to the chancellor to dismiss the appeal, or for leave to proceed in the Court below, notwithstanding the appeal. *Ibid.*

149. The petition of appeal may be filed in the Court of Chancery before the transcript of the proceedings before the surrogate is returned and filed; but the respondents cannot be compelled to answer the petition until the transcript is returned by the surrogate. *Ibid.*

150. Upon appeal from a surrogate, the mode of compelling a return of the transcript, or of correcting any omissions or imperfections therein, is by order and by attachment for disobedience to the same, in conformity with the practice of the Court of Chancery in similar cases. *Ibid.*

151. Upon an appeal to the chancellor from the sentence or decree of a surrogate, the papers and proceedings in the Court of Chancery, after the petition of appeal has been filed, must be entitled in the appeal cause. *Gardner v. Gardner*, 5 Paige, 170.

152. No person is considered a party respondent in a petition of appeal who is not named therein, and called upon by the prayer of the petition to answer the same. *Ibid.*

153. If a party to the proceedings before the surrogate, and whose interests are affected by the appeal to the chancellor, is not made a party to the petition of appeal, he may apply to the chancellor to dismiss the appeal as to him, with costs, so far as it stays the proceedings in the Court below to his injury. *Ibid.*

IV. ASSIGNMENT.

154. A party who is at once taken into custody, under a precept issuing out of this Court, for a contempt in not paying money pursuant to an order, is entitled to apply for his discharge, under the law relating to voluntary assignments by a debtor imprisoned in execution in civil cases. (9 R. S. 31.) *Van Wessel v. Van Wessel*, 1 Edw. 113.

155. A precept to commit to prison under the statute relating to proceedings for contempt (9 R. S. 534, § 4.) is an execution. *Ibid.*

156. Whether a party would be entitled to

apply under the act relating to voluntary assignments, &c., when he had been committed for an ordinary contempt, after having been brought up on an attachment? *Quære. Ibid.*

157. Voluntary assignees are not entitled to charge a commission, except under express agreement; still, it would seem, that in some cases a compensation, on the ground of *quantum meruit*, would be just. *Jewett v. Woodward*, 1 Edw. 195.

158. It seems, that, generally, the best way to get at the amount of compensation to be allowed to an assignee under a trust deed, will be to inquire the value of his services, and the length of time employed, and fix the amount by way of salary, or by a *per diem* allowance. *Ibid.*

V. BANKING.

159. All questions concerning the possession or forfeiture of chartered rights belong to the Courts of law, exclusively of the Courts of Equity. *Attorney-general v. Bank of Niagara*, 1 Hopk. 354.

160. This Court will not sustain a bill in aid of any information in the nature of a *quo warranto* filed in the Supreme Court. *Ibid.*

161. The exercise of banking privileges without authority is not a nuisance in the legal sense of that word. *Ibid.*

162. The mere omission by a corporation to exercise its power does not, of itself, work a forfeiture in its charter. *Ibid.*

163. If a bank should continue its operations while insolvent, or if it should buy up its own notes at a discount, those circumstances would not authorize the interference of this Court, to restrain the operations of the bank by injunction. *Ibid.*

164. Upon an application for an injunction against a bank, under the act of the 21st of April, 1825, concerning fraudulent bankruptcies by incorporated companies, the proof may be summary. *Attorney-general v. Bank of Chango*, 1 Hopk. 598.

165. An affidavit of the complainant, that he believes his statements of the acts or defaults of the bank to be true, is not sufficient proof. *Ibid.*

166. The act incorporating the Commercial Bank of Albany appointed commissioners to receive subscriptions; but made no provision for an excess of subscription beyond the capital stock. The subscription greatly exceeded the prescribed amount of capital stock, and the commissioners made large subscriptions for themselves after an amount equal to the capital stock had been subscribed by others. The commissioners proceeded to apportion; they wholly excluded the complainants and other subscribers; they allotted shares of stock to themselves and others, as they thought expedient, and they thus made a distribution of the stock, without observing any rule founded on rights acquired by subscription. *Ibid.*

167. Where discretionary power is expressly conferred on subordinate agents, it must prevail;

and nothing less than fraud will violate its exercise. *Ibid.*

168. Where the power of such agents is raised by implication, it is subject to the supervision of law both for fraud and for error. A power to remove the excess of these subscriptions results by implication. This power belongs in the first instance to the commissioners; and if they exceed their authority or violate their private rights, then to the Courts. *Meads v. Walker*, 1 Hopk. 587.

169. These commissioners are trustees; and are subject to the principles which prohibit a trustee from exercising his trust for his own benefit. *Ibid.*

170. Every subscriber acquired, by subscription and payment, some right. *Ibid.*

171. No method for the reduction of these subscriptions being prescribed, no particular rule for that purpose is to be inferred; but the exercise of the power to reduce must be reasonable and equitable, and not merely arbitrary. *Ibid.*

172. The rule for reducing subscriptions, established by the act of Congress, in the case of the existing Bank of the United States, is highly equitable. *Ibid.*

173. The commissioners having in this case allotted to themselves and their copartners about two-fifths of the capital stock, and having wholly excluded the complainants; the distribution, though not fraudulent, must be rectified. *Ibid.*

174. But the Court laid down no precise rule for the distribution of this stock; it being sufficient, upon this motion to dissolve an injunction, to adjudge that the complainants are entitled to some stock in virtue of their subscriptions. *Ibid.*

175. Whenever a bank becomes insolvent, and unable to pay its debts, the act of April, 1825, (Sess. laws of 1825, ch. 325, sec. 17.) makes it the duty of the attorney-general to apply to the Court of Chancery for an injunction against the officers of the corporation, to restrain them from exercising any of the corporate franchises, and for the appointment of a receiver to take charge of the property and effects of the institution, and to collect and distribute the same among its fair and honest creditors. *Attorney-general v. Bank of Columbia*, 1 Paige, 511.

176. An information, verified by the oath of the attorney-general, setting forth that the bank had stopped payment, that a large amount of its bills were notoriously in circulation, and that it was reputed to be insolvent; and accompanied by the further statement of the attorney-general, under oath, that he believed the bank was insolvent, is sufficient to authorize the Court to grant an injunction, and appoint a receiver, where there is no denial by the corporation of the facts stated in the information. *Ibid.*

177. Where a person obtains money from a bank by an improper and fraudulent overdraw of his account, and the money thus obtained is placed in the hands of a third person, who has notice of the fraud before he parts with the money, or pays any valuable consideration

therefor, the latter cannot retain the money as against the bank. *Mechanics' Bank v. Levy*, 3 Paige, 606.

178. The president of a corporation is not, by virtue of his office, authorized to draw checks for the moneys of the corporation deposited in a bank, unless by the established usage of the place where the operations of the company are carried on, the presidents of such corporations are in the practice of drawing such checks without any special authority for that purpose. *Fullon Bank v. N. Y. and Sharon Canal Company*, 4 Paige, 127.

179. Where by the negligence of the directors or agents of a corporation, the corporate funds were deposited in a bank in such a manner as to give the officers of the bank reason to suppose the deposit was made by the president of the corporation, who, at the same time, left his signature in the bank as that upon which the money was to be drawn out; and the officers of the bank afterwards paid out the money on his check, under a supposition that he had authority to draw for the same; *held*, that the bank was not liable for the loss sustained by the corporation from the misapplication of such funds by their president. *Ibid.*

180. The directors or trustees of a corporation, when assembled as a board, are the general agents of the corporation; and notice to them when so assembled is notice to their successors and to the corporation. But notice to an individual director, who has no duty to perform in relation to the subject-matter of such notice, is not a good constructive notice to the corporation. *Ibid.*

181. Under the act of Incorporation of "The President, Directors, and Company of the Jersey Bank," the service of process upon the corporation only was not sufficient to authorize a Court in the state of New Jersey to give judgment against the president and directors of the bank, in their individual capacity, for the debts of the bank, under the provision of the act making them personally liable, if the debt could not be collected out of the corporate estate. To authorize the entry of a judgment against the president and directors individually, the process must be sued out against them, and must be served upon them personally. *Cunningham v. Pell*, 5 Paige, 607.

VI. BANKRUPT.

182. Where a British subject, being indebted, left England, and while on his voyage to this country, and before he arrived here, he was, under the laws of Great Britain, declared a bankrupt, and provisional assignees were appointed; it was *held*, that the assignment to such assignees divested the title of the bankrupt to the personal property brought with him to this country. *Plextor v. Abraham*, 1 Paige, 236.

183. And an injunction will lie, upon the application of such assignees, to restrain a third person from delivering the goods to the bank-

rupt, and also to restrain the latter from receiving or prosecuting for the same. *Ibid.*

184. And the commencement of suits against the bankrupt by his creditors in the Courts of common law, will not defeat the effect of the assignment to his assignees. *Ibid.*

VII. CHANCELLOR.

185. The chancellor, being a stockholder in a corporation, cannot do any judicial act in a cause in which that corporation is a party, although he is not personally a party to the record. *Washington Ins. Co. v. Price*, 1 Hopk. 1.

186. In such case the cause is to be heard before the chief justice sitting in equity. *Ibid.*

VIII. CONSTITUTIONAL LAW.

87. Navigation is subject to the control of the laws of the United States, not directly as such, but only as an instrument of commerce, or as an object of taxation. *North River Steamboat Company v. Livingston*, 1 Hopk. 149.

188. Laws of the United States, having a complex operation upon revenue, commerce, and navigation, are to be construed with reference to the main object of those laws, under some one of the powers granted to Congress, and to the question, whether they are intended direct regulations either of revenue or of commerce; or, whether they effect either of those objects in a consequential and indirect manner only. *Ibid.*

189. The act of 1793, regulating the coasting trade, is a body of provisions resting in some measure upon each of the different powers of Congress to collect duties and imposts, to regulate commerce with foreign nations, and to regulate commerce among the states. *Ibid.*

190. One great object of that law was to confine the coasting trade to vessels owned by citizens of the United States, and to exclude foreign navigation. *Ibid.*

191. The coasting trade may be, and is, carried on, both by registered vessels which have no license and by vessels enrolled and licensed; but the duties are so regulated as to confer an advantage on the latter; and this advantage, together with the exclusion of foreign vessels, is the privilege intended by law in favour of licensed vessels. *Ibid.*

192. The enjoyment of this privilege, the security of the tonnage duty to government, and the guarding of the revenue against evasion, are the object of the laws for the regulation of licensed vessels. But these regulations are limitations of a pre-existing right, and not a grant of any right or authority to carry on the coasting trade. *Ibid.*

193. Registered vessels which have no license participate in this trade. *Ibid.*

194. What is the coasting trade is not in terms defined by these laws, nor in the license; and the definition is only to be gathered from the restrictions in the laws. But it is a trade the right to which was not given by those

laws; the right was perfect before, and is only regulated by them. *Ibid.*

195. Laws for the collection of revenue do not give rights except to the government. On the citizens they operate as restrictions. *Ibid.*

196. The law regulating the coasting trade, considered as operating to confine the navigation to citizens, and to protect the revenue, is not in conflict with the exclusive grant made by this state to Livingston and Fulton for navigating steam vessels. Those steam vessels are equally subject to the regulations of the coasting trade. *Ibid.*

197. So far as the law regulating the coasting trade rests upon the power to regulate commerce among the states, it is inoperative as regards the internal commerce of each state; and the exclusive grant to Livingston and Fulton being now reduced, by the decision of the Supreme Court of the United States, to the limits of the purely internal commerce, there is no longer any collision. *Ibid.*

198. State laws operating directly upon legitimate subjects of state regulations, but which, at the same time, indirectly and consequently affect other states, do not, therefore, so affect the commerce among the states as to encroach upon the powers of Congress to regulate that commerce. *Ibid.*

199. But if the law regulating the coasting trade is considered as a revenue law, it may then operate for that purpose upon the purely internal trade; and if it affects commerce among the states, it is only indirectly and consequentially. *Ibid.*

200. And thus understood, it is not incompatible with any state law which may operate upon the trade at the same time, and neither excludes the other. Steam vessels may navigate under the exclusive grant; but they must also conform to the laws of the United States. *Ibid.*

201. The right to navigate from state to state under the laws of the United States, and the exclusive right to navigate from port to port within this state under the state grant, must both have effect so far as they are compatible; and when not so, the state right must yield. *Ibid.*

202. A steam vessel having a license, and entering this state from another state, may proceed to any port in this state, and may depart from any port in this state to another state; and in either case may touch at any intermediate port in this state. *Ibid.*

203. The navigation which thus remains subject to the state grant is not affected by the limits of revenue districts, nor by the regulations regarding ports of entry and delivery. *Ibid.*

204. The termini of the voyage fix its character as respects its being subject or not to the state grant, and thus a steam vessel, by touching at a port in another state, may be enabled to continue her voyage within the state; and the intention with which such vessels may have touched at the port of the other state cannot destroy her absolute right thus to navigate within this state. *Ibid.*

205. In this case the defendant's steam vessel, the Olive Branch, having touched at the

city of Jersey, and landed goods and passengers, had a right to proceed from thence to any port in this state; and though the waters of the Hudson to the shore of New Jersey are within this state, yet touching there, and so trading, are an intercourse in the only manner there practicable, and the case is substantially a case of navigation from state to state. *Ibid.*

206. A state cannot pass any law which alters or amends the charter of a private corporation, without the consent of such corporation. *McLaren v. Pennington*, 1 Paige, 102.

207. But a law altering the remedy of one of the parties to a contract is constitutional and valid. *Ibid.*

208. Where, however, a state Legislature reserves to itself in the very charter it grants to a private corporation, the right of altering, amending, or repealing the act of incorporation, a subsequent repeal of such act of incorporation will be valid and constitutional. *Ibid.*

209. Such a reservation in the charter of a corporation, upon common law principles, would not be a condition repugnant to the grant, but a limitation of the grant. *Ibid.*

210. Where a state Legislature repealed an act of incorporation containing a reservation of the right of repeal, it will not be presumed this right was improperly or unconstitutionally exercised. *Ibid.*

211. Acts authorizing railroad companies to take private property for the purposes of the road, upon the payment of a fair compensation, are constitutional. *Beckman v. The Saratoga and Schenectady Railroad Company*, 3 Paige, 45.

212. The mode of ascertaining the damages of the owners of the land taken for the road, by commissioners appointed by the Legislature or the governor, is not repugnant to the constitution. *Ibid.*

213. The provision of the state constitution which declares that the right of the trial by jury in all cases in which it has heretofore been used shall remain inviolate for ever, relates to the trials of issues of fact in civil and criminal cases in Courts of justice. *Ibid.*

214. The eminent domain remains in the government, or in the aggregate body of the people in their sovereign capacity, and the government of the people can resume the possession of private property, not only where the safety, but also where the interest or even the convenience of the state is concerned; as where the land is wanted for a road, canal, or other public improvement. *Ibid.*

215. The only restriction upon the power of the people to resume the possession of property for the purpose of an internal improvement, in which the public or the inhabitants of any particular section of the state, as citizens merely, have an interest, is that the property cannot be taken for such purpose without just compensation to the owner, and in the mode prescribed by law. *Ibid.*

216. It belongs to the Legislature to determine whether the benefit to the public from such improvement is of sufficient importance to justify their exercise of the right of eminent domain, thus interfering with the private rights of individuals. *Ibid.*

217. In cases of public improvements, from which a benefit would result to the public, this right of eminent domain may be exercised either directly by the agents of the government, or through the medium of corporate bodies, or by means of individual enterprise. *Ibid.*

218. Railroads are public improvements, from which the public derive benefit; and the Legislature can appropriate the private property of an individual for the purpose of such improvements, or may authorize an individual or a corporation thus to appropriate it, upon paying a just compensation to the owner for the same. *Ibid.*

219. The sovereign power has no right to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will not be promoted thereby. *Ibid.*

220. An act of the Legislature making such transfer would be a violation of the contract by which the land was granted by the government, and repugnant to the constitution of the United States. *Ibid.*

221. The Albany basin, notwithstanding the jurisdiction of the city of Albany over it, can to the same extent as the navigable waters of the Hudson river be regulated by the Legislature, if not inconsistent with the vested rights of individuals. *Hart v. Mayor, &c. of Albany*, 2 Paige, 213.

222. The right of eminent domain does not authorize the government to take the property of one citizen and transfer it to another even for a full compensation; if the public interest will not be promoted by such transfer. But the Legislature is the sole judge as to the expediency of making police regulations interfering with the natural rights of the citizens of the state, and as to the expediency of exercising the right of eminent domain for any public purposes. *Varick v. Smith*, 5 Paige, 137.

223. The act of Congress of the 2d day of May, 1799, which gives the United States a priority of payment in cases of insolvency, or where any estate in the hands of executors, administrators, or assignees is not sufficient, does not give a priority out of the real estate, or the proceeds of real estate belonging to or vested in the heirs of the debtor. *United States of America v. Crookshank*, 1 Edw. 233.

224. The priority given in cases of insolvency relates to living debtors: 1. Where the debtor, not having sufficient to pay all his debts, makes a voluntary assignment for the benefit of his creditors of all his estate. 2. Where the estate of an absconding, concealed, or absent debtor has been attached. 3. Where an act of legal bankruptcy has been committed. *Ibid.*

225. The priority given in the event of the death of the debtor arises after his estate has passed to executors or administrators, Congress has nowhere subjected the real estate in the hands of the heirs to the payment of the debts contracted by the ancestor with the government. *Ibid.*

IX. CONTRIBUTION.

226. When a judgment is against two joint debtors, and the surety of one of them in a limit

bond be compelled to pay the debt on the ground of an escape of the one, this is equivalent to a direct payment by the principal; and the co-debtor is liable to contribute to him (the principal) immediately; at any rate, the principal, on refunding the money to his surety, will be entitled to contribution from his co-debtor. *Ransom v. Keyes*, 9 Cow. 128.

227. When two or more joint debtors cause the debt to be paid by a surety on a bond given by the surety, this is equivalent to direct payment by the debtor; and he may sue his co-debtor for money paid for him; at any rate, he may do this after he has refunded to his surety. *Ibid.*

228. A discharge of one of two joint debtors under the insolvent act, before payment by his co-debtor, will not affect the claim of the co-debtor for contribution against the discharged debtor, toward the payment of the debt by the other made subsequent to the insolvent assignment. *Ibid.*

X. CORPORATION.

229. A corporation for manufacturing purposes, formed under the act of the 22d of March, 1811, having ceased to act as a manufacturing company, and being without funds, and indebted, is dissolved, within the intent of the act, so far as to give a remedy to creditors against the individual stockholders. *Penniman v. Brigs*, 1 Hopk. 300.

230. An election of trustees, made apparently for no purpose but to keep the company in existence, will not prevent such dissolution. *Ibid.*

231. These are corporations of a new and peculiar character. *Ibid.*

232. It is not necessary that a judgment of ouster or dissolution should have been pronounced in any other prosecution, before a creditor can maintain an action against stockholders under this law. *Ibid.*

233. In this case, the suit is proper in equity; the necessary contribution constituting the case one of equitable jurisdiction. *Ibid.*

234. Where property is conveyed for the use of an unincorporated religious society, and such society is afterwards incorporated under the general act authorizing the incorporation of religious societies, the legal title to such property thereby becomes vested in the corporation. *Baptist Church in Hartford v. Witherell*, 3 Paige, 296.

235. The statute authorizes the members of the congregation, and not merely the members of the Christian church connected with such congregation, to incorporate themselves; and the majority of the stated hearers in such religious society are authorized to elect trustees and incorporate the society, although the persons composing such majority may have been excommunicated by the church judicatories for heretodox opinions or unchristian practices. *Ibid.*

236. The members of the church have no greater rights, as corporators, than any other members of the congregation who statedly attend divine worship with them. *Ibid.*

237. The legal tribunals of the state have no

jurisdiction over the church, or the members thereof, as such; and the ecclesiastical judicatories are not authorized to interfere with the temporalities of a religious society or congregation. *Ibid.*

238. A church judicatory cannot remove a clergyman from his situation, as minister of a society or congregation, without the consent of a majority of the members of the congregation, or of their legally constituted trustees, if the society is incorporated. *Ibid.*

239. The relation of *cestui que* trust and trustees does not exist between stockholders of an incorporated company and the corporation itself; nor are they in the relative situation of partners; nor are the stockholders creditors of the company. *Verplank v. The Mercantile Ins. Co. of New York*, 1 Edw. 84.

240. The latter is merely the creature of the law, a politic, and not a natural body. It is made up by the compact entered into by the stockholders, each of whom becomes a corporator, identified with and forming a constituent part of the corporate body. *Ibid.*

241. When a corporation aggregate is formed, and the management and control of its officers are in the hands of directors, the latter become the agents and trustees of the corporators, and a relation is created between the stockholders and those directors, who, as trustees, become accountable for dereliction of duty and violation of trust. *Ibid.*

242. An equitable jurisdiction over directors is expressly given by statute. (2 R. S. 462.) But it should not be exercised unless the directors are parties, and called upon to answer individually. The Court will then deal with them personally. *Ibid.*

243. Chancery cannot interfere to restrain the operations of a chartered company, or to wind up its concerns, unless under the special authority of the revised statutes, and where the case is fairly brought within their scope and object. The causes are: 1. That the company is insolvent, i. e. unable to pay its debts. 2. Where there is a violation of any of the provisions of the charter. 3. Where there is a violation of any act of the Legislature which is binding upon the company. *Ibid.*

244. The words "it shall and may be lawful" for a company to set apart a fund to be held and pledged for payments of annuities and losses on lives, do not necessarily render the doing of the thing spoken of imperative. But until a separate fund is created, the whole capital and property of the company is bound for all annuities and insurances on lives. When such fund is created, then it alone will be bound. *Ibid.*

245. Where a company is restricted from dealing "in the purchase or sale of any stock or funded debt whatsoever created or to be created by or under any act of the United States, or of any particular state," with power to sell, transfer, and again invest their capital; such company may deal by investment in the stock of the United States Bank, or in any stock of the banks or moneyed corporations of any particular state. *Ibid.*

246. When there is a particular purchasing of stock of a company by its officers with the

funds of the company, the remedy is not against the latter in its corporate character, but against the directors by whom the fraud may have been committed, or through whose management the loss has been sustained. *Ibid.*

247. The churchwardens and vestrymen of a Protestant Episcopal church have the exclusive power of calling and inducting a minister. The persons qualified to vote for the churchwardens and vestrymen have no such right. *Humbert v. The Rector, &c. of St. Stephen's Church*, 1 Edw. 308.

248. In such a case, a call and induction consists in a power to fix the salary as well as to make a contract with the rector, and deliver him possession of the church. The term "call," as used in the statute for the incorporation of religious societies, (3 R. S. 292.) is derived from the constitution of the Reformed Dutch Church. *Ibid.*

249. The act incorporating the Brooklyn Bank authorized the commissioners, in case of an excess of subscriptions, to distribute stock among the subscribers in such manner as a majority of such commissioners should deem most advantageous to the interest of the institution. The persons subscribing for twenty shares or upwards were not to receive less than twenty shares, unless such subscribers or those for a less amount exceeded the whole amount of stock. And no one commissioner was to be allowed more than two hundred and fifty shares, if, without it, the whole stock was taken up. There was an excess of subscriptions. *It was held*, that the commissioners were authorized to take two hundred and fifty shares a piece, and were not bound to give every subscriber some stock. They could not be compelled to make a rateable apportionment of the stock. The power given to them was broad and general. *Clarke v. Brooklyn Bank*, 1 Edw. 361.

250. Even though a loss accrues to the funds of an incorporated company arising from error on the part of the directors, still, as between them and a stockholder, they will not without other fault be held liable. *Scott v. Depeyster*, 1 Edw. 513.

251. No man who takes upon himself an office of trust or confidence for another, or for the public, contracts for any thing more than a diligent attention to its concerns, and a faithful discharge of the duty which it imposes. He is not supposed to have attained infallibility; and, therefore, does not stipulate that he is free from error. *Ibid.*

252. If a corporate company engaged in unauthorized and illegal transactions, a stockholder who had a knowledge of the same and acquiesced therein by participating in the results, should not be allowed to charge the directors personally if there be a loss through such transactions. *Ibid.*

253. Directors of a corporate company, in appointing a secretary, do not become sureties for his fidelity and good behaviour. If they select persons to fill subordinate situations who are known to them to be unworthy of trust, or notoriously of bad character, and a loss by fraud or embezzlement ensues, in such a case a personal liability rests upon them, but not otherwise. *Ibid.*

254. Directors have a right to repose confidence in their secretary in every thing within the scope of his duties. *Ibid.*

255. Directors are not to be held personally liable, as between themselves and a stockholder, unless there has been negligence or fraud. *Ibid.*

256. Persons who become directors or managers of a corporation place themselves in the situation of trustees; and the relation of trustees and *cestui que* trust is thereby created between them and the stockholders. The former are obliged to take the same care and use the same diligence as factors and agents. They are answerable not only for their own fraud and gross negligence, but for also all faults which are contrary to the care required of them. *Ibid.*

257. Directors are to be looked upon as bailees of the property, and as they are persons generally having an interest in the stock, they are not bailees who are to derive no benefit from their undertaking, and therefore to be held responsible for slight neglect, but they act in relation to a bailment beneficial to both parties; and the rule then is, they must answer for ordinary neglect; and "ordinary neglect" is understood to be, the omission of that care which every man of common prudence takes of his own concerns. *Ibid.*

258. C. G. K., as secretary of an insurance company, embezzled its funds to the amount of \$170,166 17, within three years, by altering checks, and keeping back money received to be deposited. He produced forged bank books whenever information was required; and he had written entries in the regular books, as if he had actually made the deposit. Committees had been regularly appointed, before whom he had, from time to time, passed his accounts. Neither his general course of private conduct nor his defalcations were known, until he had committed suicide. And as it appeared that the general conduct and investigations of the directors were the same as pursued in other companies by prudent men careful of their own concerns; *it was held*, on a bill by the stockholders against the directors, that they were not personally liable on account of such fraud and embezzlement. *Ibid.*

XI. COSTS.

A. Costs in general; when granted, and when refused; when charged on the person, and when on the fund.

B. Taxation.

C. Security for costs.

A. Costs in general; when granted, and when refused; when charged on the person, and when on the fund.

259. Costs in the Court of Chancery are given to or withheld from the successful party in the discretion of the Court. *Pattison v. Hull*, 9 Cow. 747.

260. The course of the Court is uniform when the question raised is a fair one, and difficult for the parties to settle themselves, not to give costs against the unsuccessful party. *Ibid.*

261. No costs are allowed by the husband against the wife upon divorce for adultery, unless she have separate property. But in the converse case costs are allowed. *De Rose v. De Rose*, 1 Hopk. 100.

262. Where a creditor recovers a debt in this Court, he recovers costs also, unless special and strong reasons to the contrary intervene. *Hunn v. Norton*, 1 Hopk. 344.

263. And those costs in general are the costs of the whole litigation, although the creditor may have failed as to part of his demand. *Ibid.*

264. In this case the demands against the defendant being partly in his own right and partly as executor, and those demands being contested in one suit by his assent, the Court would not attempt a discrimination as to costs, but decreed the whole against the defendant personally. *Ibid.*

265. But in respect to exceptions to a master's report, the general rule is, that each party recovers the costs of those exceptions on which he succeeds, and pays costs on those upon which he fails. *Ibid.*

266. The stakeholder who comes into this Court rightfully, and with good faith, by a bill of interpleader, is entitled to his costs out of the fund. *Casfield v. Morgan*, 1 Hopk. 224.

267. The costs fall, in such case, directly upon that defendant who had right, but eventually upon him who was in the wrong. *Ibid.*

268. It makes no difference in the rule, that he the defendant who was in the wrong is without the jurisdiction. *Ibid.*

269. Where the devisee of the real estate, charged with the payment of the legacy, refuses to pay the same, the costs of the legatee's suit to recover the legacy will be a charge upon the real estate. *Birdsall, Adm'x. v. Hewlett and others*, 1 Paige, 32.

270. Where a party files his bill to redeem, the general rule is, that he must pay costs to the mortgagee, although he should be successful. *Slee v. Manhattan Company*, 1 Paige, 48.

271. There are, however, exceptions to this rule; as where the mortgagee sets up an unconscientious defence; in such case the mortgagee is not only refused costs, but must pay costs to the other party. *Ibid.*

272. Where a bill is unnecessarily filed without the direction of the Court, in a case where the relief prayed for might have been obtained by petition, the complainant will not be entitled to costs. *De la Vergne v. Evertson and others*, 1 Paige, 181.

273. So, where the defendant in his answer sets up an unfounded claim, costs will in most cases be denied him. *Ibid.*

274. Where exceptions are taken to the defendant's answer, some of which are allowed and others are disallowed, and the defendant excepts to so much of the master's report as allowed a part of the exceptions to the answer, and on hearing before the Court, the master's report is confirmed, the complainant is entitled to the costs of the hearing, and also of the reference and of those exceptions to the answer which are allowed by the master; and the defendant is not entitled to the costs of the exceptions disallowed

by the master. *Richards v. Barlow and others*, 1 Paige, 138.

275. If any of the exceptions to the answer are well taken, the defendant must submit to answer further as to those exceptions, or he will not have the costs of the exceptions which are disallowed by the master. *Ibid.*

276. If a widow makes application for her dower before she files her bill, and it is refused, she will be entitled to costs; but where she neglected to make such application, and in her bill alleged that an outstanding mortgage was paid off, and insisted upon her right to be endowed of the whole premises, and claimed arrears previous to the purchase of the defendant, and the decree was against her upon all these points, no costs were allowed to either party. *Russell v. Austin*, 1 Paige, 193.

277. Where, in a bill filed for a specific performance of a contract for the sale of land, the complainant insisted upon the defendant's taking two acres more than he was bound to take, and the defendant declined paying interest which the complainant was entitled to, neither party was allowed costs. *Knickerbocker v. Harris*, 1 Paige, 209.

278. In no case can a complainant, unless he prosecutes as executor or administrator, dismiss his bill without the payment of costs, not even if it should appear he would be entitled to a decree if he proceeded in the suit. *Lewis v. Germond and another*, 1 Paige, 300.

279. Where the assignee, after notice of the fraud, attempted to enforce the judgment against the land, he was decreed to pay costs to the complainant. *Webster v. Wise*, 1 Paige, 319.

280. On a reference of exceptions to an answer, if part of the exceptions are allowed by the master, the complainant is entitled to costs on the exceptions allowed, and neither party is entitled to costs as to those which are disallowed. *Richards v. Barlow and others*, 1 Paige, 323.

281. If some of the exceptions are disallowed, and none of them are allowed in full, the defendant is entitled to his costs on the reference. *Ibid.*

282. On exceptions to a report, each party is entitled to the costs of the hearing as to the exceptions decided in his favour, which costs are to be set off against each other. *Ibid.*

283. Where the costs of exceptions on each side would be nearly equal, the usual practice of the Court is to give no costs to either party. *Ibid.*

284. Where the defendant, in a bill of foreclosure, knowingly sets up an unjust defence, and thereby subjects the complainant to extra costs and expense, he may be charged personally with the costs. *Park v. Peak*, 1 Paige, 477.

285. Where the relatives of an habitual drunkard prosecute a commission against him in good faith, they will not be charged with costs, although the commission should be unsuccessful. *In the matter of Arnhout*, 1 Paige, 497.

286. Where a mortgagor paid the complainant's debt and costs before any decree in the cause, the complainants were permitted to dis-

continue without paying the costs of junior encumbrances who had unnecessarily appeared and answered. *The Merchants' Ins. Co. v. Marvin and others*, 1 Paige, 557.

287. Where a judgment creditor, having a claim upon the surplus moneys raised by the sale of mortgaged premises, litigates in good faith before the master, on a reference to settle the priority of liens, he will not be charged with the costs of such litigation. *Norton v. Whiting and others*, 1 Paige, 578.

288. But if he excepts to the master's report, and those exceptions are disallowed, he may be charged with the costs of the hearing on the exceptions. *Ibid.*

289. Where a party pending the suit is admitted to prosecute a defence in *forma pauperis*, he is not excused from the payment of the costs which accrued before he was admitted to defend in that manner. *Brown and others v. Story*, 1 Paige, 588.

290. As a general rule, a mortgagor pays costs to the defendant on a bill to redeem, although he is successful; but if the defendant has been guilty of improper conduct, he will be deprived of costs, and in some cases will be compelled to pay costs. *Broctway v. Wells*, 1 Paige, 617.

291. If a mortgagor, who is entitled to redeem, applies before filing his bill to the mortgagee for that purpose, and the latter refuses to allow him to redeem, the mortgagee will not only be deprived of costs, but may be compelled to pay costs to the complainant. *Ibid.*

292. Where the defendants obtained from the ancestor of the complainants a conveyance of his property when he was in a state of intoxication, they were charged with the costs of the suit to set aside the deed. *Prentice v. Schorri*, 2 Paige, 30.

293. Where the wife obtains a divorce upon the ground of adultery, a reasonable counsel fee may be allowed and taxed against the husband. *Graves v. Graves*, 2 Paige, 62.

294. If persons are made parties defendants unnecessarily, the bill will be dismissed as to them with costs. *Covenhoven v. Shuler*, 2 Paige, 123.

295. In a case of great hardship, where the complainants had reason to suppose that the conduct of the defendants was fraudulent until they put in their answer, which fully explained the circumstances of the case, the Court dismissed the bill without costs. *Lapin v. Marie*, 2 Paige, 169.

296. Where, from the conflicting claims of the defendants, the complainant is compelled to resort to a bill of interpleader, he will be allowed his costs. *Bedell v. Hoffman*, 2 Paige, 199.

297. On a bill in the nature of a bill of interpleader, costs are not a matter of right, but rest in the discretion of the Court. *Ibid.*

298. But to entitle the complainant to costs out of the fund, the bill of interpleader must have been necessarily filed; and it must also have been necessarily and properly filed against all the defendants. *Badeau v. Rogers*, 2 Paige, 209.

299. If one of the defendants suffers the bill of interpleader to be taken as confessed against him, he will be personally charged with all the

costs which have been produced in consequence of his unjust claim upon the fund. *Ibid.*

300. Where a bill of interpleader is properly filed, the complainant is entitled to his costs out of the fund. *Amey v. Gaulk*, 2 Paige, 284.

301. Where a defendant gave notice of his intention to appeal from the decision of a vice-chancellor on an interlocutory motion, and that he should bring on the hearing of such appeal on the next motion day before the chancellor, and the complainant's counsel attended on that day to oppose the application; but no appeal was in fact entered, the defendant was charged with the costs of opposing. *Mechanics' Bank v. Snowden*, 2 Paige, 299.

302. The chancellor has jurisdiction to award such costs, although the cause is not regularly before him by appeal. *Ibid.*

303. Where a bill, in addition to the discovery sought, contains a prayer for general relief, and a replication is filed to the answer, the defendant cannot obtain an order for costs on motion as upon a mere bill of discovery. *McDougal v. Milm*, 2 Paige, 325.

304. If there is no ground for relief in such a case, the defendant must obtain the usual orders to produce witnesses and to close the proofs, and then bring the cause to a hearing in the usual manner, in order to obtain his costs. *Ibid.*

305. Where a suit had been commenced at law by the Bank of Niagara previous to its insolvency, and the receivers of the bank, after their appointment, elected to proceed with the suit, and upon the trial the plaintiffs were nonsuited; it was held, that the defendant was entitled to his costs of the suit, down to and including the entering of the nonsuit, out of the fund in the hands of the receiver. *Camp v. Niagara Bank*, 2 Paige, 283.

306. Where the wife has no separate estate, no decree can be made against her in favour of her husband for costs. *Wood v. Wood*, 2 Paige, 454.

307. Where a cause at the hearing is directed to stand over for want of parties, if the defendant has not made the objection previously to that time, neither party ought to have costs, as against the other, for the extra expense occasioned by that proceeding. *Rogers v. Rogers*, 2 Paige, 459.

308. Where a cause stood over at the hearing, with leave to file a supplemental bill, and nothing was said as to the costs; and a subsequent decree in the cause directed the defendant to pay all the complainant's costs not previously disposed of; held, that the costs of the supplemental bill were embraced by the decree. *Ibid.*

309. Where a party successfully opposes a motion, and nothing is said about costs in the order denying the application, he is entitled to his costs of opposing, as costs in the cause, if he obtains a decree for costs. *Ibid.*

310. Where the material allegations in a bill of discovery are admitted by the answer, and the defendant also admits that he was applied to by the complainant, and refused to make the discovery previous to the filing of the bill, he will not be entitled to costs. *King v. Clark*, 3 Paige, 76.

311. As a general rule, a party who has fully answered a bill of discovery is entitled to costs; and costs are given against the complainant, of course, if the charges in the bill are denied. *Ibid.*

312. A cause is never brought to a hearing upon a mere bill of discovery, but as soon as the answer is perfected, the defendant is entitled to move for costs. *Ibid.*

313. Where a party appealing from a taxation succeeds only as to part of the items as to which he appeals, neither party is allowed costs of the appeal; but where one of the parties is subjected to additional expense in repelling presumptions arising from affidavits on the other side which are deceptive, and calculated to mislead the Court, such additional expense will be allowed against such adverse party. *The People v. Elmer*, 3 Paige, 86.

314. Where an appellant succeeded only as to part of the matters of the appeal, neither party was allowed any costs as against the other upon the appeal. *Stafford v. Mott*, 3 Paige, 100.

315. Where a person is made a party to a creditor's bill to enable the complainant to obtain a debt due from him to the complainant's judgment debtor, which debt such person is ready and willing to pay, he is entitled to his costs out of the fund. *Ibid.*

316. Where the wife of a lunatic petitioned for the removal of the committee, upon the ground of fraud and mismanagement in the execution of his trust, and upon the hearing it appeared that the committee had faithfully discharged his duty, and no probable cause for the application was shown, the wife was denied costs out of the estate; but the costs of the committee were allowed. *In the matter of Lytle*, 3 Paige, 251.

317. Where the complainant was in *forma pauperis*, the costs upon overruling the defendant's plea, on the ground of its informality, are not to be paid to the complainant if the defendant finally succeeds in his defence. *Bolton v. Gardner*, 3 Paige, 273.

318. Under the provisions of the revised statutes, the Court of Chancery may award costs against a party to any proceeding in equity, whether such proceeding was originally instituted in such Court, or brought there by appeal. *In the matter of Hemiup*, 3 Paige, 305.

319. Where defendants are brought before the Court as merely formal but necessary parties, and without any fault on their part, they may sometimes be entitled to their costs against the complainant; and he will, in that case, have his remedy over for those costs against the other defendants who have rendered the litigation necessary. *The American Ins. Company v. Carter*, 2 Paige, 334.

320. Where the benefit of a plea is saved to the defendant until the hearing, neither party recovers costs on the argument of the plea. *Hewitt v. Corning*, 3 Paige, 566.

321. The guardian *ad litem* of an infant defendant can only be allowed his taxable costs, against a fund belonging to other parties in the cause. *Union Insurance Company v. Van Rensselaer*, 4 Paige, 86.

322. It must be a very special case to authorize the Court to allow any thing beyond the taxable costs of the guardian *ad litem*, to be charged upon a fund belonging to an infant. *Ibid.*

323. Where an officer of a corporation is necessarily made a defendant, for the purposes of discovery merely, if the complainant is compelled to pay the costs of such discovery, he may have a decree over against the other parties for such costs. *Fulton Bank v. N. Y. and Sharon Canal Company*, 4 Paige, 127.

324. Where there was a joint appeal by two defendants, and the decree was reversed as to one, and affirmed as to the other, no costs were given in favour of either party on the appeal. *Ibid.*

325. A party successfully opposing a motion, if nothing is said as to costs upon the decision of the motion, is entitled to his costs of opposing such motion, as costs in the cause. *Wilkinson v. Henshaw*, 4 Paige, 257.

326. Where the testator has expressed his intention so ambiguously as to create a difficulty, which makes it necessary to come into the Court of Chancery to obtain a construction of his will, or to remove the difficulty, the costs of the litigation are usually directed to be paid out of the estate; and the general residue is the primary fund for the payment of such costs. *Smith v. Smith*, 4 Paige, 271.

327. When impertinent matter in an answer, which should all have been embraced in one exception, is made the foundation of several exceptions to detached parts thereof, the Court may refuse to give the costs of the reference to the complainant, although the major part of his exceptions to the answer are finally allowed. *Franklin v. Keeler*, 4 Paige, 382.

328. To entitle the exceptant to the costs of the reference on exceptions, he must succeed finally in obtaining the allowance of a major part, in number, of the exceptions referred; and each exception constituting a part of such majority must be wholly sustained. *Bulwid v. Miller*, 4 Paige, 473.

329. As a general rule, a party coming into a Court of Equity to redeem pays costs to the defendant, although he obtains the relief prayed for; yet if the defendant improperly resists the claim of the complainant to redeem, he will be refused his costs, and may be compelled to pay costs to the adverse party, in the discretion of the Court. *Vroom v. Ditmas*, 4 Paige, 527.

330. If a party suing in *forma pauperis* amends his bill after answer, under a common order, it must be upon payment of costs, as in ordinary suits; and if he has a meritorious claim to amend without costs, he must apply to the Court by special motion upon affidavit and notice to the adverse party. *Richardson v. Richardson*, 5 Paige, 58.

331. A party suing as a poor person is chargeable with the costs of setting aside his proceedings for irregularity, or of a contempt, or of expunging impertinent or scandalous matter, in the same manner as other suitors. *Ibid.*

332. Where part of the exceptions are allowed, the rest disallowed, the costs to which the

respective parties are entitled may be offset, or a proportionate share of the costs only may be allowed to the party who succeeds as to a majority of the exceptions. *Norton v. Woods*, 5 Paige, 260.

333. Where two or more defendants bring a joint appeal, and fail as to the main object of such appeal, they will be charged with costs, although one of them succeeds in obtaining a modification of the decree in respect to his own interests merely. *Atlantic Ins. Co. v. Sorrow*, 5 Paige, 285.

334. Costs not allowed for setting aside a proceeding for a mere technical irregularity, and when the practice of Court on the subject was unsettled. *Hoffman v. Skinner*, 5 Paige, 526.

335. Where a party in the suit has no interest in a question which is brought up on an appeal by another party, the party who has no interest in the question can neither be charged with nor allowed costs upon such appeal. *Bulkley v. Van Wyck*, 5 Paige, 536.

336. Where a bill was filed by a general and specific legatee, and by a post testamentary child, against the executors and the residuary legatees for the purpose of obtaining the direction of the Court as to the manner in which the distributive share of the post testamentary child in the personal estate of the testator was to be apportioned among the several legatees, the Court directed the costs of the suit to be borne rateably by the several parties interested in such personal estate. *Mitchell v. Blain*, 5 Paige, 688.

B. Taxation.

337. On a motion to the Court, if the party asks in his notice for greater or other relief than that to which he is entitled, although his motion be granted in part, he will not be allowed costs. *Bates v. Loomis*, 5 Wend. 78.

338. On taxation of costs no allowance is to be made for copies of pleadings or proceedings, except where they are actually furnished by order of the Court, or in the usual course of practice. *Richards v. Barlow and others*, 1 Paige, 323.

339. Copies of pleadings for the master are not allowed on a reference of exceptions to an answer, unless in cases of difficulty, where copies are required by him, and are actually made for that purpose. *Ibid.*

340. On exceptions to a master's report on exceptions, the solicitor is only entitled to the usual fee for attendance on special motions. *Ibid.*

341. Only one solicitor's and counsel fee can be charged on a reference; and only one fee can be allowed to the master, except by the special order of the Court. *Ibid.*

342. On a reference of exceptions to an answer, no objections are taken to the draft of the master's report, and copies of such draft for the parties are not taxable. *Ibid.*

343. Where leave was granted to traverse an inquisition against an habitual drunkard, and the finding of the inquest was confirmed, the costs to be charged on the estate of the drunkard cannot exceed twenty-five dollars; out of which sum the expenses of the committee are first to

be paid. *In the matter of Van Cott*, 1 Paige, 489.

344. If an issue is awarded for the benefit of a third person, and it is found against him, no costs will be allowed to the solicitor who prosecutes the traverse. *Ibid.*

345. Where a witness on his cross examination is interrogated as to matters which are irrelevant and improper, and which cannot benefit either party in the suit, the party at whose request such cross examination was had is chargeable with the examiner's fees for drawing, engrossing, and copying such part of the testimony as was useless or irrelevant. *Stafford v. Bryen*, 2 Paige, 45.

346. If the depositions of witnesses are unnecessarily prolix or irrelevant, although the solicitor at whose request they were taken down may be answerable to the examiner for his fees, he cannot be allowed therefor on the taxation of costs, even as against his own client. *Ibid.*

347. Where there is a general decree for costs against the complainant, he is not chargeable with the extra expense which has been produced by the neglect of the defendant to put in a perfect answer at first. *Ibid.*

348. But the draft and copies of so many folios of the further answer as would have been necessary to make the first answer perfect; or as have been made necessary by subsequent amendments of the bill, are properly taxable. *Ibid.*

349. Where a party obtains a general decree for costs in the cause, he is entitled to have taxed the costs of a successful interlocutory motion, if no direction as to costs was given at the time, unless such application was granted as a mere matter of favour, or to relieve the party from the consequences of his own default. *Ibid.*

350. The party opposing a motion unsuccessfully is not entitled to the costs of opposing, as costs in the cause. *Ibid.*

351. The party making an unsuccessful motion is not entitled to the costs of such motion; but the party opposing the same is entitled to his costs, as costs in the cause, unless a different direction is given at the time. *Ibid.*

352. Only two copies of a bill or answer, in addition to the engrossed copy to file, are to be allowed on a taxation. *Ibid.*

353. The *jurat* should be drawn up by the solicitor in the form prescribed by the 18th rule, and charged as part of the folio contained in the bill or answer, and not as a separate affidavit. *Ibid.*

354. Under the fee bill in the revised statutes, the solicitor is not entitled to charge by the folio for the draft or copies of his bill of costs. *Ibid.*

355. Bills of costs which are to be annexed to the decree on enrolment must be fairly engrossed, without unnecessary erasures or interlineations, before they are certified by the taxing officer; and if they are not in that situation, he should direct them to be re-engrossed. *Ibid.*

356. Where amendments are made to a bill, and the solicitor unnecessarily makes a re-engrossment or a full copy of the original matter, he will not be entitled to an allowance for the same in the taxation of his costs. *The Bennington Iron Company v. Campbell*, 2 Paige, 159.

357. On an appeal to the Court of Errors, a counsel fee on the motion to file the petition of appeal is not taxable, the order to file the petition being a common order; and the solicitor is only entitled to fifty cents for attending to have the same entered. *Fulton Bank v. Beach*, 2 Paige, 185.

358. The solicitor is to be allowed for the draft of original matter to be inserted in a case for the Court of Errors on appeal; and for two written copies of the same, including the matter not original. *Ibid.*

359. No allowance can be taxed for abbreviating the case; for if properly made, it is of itself an abbreviation of the pleadings and proof, &c. *Ibid.*

360. The points for the Court of Errors constitute a part of the case, and should be estimated as a part thereof upon the taxation. *Ibid.*

361. The signature of only one counsel is necessary to a petition of appeal, or to the answer to the same, and only one counsel fee is taxable for that service. *Ibid.*

362. Where there are separate appeals entered at different times, in relation to two distinct orders of different characters, the solicitor is entitled to an allowance for all the services necessarily rendered on each appeal, until the proceedings upon the appeal are consolidated by the Court. *Ibid.*

363. The proceedings on the *remittitur* to make the decree of the Court of Errors a decree of the Court below, and the enrolment of the decree, and the execution for the costs awarded by the Appellate Court, are a necessary part of the costs on the appeal, and are to be taxed in the same bill with the other costs, and annexed to the enrolment of the decree of the Court of Errors. *Ibid.*

364. Only one counsel or solicitor's fee is to be allowed for the whole decree or order; and it is improper to tax separate fees for each distinct point or special direction contained therein. *Ibid.*

365. A retaining fee is not allowed to a solicitor and counsel upon opposing a motion founded upon a petition, for instructions to a receiver in the discharge of his duty. *Ex parte Johnson*, 2 Paige, 292.

366. Upon a denial of such an application, the like costs must be taxed as are allowed for resisting a special motion. *Ibid.*

367. Upon application for commissions of lunacy, and other proceedings of a like character, if a solicitor is actually employed to conduct the proceedings, he is entitled to a retaining fee. *Ibid.*

368. But a retaining fee to counsel is only allowed where counsel is actually employed in a cause or suit strictly so called. *Ibid.*

369. A charge for an engrossment, or copies of an order or decree to be entered, is improper, as it is to be entered from the draft after it is settled by the Court or register. *Doe v. Green*, 2 Paige, 317.

370. The defendant cannot charge for a copy of a decree for the adverse party, unless in cases where the service of such decree on him is necessary. *Ibid.*

371. Service of a summons upon the defendant to attend the master on the reference is all that is requisite, and an additional notice for that purpose cannot be allowed. *Ibid.*

372. If the name of a counsellor other than the solicitor in the cause is signed to the pleadings, the charge for perusing and amending the same should be allowed on taxation, unless the party objecting shows affirmatively that the name of the counsel was improperly placed there. *Ibid.*

373. No allowance can be made on taxation, as between party and party, for the personal expenses of the parties or their witnesses, or of the officers of the Court, as disbursements in a cause. *Ibid.*

374. Where a specific allowance is provided in the fee bill for the performance of any service by an officer of the Court, no additional charge, by way of disbursement in the performance of such service, can be taxed in favour of such officer or any other person. *Ibid.*

375. A second fee is allowed to counsel for perusing and amending a supplemental bill, or bill of revivor, when such bill becomes necessary; but not for perusing and signing an amended bill. *Ibid.*

376. Where an amended bill was filed by the agreement of the parties, embracing all the facts in the case, and as a substitute for the previous bill, and answers to save expense, the complainant on taxation was allowed for counsel perusing and amending the same, and for the usual engrossments and copies. *Ibid.*

377. On an *ex parte* hearing, upon a bill taken as confessed, the solicitor is not entitled to an attendance fee. But where there is an actual attendance and argument with the counsel of the adverse party, to settle important questions arising on the bill, an attendance fee for the solicitor and a full counsel fee are taxable. *Ibid.*

378. The statement of the nature and object of the suit, to be filed in the county clerk's office, is not a notice within the meaning of the fee bill; and is to be taxed by the folio for the draft and engrossment. *Ibid.*

379. Notices served on the defendants in mortgage cases, under the one hundred and thirty-third rule, are specifically provided for in the fee bill, and only thirty-seven and a half cents can be taxed for each notice, including copy and service. *Ibid.*

380. Where the injunction is allowed by the chancellor, it is an act of the Court, and the charge for filing the certificate of the allowance is not taxable. *Ibid.*

381. Notice to the register to set down the cause is not a proper charge under the present practice. The notice of the issue is the only one now taxable. *Ibid.*

382. No charge for notices which are not required by the rules or practice of the Court can be allowed on taxation. *Ibid.*

383. Notice to the register to enter a decree or order is not a proper charge, as the solicitor is allowed for attending in person. *Ibid.*

384. If a party insists upon items in his bill which are not legally taxable, he will be charged with the expense of an appeal from the taxation

as to such items. But if the adverse party appears to the Court from the taxation of other items also which were properly allowed, each party may be left to bear his own, on the application for a retaxation. *Ibid.*

385. Only the abbreviations of the pleadings and depositions in a cause for the use of counsel are taxable, and not full copies of such pleadings and depositions. *Ducator v. La Forge*, 2 Page, 411.

386. On an application for a retaxation, where the pleadings were before the taxing officer, the Court will presume the number of folios were correctly taxed unless there is an affidavit of a mistake in that respect. *Rogers v. Rogers*, 2 Page, 458.

387. Where postage or other disbursements are charged, each item of such disbursements, and the occasion and circumstances of the expenditure, should be particularly specified in the bill of costs and sworn to. *Ibid.*

388. It is the duty of the taxing officer to see that the several provisions of the revised statutes relative to the taxation of costs are compared with, whether the taxation is opposed or not. *Ibid.*

389. If the taxing officer on the taxation of a bill of costs has doubts as to the correctness of a charge, he should reject it. *Ibid.*

390. It is the duty of a party who is dissatisfied with the taxation as to particular items in the bill of costs, to bring the question as to such items directly before the Court, by a motion on his part, although the adverse party applies for a retaxation as to other items. The petition or other papers on which an application for a retaxation is founded should distinctly refer to, or point out the particular items or parts of the bill of costs as to which a retaxation is sought. *Ibid.*

391. Copies of the opinion of the Court furnished to the master on a reference are not taxable. *Ibid.*

392. The solicitor is entitled to charge for a notice of the taxation of his costs, in addition to the specific allowance in the fee bill for a copy of the bill of costs, to be delivered to the adverse party with such notice. *Ibid.*

393. The solicitor cannot be allowed for an engrossed copy of charges or discharges before the master; nor for engrossing objections to the draft of the master's report. The allowance for engrossed copies to file applies only to copies of such papers as are to be filed in the register's or clerk's office. *Ibid.*

394. A charge for instructions as to the manner of serving the subpoenas on a defendant is not taxable, and no allowance for serving the subpoenas can be made by way of disbursement beyond the sum fixed by the fee bill. *Ibid.*

395. Where a motion is made or opposed by counsel other than the solicitor on record, the attendance fee of the solicitor is taxable, although he did not attend in person; but where the solicitor makes or opposes the motion himself, and is allowed therefor as counsel, he cannot charge an attendance fee as solicitor also. *Ibid.*

396. No allowance can be made to the soli-

citor for attending the hearing of a calendar cause, unless he attends in person. *Ibid.*

397. The charge for perusing, amending, and signing pleadings can only be allowed when the service is actually performed by counsel other than the solicitor in the cause; and where the name of the solicitor alone is signed to the engrossed pleadings as counsel, the presumption is that no other counsel perused and signed the drafts. *Ibid.*

398. The charge for perusing and settling a decree applies to a final decree only, and it cannot be allowed on a mere decretal order. *Ibid.*

399. But an affidavit of service of a notice of the examination of a witness is not taxable, unless it becomes necessary to make and use such an affidavit on some special application to the Court. *Ibid.*

400. Where the examination of several witnesses is noticed for the same time, only one notice is necessary; and a notice of the examination of a witness for the examiner is not taxable. *Ibid.*

401. Where the whole travel of a witness in going and returning is less than fifteen miles, no allowance for travel can be made, unless it appears that he was obliged to come so early, or was detained so late, that he could not come and return on the day of his attendance. If the whole distance both ways is over fifteen miles and under thirty, one day should be allowed for travel; and if over fifteen miles each way, one day should be allowed for the witness to come, and one to return, independent of the time he is detained for examination. *Ibid.*

402. Charges for disbursements to witnesses, beyond the amount of their *per diem* allowance, are not taxable against the adverse party. *Ibid.*

403. Where travelling fees are claimed, the affidavit should state the probable distance travelled by each witness. *Ibid.*

404. Where depositions are drawn by the solicitor under a stipulation between the parties, no higher charge can be allowed for the draft or engrossment thereof than if the service had been performed by the proper officer of the Court. *Ibid.*

405. A copy of the pleadings and depositions for the use of counsel is not taxable against the adverse party; the abbreviation of the pleadings and depositions for the use of counsel is all that can be allowed. *Ibid.*

406. If counsel other than the solicitor is actually employed in the cause, retaining fees both for solicitor and counsel are taxable, although the name of the solicitor only is subscribed to the pleadings as counsel. *Ibid.*

407. Instructions to search for judgments, &c., are only taxable in mortgage cases and others of that description, where, by the practice of the Court, it is necessary to make all the encumbrancers parties to the suit. *Ibid.*

408. Where deeds and other writings or parts thereof are incorporated into pleadings, they cannot be charged as a part of the draft of such proceedings. *Ibid.*

409. A copy of the *subpoena* to annex to the affidavit of service is unnecessary, and not taxable; the original *subpoena* should be annexed. *Ibid.*

410. Three folios are allowed for the draft and engrossments of *subpenas* for witnesses, and two for the draft and copies of *subpena* tickets. *Ibid.*

411. Twelve and a half cents is the proper allowance for serving a *subpena* on a witness in Chancery. *Ibid.*

412. A written request to the register to enter an order is in the nature of a *precipe*, and cannot be taxed under the revised statutes. *Ibid.*

413. Where a witness is directed to be examined on written interrogatories, an engrossed copy of the interrogatories to be filed with the testimony is taxable. *Ibid.*

414. It is not necessary, where the copy of a pleading is served on the adverse party, to give him notice that it is a copy; and no allowance can be made on taxation for such notice. *Ibid.*

415. All charges for notices not required by the rules and practices of the Court should be rejected, by the taxing officers, as useless and unnecessary services. *Ibid.*

416. An affidavit of serving a notice of the order to answer is taxable, if actually made, although it is afterwards rendered unnecessary by the putting in of the answer. *Ibid.*

417. The charges for attending the master to obtain his signature to a summons, and for attending to obtain his report after it has been completed, are not provided for by the fee bill, and are not taxable. *Ibid.*

418. No charge for counsel attending prepared for argument, where the cause is not reached on the calendar, can be allowed. *Ibid.*

419. The defendant in an attachment cannot be charged for proceeding against the sheriff to procure a return of the attachment. *The People v. Elmer*, 3 Paige, 85.

420. Upon a proceeding by attachment to compel an answer, retaining fees for solicitor and counsel cannot be taxed. *Ibid.*

421. Where a solicitor refuses to waive a default, or other technical advantage which he has obtained over the adverse party, upon fair and reasonable terms, and thus compels him to apply to the Court for relief, such solicitor will not be allowed costs for opposing the application. *Gaul v. Miller*, 3 Paige, 192.

422. Upon an order for the payment of costs, prospective costs can only be taxed for a copy of the order and of the taxed bill, to be served on the adverse party at the time of the demand of payment. *Chapman v. Munson*, 3 Paige, 347.

423. If costs are not paid within the time limited by the order, the party entitled to the costs may make an *ex parte* application for an order to commit the delinquent to prison; and all the costs subsequent to the demand can then be allowed, and inserted in the mittimus. *Ibid.*

424. A vice-chancellor is authorized to tax the costs in a suit or proceeding before any other vice-chancellor. *Ibid.*

425. Questions as to the regularity of the taxation should be brought before the vice-chancellor in whose circuit the suit is pending, and not before the chancellor. *Ibid.*

426. The rule of the Court allowing an application to the chancellor for a retaxation of costs in a suit pending before a vice-chancellor,

applies only to those cases where the amount of the taxable costs is in controversy, and not to a motion for a retaxation, upon the ground of irregularity in the proceedings of the adverse party. *Ibid.*

427. Where a party is entitled to an order of course, he cannot charge the adverse party with the extra expense of a special application to the Court for such order. *Ibid.*

428. In a proceeding by petition for an attachment against a person who is not a party to the suit, the solicitor for such person is entitled to a retaining fee, if the petition is discussed with costs. But a retaining fee cannot be taxed in his favour, against the adverse party, upon a mere collateral proceeding on such petition; as upon a reference for scandal or impertinence. *Ibid.*

429. Upon a petition for the sale of infants' estates, if several infants are included in the same application, or if several parcels of land are sold at different times, the solicitor for the petitioners is entitled to an allowance for the extra expense, notwithstanding the limitation of costs by the 161st rule to \$25. *In the matter of Morrell*, 4 Paige, 44.

430. Upon an appeal from a vice-chancellor to the chancellor, retaining fees for solicitor and counsel are proper charges. *Lampman v. Hand*, 4 Paige, 120.

431. So also is a charge for abbreviating the pleadings and proofs for the use of counsel on the appeal. *Ibid.*

432. But a charge against the adverse party for making copies of the pleading and proofs for the use of counsel will not be allowed. *Ibid.*

433. Where an injunction is allowed at chambers by a vice-chancellor acting in his character of injunction master, the complainant is not entitled to solicitor's and counsel fees as on a special motion for an injunction, although the suit is pending before such vice-chancellor. *Wilkinson v. Henshaw*, 4 Paige, 267.

434. A party is entitled to an allowance, on taxation, for drawing instructions for the examination of the witnesses for the adverse party, if such service has been actually performed. *Ibid.*

435. Upon special motions and petitions, if the papers in which the application is made or opposed are unnecessarily prolix or voluminous, costs will be refused to the party using such improper papers, although he otherwise might have been entitled to costs against the adverse party. *Seebor v. Hess*, 5 Paige, 86.

436. If the party applying for a retaxation of costs succeeds only as to part of the objections contained in the papers on which his application is founded, neither party will be entitled to costs on the motion. *Lloyd v. Brewster*, 5 Paige, 87.

437. When an order for further time to answer, under the 125th rule, is obtained as matter of necessity, and not for the accommodation or convenience of the defendant or his solicitor, the expense of obtaining such order is taxable as against the adverse party. *Ibid.*

438. If different defendants appear by the same solicitor, and there are no conflicting

as to such items. But if the adverse party appeals to the Court from the taxation of other items also which were properly allowed, each party may be left to bear his own, on the application for a retaxation. *Ibid.*

385. Only the abbreviations of the pleadings and depositions in a cause for the use of counsel are taxable, and not full copies of such pleadings and depositions. *Decalers v. La Forge*, 2 Paige, 411.

386. On an application for a retaxation, where the pleadings were before the taxing officer, the Court will presume the number of folios were correctly taxed unless there is an affidavit of a mistake in that respect. *Rogers v. Rogers*, 2 Paige, 458.

387. Where postages or other disbursements are charged, each item of such disbursements, and the occasion and circumstances of the expenditure, should be particularly specified in the bill of costs and sworn to. *Ibid.*

388. It is the duty of the taxing officer to see that the several provisions of the revised statutes relative to the taxation of costs are complied with, whether the taxation is opposed or not. *Ibid.*

389. If the taxing officer on the taxation of a bill of costs has doubts as to the correctness of a charge, he should reject it. *Ibid.*

390. It is the duty of a party who is dissatisfied with the taxation as to particular items in the bill of costs, to bring the question as to such items directly before the Court, by a motion on his part, although the adverse party applies for a retaxation as to other items. The petition or other papers on which an application for a retaxation is founded should distinctly refer to, or point out the particular items or parts of the bill of costs as to which a retaxation is sought. *Ibid.*

391. Copies of the opinion of the Court furnished to the master on a reference are not taxable. *Ibid.*

392. The solicitor is entitled to charge for a notice of the taxation of his costs, in addition to the specific allowance in the fee bill for a copy of the bill of costs, to be delivered to the adverse party with such notice. *Ibid.*

393. The solicitor cannot be allowed for an engrossed copy of charges or discharges before the master; nor for engrossing objections to the draft of the master's report. The allowance for engrossed copies to file applies only to copies of such papers as are to be filed in the register's or clerk's office. *Ibid.*

394. A charge for instructions as to the manner of serving the *subpoena* on a defendant is not taxable, and no allowance for serving the *subpoena* can be made by way of disbursement beyond the sum fixed by the fee bill. *Ibid.*

395. Where a motion is made or opposed by counsel other than the solicitor on record, the attendance fee of the solicitor is taxable, although he did not attend in person; but where the solicitor makes or opposes the motion himself, and is allowed therefor as counsel, he cannot charge an attendance fee as solicitor also. *Ibid.*

396. No allowance can be made to the soli-

citor for attending the hearing of a calendar cause, unless he attends in person. *Ibid.*

397. The charge for perusing, amending, and signing pleadings can only be allowed when the service is actually performed by counsel other than the solicitor in the cause; and where the name of the solicitor alone is signed to the engrossed pleadings as counsel, the presumption is that no other counsel perused and signed the drafts. *Ibid.*

398. The charge for perusing and settling a decree applies to a final decree only, and it cannot be allowed on a mere decretal order. *Ibid.*

399. But an affidavit of service of a notice of the examination of a witness is not taxable, unless it becomes necessary to make and use such an affidavit on some special application to the Court. *Ibid.*

400. Where the examination of several witnesses is noticed for the same time, only one notice is necessary; and a notice of the examination of a witness for the examiner is not taxable. *Ibid.*

401. Where the whole travel of a witness is going and returning is less than fifteen miles, no allowance for travel can be made, unless it appears that he was obliged to come so early, or was detained so late, that he could not come and return on the day of his attendance. If the whole distance both ways is over fifteen miles and under thirty, one day should be allowed for travel; and if over fifteen miles each way, one day should be allowed for the witness to come, and one to return, independent of the time he is detained for examination. *Ibid.*

402. Charges for disbursements to witnesses, beyond the amount of their *per diem* allowance, are not taxable against the adverse party. *Ibid.*

403. Where travelling fees are claimed, the affidavit should state the probable distance travelled by each witness. *Ibid.*

404. Where depositions are drawn by the solicitor under a stipulation between the parties, no higher charge can be allowed for the draft or engrossment thereof than if the service had been performed by the proper officer of the Court. *Ibid.*

405. A copy of the pleadings and depositions for the use of counsel is not taxable against the adverse party; the abbreviation of the pleadings and depositions for the use of counsel is all that can be allowed. *Ibid.*

406. If counsel other than the solicitor is actually employed in the cause, retaining fees both for solicitor and counsel are taxable, although the name of the solicitor only is subscribed to the pleadings as counsel. *Ibid.*

407. Instructions to search for judgments, &c., are only taxable in mortgage cases and others of that description, where, by the practice of the Court, it is necessary to make all the encumbrancers parties to the suit. *Ibid.*

408. Where deeds and other writings or parts thereof are incorporated into pleadings, they cannot be charged as a part of the draft of such proceedings. *Ibid.*

409. A copy of the *subpoena* to annex to the affidavit of service is unnecessary, and not taxable; the original *subpoena* should be annexed. *Ibid.*

410. Three folios are allowed for the draft and engrossments of *subpoenas* for witnesses, and two for the draft and copies of *subpoena* tickets. *Ibid.*

411. Twelve and a half cents is the proper allowance for serving a *subpoena* on a witness in Chancery. *Ibid.*

412. A written request to the register to enter an order is in the nature of a *precipe*, and cannot be taxed under the revised statutes. *Ibid.*

413. Where a witness is directed to be examined on written interrogatories, an engrossed copy of the interrogatories to be filed with the testimony is taxable. *Ibid.*

414. It is not necessary, where the copy of a pleading is served on the adverse party, to give him notice that it is a copy; and no allowance can be made on taxation for such notice. *Ibid.*

415. All charges for notices not required by the rules and practices of the Court should be rejected, by the taxing officers, as useless and unnecessary services. *Ibid.*

416. An affidavit of serving a notice of the order to answer is taxable, if actually made, although it is afterwards rendered unnecessary by the putting in of the answer. *Ibid.*

417. The charges for attending the master to obtain his signature to a summons, and for attending to obtain his report after it has been completed, are not provided for by the fee bill, and are not taxable. *Ibid.*

418. No charge for counsel attending prepared for argument, where the cause is not reached on the calendar, can be allowed. *Ibid.*

419. The defendant in an attachment cannot be charged for proceeding against the sheriff to procure a return of the attachment. *The People v. Elmer*, 3 Paige, 85.

420. Upon a proceeding by attachment to compel an answer, retaining fees for solicitor and counsel cannot be taxed. *Ibid.*

421. Where a solicitor refuses to waive a default, or other technical advantage which he has obtained over the adverse party, upon fair and reasonable terms, and thus compels him to apply to the Court for relief, such solicitor will not be allowed costs for opposing the application. *Gaut v. Miller*, 3 Paige, 192.

422. Upon an order for the payment of costs, prospective costs can only be taxed for a copy of the order and of the taxed bill, to be served on the adverse party at the time of the demand of payment. *Chapman v. Munson*, 3 Paige, 347.

423. If costs are not paid within the time limited by the order, the party entitled to the costs may make an *ex parte* application for an order to commit the delinquent to prison; and all the costs subsequent to the demand can then be allowed, and inserted in the mittimus. *Ibid.*

424. A vice-chancellor is authorized to tax the costs in a suit or proceeding before any other vice-chancellor. *Ibid.*

425. Questions as to the regularity of the taxation should be brought before the vice-chancellor in whose circuit the suit is pending, and not before the chancellor. *Ibid.*

426. The rule of the Court allowing an application to the chancellor for a retaxation of costs in a suit pending before a vice-chancellor,

applies only to those cases where the amount of the taxable costs is in controversy, and not to a motion for a retaxation, upon the ground of irregularity in the proceedings of the adverse party. *Ibid.*

427. Where a party is entitled to an order of course, he cannot charge the adverse party with the extra expense of a special application to the Court for such order. *Ibid.*

428. In a proceeding by petition for an attachment against a person who is not a party to the suit, the solicitor for such person is entitled to a retaining fee, if the petition is discussed with costs. But a retaining fee cannot be taxed in his favour, against the adverse party, upon a mere collateral proceeding on such petition; as upon a reference for scandal or impertinence. *Ibid.*

429. Upon a petition for the sale of infants' estates, if several infants are included in the same application, or if several parcels of land are sold at different times, the solicitor for the petitioners is entitled to an allowance for the extra expense, notwithstanding the limitation of costs by the 161st rule to \$25. *In the matter of Morrell*, 4 Paige, 44.

430. Upon an appeal from a vice-chancellor to the chancellor, retaining fees for solicitor and counsel are proper charges. *Lampman v. Hand*, 4 Paige, 120.

431. So also is a charge for abbreviating the pleadings and proofs for the use of counsel on the appeal. *Ibid.*

432. But a charge against the adverse party for making copies of the pleading and proofs for the use of counsel will not be allowed. *Ibid.*

433. Where an injunction is allowed at chambers by a vice-chancellor acting in his character of injunction master, the complainant is not entitled to solicitor's and counsel fees as on a special motion for an injunction, although the suit is pending before such vice-chancellor. *Wilkinson v. Henshaw*, 4 Paige, 267.

434. A party is entitled to an allowance, on taxation, for drawing instructions for the examination of the witnesses for the adverse party, if such service has been actually performed. *Ibid.*

435. Upon special motions and petitions, if the papers in which the application is made or opposed are unnecessarily prolix or voluminous, costs will be refused to the party using such improper papers, although he otherwise might have been entitled to costs against the adverse party. *Seedor v. Hess*, 5 Paige, 85.

436. If the party applying for a retaxation of costs succeeds only as to part of the objections contained in the papers on which his application is founded, neither party will be entitled to costs on the motion. *Lloyd v. Brewster*, 5 Paige, 87.

437. When an order for further time to answer, under the 125th rule, is obtained as matter of necessity, and not for the accommodation or convenience of the defendant or his solicitor, the expense of obtaining such order is taxable as against the adverse party. *Ibid.*

438. If different defendants appear by the same solicitor, and there are no conflicting

rights or disputed facts between them to render separate answers necessary, the solicitor will only be allowed on taxation for one answer. *Ibid.*

439. Where the answers of several defendants refer to the same schedule, only one engrossment of the schedule is necessary if the defendants appear by the same solicitor, and only one copy for the defendant's solicitor and one copy for the complainant should be allowed on taxation. *Ibid.*

440. On an appeal from an interlocutory order of a vice-chancellor, retaining fees for solicitor and counsel are taxable, but not a charge for an abbreviation of the pleadings, depositions, and exhibits for the use of counsel. These last charges can only be allowed when the cause upon the appeal is headed as a calendar cause. *Dennison v. Fischer*, 5 Paige, 61.

441. A charge for abbreviating the schedules annexed to a bill or answer is not taxable. *Ibid.*

442. The only disbursements which are properly taxable against the adverse party, under the provision in the fee bill on that subject, are disbursements by the solicitor for postage, for exemplifications to be used in the suit; for necessary searches in the public offices for the publication of notices, when required by law or the practice of the court; and other disbursements of like nature. *Hovey v. Hovey*, 5 Paige, 551.

443. The complainant's solicitor is not entitled to have taxed against the adverse party the expense of ascertaining the residences of the defendants, as a necessary disbursement of the solicitor in the cause. *Ibid.*

444. A vice-chancellor in the taxation of costs acts merely in his ministerial capacity as a taxing officer of the Court, and an application to the chancellor to review his decision as such taxing officer, under the 129th rule of this Court, is not an appeal from an order of a vice-chancellor or from a proceeding in the nature of an order; it may therefore be made after the time allowed by law for bringing an appeal. *Lloyd v. Brewster*, 5 Paige, 87.

445. The order of the chancellor upon an application for retaxation of costs in a cause pending before a vice-chancellor may, when necessary, be transmitted to, and entered with the clerk of such vice-chancellor. *Ibid.*

446. The last clause of the 130th rule does not give the taxing officer an absolute and uncontrollable discretion in the taxation of costs; and if he comes to an erroneous conclusion as to the necessity or propriety of putting in separate answers, &c., his decision may be reviewed by the Court upon an application for a retaxation. *Ibid.*

447. The complainant in a judgment creditor's bill is not entitled to extra costs and counsel fees, to be paid out of the estate of the debtor in the hands of a receiver appointed by the Court. *Ryckman v. Perkins*, 5 Paige, 543.

448. When the interests of the parties to a suit are adverse, nothing beyond legal taxable costs can be allowed by one party as against another. Neither does the Court allow extra counsel fees to be paid to the complainant's

counsel out of a fund in Court belonging to a defendant, except in those cases where the counsel has been employed to recover or create such fund for the joint benefit of both parties. *Mitchell v. Blain*, 5 Paige, 588.

(c) *Security for costs.*

449. Where the person who prosecutes a suit in the name of an infant, as his next friend, is insolvent, he will be compelled on the application of the defendant to give security for costs. *Fulton et al. v. Roosevelt*, 1 Paige, 178.

450. Where the complainants became insolvent pending the suit, and assigned all their interest therein to a third person, the assigned was not permitted to proceed with the suit in their names without giving security for costs. *Massey v. Gillelan*, 1 Paige, 644.

451. Where the complainant has actually removed from the state with his family, and changed his residence, the defendant is entitled to security for costs, although there is a probability that the complainant may return at some future day. *Gilbert v. Gilbert*, 2 Paige, 603.

452. Upon a bill filed by the wife against her husband for a separation or limited divorce, if the next friend of the wife who prosecutes the suit is irresponsible or insolvent, all proceedings may be stayed until security for costs is given, or a responsible person is substituted in his place; and if such security is not given, or substitution made within a reasonable time, the bill will be dismissed. *Lawrence v. Lawrence*, 3 Paige, 267.

453. An appellant is not allowed to prosecute an appeal as a poor person, but he must give security for costs; and therefore, if he succeeds on the appeal, he is entitled to draw costs on the appeal, although he sued in *forma pauperis* in the Court below. *Bolton v. Gardner*, 3 Paige, 273.

454. The next friend of a wife, in a suit against her husband for a separation, should be worth at least \$280, over and above his debts. *Robertson v. Robertson*, 3 Paige, 387.

455. Although the next friend of the complainant is irresponsible, the defendant is not entitled to have the bill dismissed in the first instance; but the proceedings on the part of the complainant will be stayed until sufficient security for costs is given, or a responsible person is substituted as the next friend. *Ibid.*

XII. DEBTOR AND CREDITOR.

- A. (a) *When and how equity interferes in favour of creditors; (b) And of frauds against them.*
- B. *Trusts and assignments for the benefit of creditors, and agreements between debtor and creditor.*
- C. *Of the order and manner in which debts should be paid, and different liens enforced; of preferences between creditors, and the distribution of assets between them.*
- D. *Insolvent debtors; their discharge under the statute.*
- F. *Debtors absent or absconding.*

A. (a) *When and how equity interferes in favour of creditors.*

456. A creditor, having obtained judgment and procured his *fiery facias* to be returned unsatisfied, may file his bill against a debtor of the defendant to whom he has loaned moneys or sold goods on credit for the purpose of keeping the fund out of the reach of his (the defendant's) creditors; and Chancery will divert the payment from the defendant to his creditor so filing his bill. *Weed v. Pierce*, 9 Cow. 722.

457. If the creditors to whom the defendant loaned or sold are privy to the fraud, they may be compelled to pay immediately, though their debt was contracted on a credit; but if not privy to the fraud, they may be compelled to pay the debt to the execution creditor at the expiration of the credit. *Ibid.*

458. Where there are several judgment creditors of the defendant holding different judgments, they need not be made parties. *Ibid.*

459. The issuing and return of a *fiery facias* does not give a lien on the fund; but the filing of the bill, or doing some other decisive act, showing an intention to pursue the fund. *Ibid.*

460. A *justice's judgment*, when the amount is \$100 or upwards, is as well entitled to the aid of a Court of Equity as the judgment of a Court of Record, and that whether judgment is obtained upon *attachment* as otherwise. *Bailey v. Burton*, 8 Wend. 339.

461. Several judgment creditors, the joint amount of whose judgments is \$100 or upwards, may unite in a bill for discovery, and to remove impediments at law created by the fraud of their common debtor. *Ibid.*

462. To entitle a judgment creditor at law to the aid of a Court of Chancery, to obtain satisfaction of his judgment against the defendant, out of property not liable to be levied upon by execution, he must show not only an execution issued, but returned *nulla bona*, and no state of facts will excuse such return. *M'Elwain v. Willis*, 9 Wend. 548.

463. A bill in Chancery may be filed to remove a fraudulent or inequitable obstruction or embarrassment to the satisfaction of a judgment by execution; but the bill in such case must distinctly and specifically allege that there is real estate which is subject to the judgment, or personal property liable to the execution. *Ibid.*

464. After a party has proceeded to judgment and execution at law, he may, by the aid of a Court of Equity, reach property in the hands of a third person, which was not, in itself, liable to execution. *Candler v. Pettit*, 1 Paige, 168.

465. An injunction in such case will also be granted, to prevent the defendant from disposing of his property after an execution has been issued and returned unsatisfied. *Ibid.*

466. Where a debtor conceals his ownership of property to prevent its seizure from executions against him, and one of his judgment creditors aids him in this fraud, this Court will not interpose in favour of the debtor against such judgment creditor, but will leave the parties to their legal rights. *Manny, Administrator, v. Phillips*, 1 Paige, 479.

467. While the plaintiff has the body of the defendant in execution on a *ca. sa.*, his right to proceed against the property of the latter is suspended. He cannot, therefore, as long as the defendant is so in custody, file a bill in Chancery to reach his equitable estate. *Stillwell v. Van Eps*, 1 Paige, 615.

468. A creditor whose execution at law has been returned unsatisfied may file a bill to reach the equitable estate of the defendants, either in his own name or for his own benefit, or he may join with other creditors standing in the same situation with himself, or he may file a bill in behalf of himself and all others, being judgment creditors, whose executions have been returned unsatisfied, and who may choose to come in under the decree and contribute to the expenses of the suit. *Edmeston v. Lyde*, 1 Paige, 637.

469. A judgment creditor does not obtain a specific lien upon the equitable estate of the debtor by the return of an execution unsatisfied, but by the commencement of a suit in equity after the execution has been so returned. *Ibid.*

470. Every species of property belonging to a debtor may be reached, and applied to the satisfaction of his debts. *Ibid.*

471. Upon a judgment creditor's bill the complainant may reach the defendant's interest in the effects of a copartnership, after payment of the partnership debts, and satisfying all prior equities in favour of his copartners. *Eager v. Price*, 2 Paige, 334.

472. Where there is no allegation of fraud or collusion between the complainant and the sheriff, the return of an execution at law unsatisfied is sufficient to authorize the filing of a judgment creditor's bill, although the sheriff was told the defendants had some interest in the property, which might be sold on the execution. *Stoors v. Kelsey*, 2 Paige, 418.

473. Under a decree upon a creditor's bill for the creditors to come in and prove their demands, it is a matter of course to permit a creditor to come in and prove his debt at any time before the fund is actually distributed and paid out, upon his showing a sufficient excuse for not coming in before the master, and upon payment of all the costs produced by the delay. *Wilder v. Keeler*, 3 Paige, 164.

474. After the filing of the master's report, a creditor who has neglected to come in in time cannot have an *ex parte* order permitting him to go before the master and prove his debt; but he must give notice of his application to the solicitors of the creditors who have already proved their claims, and to the original parties in the suit. *Ibid.*

475. Neither a party to the suit nor a stranger will, after the filing of the master's report, be permitted to purchase a demand against the estate which the owner had neglected to establish and prove before the master, unless there is a surplus of the fund. *Ibid.*

476. Where a party contracts with his debtor for the payment of a sum in gross with interest, the debtor cannot compel him to receive a part of his debt, leaving the residue unpaid. *Lawrence v. Murray*, 3 Paige, 400.

477. But when the creditor attempts to en-

force a payment of his debt by a legal proceeding, the collection of a part, under the process of the Court, will be a payment *pro tanto*; and interest upon the part so received cannot afterwards be collected. *Ibid.*

478. Upon a creditor's bill filed after the return of an execution at law against the defendant unsatisfied, the complainant is entitled to a discovery as to a trust created for the defendant's benefit by a third person, so that the Court may see whether it is one upon which the complainant has an equitable claim for the satisfaction of his debt. *Le Roy v. Rogers*, 3 Paige, 234.

479. The exception in the last clause of the section of the revised statutes which relates to proceedings in Chancery upon creditor's bills, relates to the trusts held by third persons for the benefit of the debtor or his family; but it does not extend to property in the debtor's hands upon trust, and in which he has himself also a beneficial interest. *Ibid.*

480. Upon a creditor's bill, under the statute, which is a bill for a discovery in aid of the execution at law as well as for relief against property which cannot be sold on execution, the complainant is entitled to a discovery of all the real estate which the defendant owned, within the jurisdiction of the Court of law, at the time of the docketing of the judgment. *Ibid.*

481. The complainant is also entitled to a discovery of all the estate or property which the defendant had at the time of filing the bill, or of putting in his answer, although it is out of the jurisdiction of the Court of law; as it may be reached through the medium of the Court of Chancery, or otherwise, upon the discovery being made. *Ibid.*

482. If one creditor by judgment and another by a decree have acquired liens upon the property of their debtor, which entitle them to similar relief against an act of the defendant which is a common injury to both, and prevents them from enforcing their liens, they may join in a bill to obtain such relief. *Clarkson v. De Peyster*, 3 Paige, 320.

483. A creditor by decree in Chancery, upon the return of his execution unsatisfied, is entitled to the same relief against the equitable interests and property of his debtor as a creditor by judgment at law. *Ibid.*

484. To obtain an equitable lien upon property not subject to a levy and sale under an execution, the creditor must exhaust his remedy under his judgment or decree by the return of an execution unsatisfied. *Ibid.*

485. But to obtain relief against an encumbrance upon the real estate of the debtor, improperly or fraudulently created, it is not necessary for the judgment creditor to sue out an execution previous to filing his bill. *Ibid.*

486. Before a judgment creditor is authorized to file a creditor's bill, he must make a *bona fide* attempt to collect his debt by execution against the defendant. And where the judgment is against several persons, he must exhaust his remedy, by execution against all, before he can apply to the Court of Chancery for relief; unless it appears that the persons against whose property the remedy at law is

not exhausted stand in the situation of sureties, and that the bill is filed with their assent, and for their benefit. *Child v. Brace*, 4 Paige, 309.

487. Where the judgment debtor has a fixed and known place of residence within the state at the time of issuing the execution against him, and has visible property in the county in which he resides, sufficient to satisfy the execution, and which may be reached by it, and the judgment is in the Supreme Court, so that an execution may be issued to that county, it will be a good defence to the complainant's bill, that he has neglected to issue an execution to that county. *Ibid.*

488. A judgment creditor, who has exhausted his remedy at law, may file a bill in Chancery to obtain satisfaction out of the equitable interests of the debtor, for his own benefit only, without making other creditors, standing in the same situation, parties. *Wakeman v. Grover*, 4 Paige, 23.

489. Where a judgment creditor's bill contains merely a general allegation as to the value of the defendant's property, and it appears the defendant has no property which can be reached and applied toward the payment of the complainant's judgment, the bill will be dismissed with costs. *Smets v. Williams*, 4 Paige, 364.

490. Judgment creditors may join in filing a bill to reach the equitable interests, choose in action, or concealed property of their debtor. *Lenthion v. Moffat*, 1 Edw. 451.

491. Whenever there are creditors or other persons having demands (which are cognizable in equity and of equal standing) upon a common fund or estate, and out of which they claim to be paid, the proper course for them is to unite in one bill, or for one or more to file a bill in behalf of all. Such a bill is not multifarious. *Ibid.*

492. An assignee of a judgment who has not taken out execution cannot file a judgment creditor's bill in his own name, even though the original plaintiff may have had a *feri facias* returned unsatisfied. *Wakeman v. Rustel*, 1 Edw. 509.

493. The Court will not grant the defendant means to carry on a defence to a judgment creditor's bill out of the property enjoined. *Tut-hill v. Lupton*, 1 Edw. 654.

494. Where a complainant has filed a mere judgment creditor's bill upon judgments which are afterwards set aside at law, and filed a supplemental bill founded upon a third judgment which is valid, both the original and supplemental bill will be dismissed. *Butchers and Drivers' Bank v. Willis*, 1 Edw. 645.

495. Creditors have no right to file a bill in Chancery against a debtor upon a sale of goods, treating him as the debtor, until an execution at law has been returned unsatisfied, however dishonest the conduct of the latter may have been. But, if vendors of the goods will charge that the purchase was fraudulent, and the defendant has got possession of them by fraud, and seek to rescind the contract, then the goods and the proceeds can be enjoined in the hands of such fraudulent purchaser. *Wiltshire v. Murfield*, 1 Edw. 654.

496. Although creditors had set out a case of

fraud in the sale of goods, yet as by their particular prayer they evidently recognised the transaction as a sale, and sought relief as creditors, and did not add a disjunctive general prayer; it was held, that such a bill was demurrable, and, consequently, an injunction would not hold. *Ibid.*

(b) Of frauds against them.

497. To enable a Court of Chancery to set aside, as fraudulent, a settlement between a defendant in a judgment and a third person, and to order an account, &c., such settlement must be directly charged to have been fraudulent; and all the creditors in such case should be made parties, or an offer made in the bill for them to come in. *Forsyth v. Clark*, 3 Wend. 637.

498. Where property is subject to an execution, and a fraudulent obstruction is interposed to prevent the sale, a creditor may file his bill here to remove the obstruction, as soon as he has obtained a specific lien upon the property by the issuing of his execution. *Beck v. J. and B. C. Burdett*, 1 Paige, 365.

499. But if the property is not a subject of levy and sale on execution, the creditor must show his remedy at law exhausted by an actual return of the execution unsatisfied, before he files a bill in this Court to reach the equitable property of the debtor. *Ibid.*

500. If such property is not a subject of sale by the sheriff, the creditor obtains no specific lien or preference until his execution is returned unsatisfied, and he has followed up his remedy by the commencement of a suit in this Court to reach the debtor's equitable assets. *Ibid.*

501. Where a judgment was entered on a bond and warrant, and a specification was filed under the act of April 21st, 1818, and it appeared no such consideration as that stated in the specification existed, the judgment was declared fraudulent and void as against other judgment creditors. *White v. Williams and others*, 1 Paige, 502.

502. If a judgment is void as against a subsequent judgment creditor, it is also void as against a purchaser under the subsequent judgment. *Ibid.*

503. Pending a treaty of purchase, a third person took a confession of judgment from the vendor, and fraudulently concealed the fact from the vendee until after the sale, for the purpose of enforcing the judgment against the land in his hands. On a bill filed against the judgment creditor and his assignee, they were decreed to release the land from the lien of the judgment. *Webster v. Wise and Ford*, 1 Paige, 319.

504. If a purchaser who is insolvent, concealing his insolvency from the vendor, obtains goods from him without intending to pay for them, it is a fraud upon the vendor, and the property in the goods will not be changed. *Durell and others v. Haley and Turner*, 1 Paige, 492.

505. But if the goods have been resold by the fraudulent vendee to a bona fide purchaser, who has actually paid for the same without notice of the fraud, such purchaser will be protected. *Ibid.*

506. Where an insolvent confessed a judgment to his friend, on which an execution

immediately issued, and then purchased goods for the purpose of subjecting them to the execution; it was held, to be a fraud upon the vendor, and the judgment creditor was not permitted to retain the goods which had been purchased in by him upon his execution. *Ibid.*

507. A creditor may file his bill to set aside a fraudulent conveyance of the real estate of his debtor as soon as he has obtained a judgment, which is a lien on the land. *The Mohawk Bank v. Alwater*, 2 Paige, 54.

508. Where the vendor recovers a judgment for the price of goods sold before he has notice of a fraud committed in such rule, he cannot file a creditor's bill against the vendee for the purpose of collecting the amount of the judgment out of the equitable assets and choses in action of the defendant, and in the same bill claim to follow the goods or the proceeds thereof into the hands of a third person, on the ground that the original sale was fraudulent and void. Neither is a bill with a double aspect proper for such a case. *Lloyd v. Brewster*, 4 Paige, 537.

B. Trusts and assignments for the benefit of creditors; and agreements between debtor and creditor.

509. Upon a composition between debtor and creditors, if the debtor furnishes a statement of his affairs as the basis of the agreement, he is answerable for the truth of that statement. *Irving v. Humphrey*, 1 Hepk. 284.

510. Any one material misrepresentation will avoid the contract. *Ibid.*

511. But in such case, the composition is not to be wholly vacated. The defendant will be decreed to make his representations good, and to account for any property which he held beyond the amount stated by him. *Ibid.*

512. When a debtor, in failing circumstances, assigns an unreasonable amount of property to satisfy a single creditor, it is evidence of fraud; but if no more than is supposed to be sufficient to satisfy the debt is assigned, a mere hypothetical reservation of the surplus, if any there should be, to the debtor, would not render the assignment void. *Beck v. Burdett*, 1 Paige, 305.

513. Where judgment is given for a specific object, an assignee cannot hold it against the creditors who have a prior equity. *Heath v. Hand and others*, 1 Paige, 329.

514. An assignment by a debtor under the insolvent act transfers all his estate to the assignee for the benefit of his creditors generally; and a judgment creditor can gain no preference in relation to such property by a bill subsequently filed in this Court. *Ibid. Stillwell v. Van Eps*, 1 Paige, 615.

515. An assignment by the defendant of his property after the filing the bill in this Court will not divest the lien of the judgment creditor. *Edmeston v. Lytle*, 1 Paige, 637.

516. Where property has been fraudulently assigned by the debtor, so that he has no legal or equitable rights as against the assignee, it will be necessary to make the assignee a party to reach the property in his hands. *Ibid.*

517. But where the debtor still retains the

legal or equitable interest in the property, such interest may be conveyed to the complainant, or transferred to a receiver under the decree of the Court, without making the trustee of the defendant a party. *Ibid.*

518. The debts, choses in action, and other equitable rights of the defendant may be assigned or sold under the decree of this Court, and the purchaser will be protected both in equity and at law. *Ibid.*

519. Where R. R. and I. R., partners, confessed a judgment to W., their brother-in-law, for \$25,000, under which the household furniture of R. R., together with other property, was sold, and W. at the sale purchased the furniture and left it with R. R.; and it appeared that the judgment was given to W. to secure a debt due him of \$2850, and to apply the residue of said judgment, when collected, in paying such of the creditors of R. R. and I. R. as R. R. should designate; and the property of the firm which could not be reached by execution was assigned by R. R. to I. R., in trust, to pay himself the costs of executing the trust, the expenses of obtaining R. R.'s insolvent's discharge, and the expenses of all suits at law or in equity, and to apply the residue in payment of the debts of the firm in the order prescribed in a schedule annexed; S., a creditor of R. R. and I. R., prosecuted his debt to judgment against them, and issued an execution thereon, which was returned unsatisfied; *it was held*, that the judgment to W. was given to defraud creditors, and that the assignment from R. R. to I. R. was also fraudulent and void, as against the creditors of R. R. and I. R., and that S. was entitled to receive out of the property so assigned the amount of his judgment, with interest and his costs of suit. *Swall v. Russell*, 2 Paige, 175.

520. If an assignor under a voluntary assignment neglect to furnish the schedule required by the assignment, the assignee may file a bill for discovery against him, and also to obtain a delivery of the books and securities; and he will also be entitled to an injunction against the assignor, restraining him from wasting the property. *Keyes v. Brush*, 2 Paige, 311.

521. Where an insolvent debtor assigns all his property to his surety for his indemnity, the surety is entitled to the possession of the property so assigned, in order to discharge the responsibilities which he has assumed for the debtor. *Ibid.*

522. The creditors of the insolvent debtor to whom the surety is liable can also compel the appropriation of the property in the manner directed by the assignment. *Ibid.*

523. If the assignee becomes insolvent, the assignor may apply for the appointment of a receiver to execute the trusts declared in the assignment. *Ibid.*

524. Where an insolvent debtor assigned all his property to C. in trust, to pay in the first place certain preferred creditors, and afterwards to distribute the residue rateably between such of his general creditors as should, within one year from the date of that conveyance, accept the provision made therein for them, and release him (the insolvent) from all further claims; and D. a creditor of the insolvent, did not re-

ceive any notice of trust until after the expiration of the one year; but as soon as he received such notice, applied to C., the trustee, to be permitted to accept the provisions made by the trust deed, upon a compliance on his part with the conditions thereof, and the trustee refused such permission; and the insolvent debtor was afterwards discharged under the insolvent act, and assigned all his interest in the surplus which, by the trust deed, was to be refunded to him to K., for the benefit of his creditors generally; *it was held*, that D. had an equitable right to his proportion of the trust fund, upon a compliance with the conditions imposed, he not having had notice of the trust within the year, and having done nothing, since he had notice, inconsistent with his offer to accept of the provision made for him in the trust deed. *De Caters v. Le Ray de Chaumont*, 2 Paige, 490.

525. Where, under such circumstances, a creditor, in consequence of want of notice, mistake, or accident, was unable to comply with the terms prescribed within the time limited, and who has done nothing inconsistent with an acceptance of the provision made in his favour, he will be admitted to his share of the fund, provided he signifies his election to do so in a reasonable time. *Ibid.*

526. But such of the creditors as, within the time limited, had notice of the creation of the trust, and neglected or refused to accept of the provision made therein for them, are precluded from any participation in the fund, and their only claim will be upon the surplus, if any there should be remaining, after satisfying the debts of the creditors who accepted their proportion of the trust fund upon the terms proposed. *Ibid.*

527. An assignment, after the lien of a creditor has attached by the filing of a bill, only conveys the property to the assignee subject to that lien. *Cornig v. White*, 2 Paige, 567.

528. Where the complainant by his bill claims a beneficial interest under an assignment, without alleging it to be fraudulent, he cannot be permitted, at the hearing, to claim relief on the ground that the assignment is proved to be fraudulent. *Ontario Bank v. Root*, 3 Paige, 478.

529. Where a bill was filed against a defendant to charge him as the trustee of the complainant, upon an alleged assignment of the property of their debtor for their benefit, and the complainants in their bill, not as a substantive ground of equity, but only as evidence, and in confirmation of the fact that the defendant received such assignment in trust for their benefit, stated an agreement of the defendant to pay their debt, but which agreement was denied in the answer of the defendant; *held*, that the complainants, who had failed to prove the assignment in trust, could not recover on the alleged agreement. *Ibid.*

530. If an express trust is created for the benefit of creditors, without conferring upon the trustee any authority to give a preference to any particular creditor, it will both at law and in equity be considered as a trust for all the creditors rateably. *Egberts v. Wood*, 3 Paige, 517.

531. In cases of implied trusts for the benefit of creditors, if one of the creditors comes into

the Court of Chancery to enforce the execution of the trust, the Court will act upon the principle that equality is equity; except in cases where such creditor has acquired a specific lien upon the fund by his superior vigilance, or where he is entitled to a legal preference. *Ibid.*

532. A general denial of fraud in an assignment of property by a debtor is not sufficient to sustain the assignment, if it appears upon the face of the assignment that its legal effect must be to defraud the creditors of the assignor. *Cunningham v. Freeborn*, 3 Paige, 557.

533. Where a party intentionally executes an instrument, the legal effect of which must be to defraud a third person, the question whether such an instrument is fraudulent is a question of law and not of fact. *Ibid.*

534. It is the fraudulent intent, and not the question of fraud, which by the revised statutes is declared to be a question of fact and not of law. *Ibid.*

535. Upon a bill to set aside an assignment on the ground of fraud, the answer of the defendant denying the fraud, if unreplyed to, is conclusive evidence that no fraud exists, unless there are other admissions or statements in the answer inconsistent with such denial. *Ibid.*

536. Where certain creditors agreed to compound with their debtors, and to receive twelve shillings in the pound in full satisfaction of their respective debts, and it was expressly provided in the composition deed, that it should not be binding on any of the creditors executing the same, until all and every creditor of such debtors had executed the deed; *held*, that the debtors could not vary the terms of the written agreement by showing that there was a parol understanding between them and those who executed the composition deed, that certain creditors denominated confidential creditors were not to execute the same, were to be paid by the same creditors in full. *Acker v. Phoenix*, 4 Paige, 305.

537. An agreement by a creditor to accept from his debtor a part of his debt in full satisfaction for the whole, is without consideration and void, unless the agreement is in writing, and is also under seal, which imports a consideration. *Ibid.*

538. If the assignees, under an assignment fraudulent in law, pay over the proceeds of the assigned property to creditors of the assignor, in pursuance thereof, before any other creditors obtain a general or specific lien on the assigned property, the other creditors cannot compel the assignees to account to them for such proceeds. *Waldman v. Grover*, 4 Paige, 24.

539. Where an insolvent debtor makes a voluntary assignment of his property to trustees of his own selection, and excludes in the assignment certain of his creditors from any participation in the assigned property unless they consent to take their share of the surplus, after paying certain preferred creditors, and discharge the assignor from all further liability, whether their debts are paid or not; such assignment is fraudulent and void as against creditors who do not assent to the same. *Ibid.*

540. Although an assignment for the benefit of creditors is fraudulent as to those who do

not assent to it, the assignees are not answerable for the proceeds of assigned property actually paid to *bona fide* creditors of the assignee, pursuant to the assignment, before any others have obtained either a legal or equitable lien on such property or the proceeds thereof. *Ames v. Blunk*, 5 Paige, 13.

541. But if the assigned property was such as might be seized and sold on any execution, it seems it might still be levied on in the hands of a purchaser from the assignees, provided he had either actual or constructive notice of the fraud at the time of his purchase. *Ibid.*

542. Where R., who had failed in business, employed W. to compromise with his creditors, and authorized him to offer fifty cents in the dollar upon such compromise, and W., while acting as such agent, purchased several notes of R. at that rate upon his own account, and afterwards sold such notes to J. and H. for the whole nominal amount after they became due; *held*, that J. and H. could not be permitted to recover more than fifty cents upon the amount of such notes; *held also*, that W. was a proper party to a bill in Chancery filed by R. against J. and H. to stay the proceedings at law on such notes, upon the payment of what was equitably due thereon as between R. and W. *Reed v. Warner*, 5 Paige, 650.

543. Where an assignment professed to provide for creditors named in the schedule, by directing the proceeds of the assigned property to be divided among them *pro rata*, but that the creditors, as a condition of receiving the dividend, should release the balance of their debts; and also, that any creditor not giving a discharge within five days after a dividend was declared and received should be precluded from all benefit; *held*, to be a fraudulent assignment. *Armstrong v. Byrne*, 1 Edw. 79.

544. Debtors who stipulate for an absolute discharge, before a creditor is to have the benefit of the property, assume to themselves a power over the creditors for their own personal advantage. *Ibid.*

545. Where all the creditors, or a greater part of them, do not conform to the terms of an assignment, a trust results to the debtors, and the assignees would be liable to account to them for any surplus in their hands. *Ibid.*

546. Where creditors choose to come in under an assignment, and claim the benefit of it, they must comply with the terms which the debtor has imposed. *Jewett v. Woodward*, 1 Edw. 195.

547. Where an assignment provided, that should there not be sufficient to pay the debts in full, the assignees might compromise as to the same, and require discharges on payment of a dividend; it was *held*, this did not compel the creditors to release the whole of their demands before they could take a dividend. *Ibid.*

548. Creditors who commence legal proceedings against the property of their debtor, but abandon such proceedings, are not thereby precluded from receiving a dividend under a trust deed, nor from calling the assignee to an account. The doctrine of election does not apply to such a case. *Ibid.*

549. Although there is a general denial of fraud, yet if upon the face of a trust deed it ap-

pears intended to hinder and delay creditors, the same will be set aside. *Cunningham v. Freeborn*, 1 Edw. 256.

550. A debtor may protect his accommodation endorser, and make him his assignee. *Ibid.*

551. An assignee's not having signed and sealed the deed of trust, nor entered into a covenant to perform his duty, can be no ground for vitiating the instrument. *Ibid.*

552. When a deed for the benefit of creditors is absolute, vesting the property in a trustee and giving the creditors rights, (after preferences,) the same is valid without the necessity of the creditors signing it. *Ibid.*

553. Although such a deed has no schedules to show the property assigned, nor the name of the creditors, nor the amount of the debts, yet these omissions are not, of themselves, sufficient to avoid it. In some cases, when taken in connexion with the circumstances, it might be otherwise. In the present case all this was obviated by the defendants adding schedules to their answers. *Ibid.*

554. When a debtor, by a valid deed of trust, prefers a few, and declares the balance is to go to his other creditors, a judgment creditor filing his bill after execution will not by his diligence be entitled to payment immediately after the preferred few—he cannot affect the trust. *Ibid.*

555. Although merchandise may be assigned upon a verbal condition that no suit shall be brought against the assignor, yet the commencing of actions is not necessarily in avoidance of the contract. *De Forrest v. Bates*, 1 Edw. 394.

556. Where A. in New York, being indebted to B. and C., directs, by letter, the proceeds of a cargo in St. B. to be sent to B., in order to go in satisfaction of the debt due to B. and C., and his letter is carried out by E., who has promised, in writing, to facilitate the measure; E. becomes their agent in receiving the property, and A. cannot revoke the authority he has given, nor, by subsequent assignment, deprive them of the benefit of it. *Ibid.*

557. A debtor may provide in an assignment for payment of present and prospective costs of suits going on, (relating to some of the assigned property,) without its invalidating such assignment. *Lentillon v. Moffatt*, 1 Edw. 451.

558. A debtor assigns a part of his property, in trust, for all his creditors, and to be paid to them "as they respectively execute, under their hands and seal, a full release and discharge of their respective debts, claims, and demands" against him. If all the creditors do not accept of the assignment within sixty days, then the debtor has power to appoint so much of the property as may not be accepted to such creditors as he may think proper; and that such appointment shall go into effect at the expiration of such sixty days, or as soon as such non-acceptance could be ascertained; held, that such an assignment hindered and delayed creditors, and was void. *Ibid.*

559. It would seem, that while preferences are allowed, a debtor who assigns every thing generally may provide that those creditors who within a reasonable time agree to accept the amount in full, and give a discharge, shall be first paid. *Ibid.*

C. Of the order and manner in which debts shall be paid, and different liens enforced; of preferences between creditors, and the distribution of assets between them.

560. No act of the creditor can affect the relation between several debtors in respect to their right and liabilities between themselves. *Catskill Bank v. Messenger*, 9 Cow. 37.

561. Judgment creditors have no preference over prior equitable claims against the estate of the debtor. *In the matter of Howe*, 1 Paige, 125.

562. Thus a contract for a mortgage or the sale of real estate has been preferred to judgments recovered subsequent to the contract. *Ibid.*

563. Under the act of Congress of the 2d of March, 1799, the United States are not entitled to a preference, in the payment of bonds given for duties, over the general creditors of the debtor, unless the debtor is actually insolvent, and his insolvency is manifested by some notorious or public act. *Marshall and others v. Barclay and others*, 1 Paige, 159.

564. To entitle the United States to this preference, on account of a voluntary assignment of the property of the debtor for the benefit of his creditors, it must appear that the assignment was of all the property of the debtor, or was made with a view to defeat the claim of the United States. *Ibid.*

565. Where, however, a debtor is actually insolvent, and intending to assign his whole property, first makes an assignment of part for the benefit of some of his creditors, and afterwards makes another assignment of the residue of his property for the benefit of his remaining creditors, the two assignments will be considered as one transaction, and the United States will be entitled to a preference. *Ibid.*

566. As between different creditors, equality is equity. *De la Vergne v. Boetman and others*, 1 Paige, 181.

567. And where there are several judgment creditors, and the land is sold under a prior mortgage, the holder of the eldest judgment, as against the others, has no greater lien upon the surplus moneys than he had upon the equity of redemption before the sale. *Ibid.*

568. If the judgment creditors are equitably entitled to interest as against the debtor, but have no right to collect it on their executions against the land, the principal of their judgments must be first paid out of the fund according to their priority, and if any thing remains, it can be applied to the payment of the interest on the several judgments rateably. *Ibid.*

569. Where a creditor has a lien upon two funds for the payment of his debt, Chancery will not compel him first to exhaust the fund which a junior creditor cannot reach, if the senior creditor will thereby be injured, or if he offers to substitute the junior creditor in his place on being paid the amount of his debt. *Woollocks v. Hart*, 1 Paige, 186.

570. The depositors of money in a bank are only general creditors of the corporation, and in case of a failure of the bank, they are not entitled to a priority of payment over till holders or other creditors. *In the matter of the Franklin Bank*, 1 Paige, 340.

571. Where a judgment is given by the principal debtor to his endorers to secure the payment of the debt for which they are responsible, and they become insolvent, the creditor is entitled to the benefit of the security. *Heath v. Hand and others*, 1 Paige, 389.

572. Where a creditor, having a judgment lien upon property, agreed with the vendor and purchaser to relinquish it, and take an assignment of the mortgage given for the purchase money in lieu thereof, he is entitled to satisfaction out of the mortgaged premises to the extent of his judgment lien, in preference to an equitable claim of set-off in behalf of the mortgagor which has subsequently arisen. *Smith v. Smith and Clark*, 1 Paige, 391.

573. Where land is sold under a decree of foreclosure, and the surplus is brought into this Court, judgment creditors who had obtained a specific lien thereon at law before the foreclosure are entitled to a priority of payment out of the proceeds, according to the dates of their respective judgments. *Purdy v. Doyle and others*, 1 Paige, 558.

574. But if the person against whom their judgments were obtained had only an equitable estate in the mortgaged premises, so that the judgments could not bind his interests at law, the creditors here are to be paid upon the basis of equality only. *Ibid.*

575. The rule of this Court as to equitable assets is to put all the creditors on an equal footing. *Ibid.*

576. Where assets are partly legal and partly equitable, this Court cannot take away the legal preference as to the legal assets; but if one creditor has by reason of his priority been partially paid out of the legal assets, when satisfaction comes to be made out of the equitable assets, his claim thereon will be deferred until the other creditors have been paid a proportionate amount out of the equitable assets. *Ibid.*

577. When a bank becomes insolvent, the cashier has no lien upon the money therein for his deposits therein, or for the payment of his salary. *Brayn v. Receiver of the Middle District Bank*, 1 Paige, 584.

578. He has no other or greater rights than the other creditors of the institution. *Ibid.*

579. The judgment creditor only acquires a specific lien upon the equitable property which belonged to the defendant at the time of filing his bill, or upon the proceeds thereof. If he wishes to obtain a priority as to subsequently acquired property, he must file a supplemental bill. *Eager v. Price*, 2 Paige, 334.

580. The Court will not permit supplemental bills to be filed in such a case merely to harass the defendant, or to deprive him and his family of his daily earnings. *Ibid.*

581. The judgment creditor who first files his bill in Chancery obtains a priority in relation to the property and effects of the defendant which cannot be reached by execution at law. *Corning v. White*, 2 Paige, 567.

582. Where there is a joint debt, but there never was any joint fund, and the joint creditor looked originally to the separate property of the joint debtors respectively for the payment of his demand, and one of the joint debtors

dies, leaving the survivor insolvent, and the fund to be distributed in Chancery consists of equitable assets, the joint creditor will be permitted to come in upon the fund with the separate creditors of the deceased debtor, at least for one-half of his debt; but if the assets are legal, the separate creditors cannot be deprived of their legal preference. *Wilder v. Keeler*, 3 Paige, 167.

583. Where there are both legal and equitable assets, a creditor who, having a preference as to the legal assets, has been partially paid out of such assets, cannot receive any share of the equitable assets until the other creditors have received sufficient to place them upon an equality with him; and then all the creditors will be paid rateably out of the assets which remain. *Ibid.*

584. Equitable rules are adopted by the Court of Chancery in the administration of legal assets, except in cases where the law has given an absolute preference to one class of creditors over another. *Ibid.*

585. If, after the filing of a creditor's bill upon the return of an execution at law unsatisfied, the debtor assigns his choses in action, the assignee will take them subject to the equitable lien of the complainant. *Utica Insurance Co. v. Power*, 3 Paige, 365.

586. H., a merchant residing in Providence, R. I., was indebted to M., who was in business in New York. Upon being applied to by M. for payment, H. informed M. that he had ordered the balances of his funds in the West Indies to be forwarded to him, and directed him to place those funds to his credit on account when received. The agents of H. in the West Indies shipped the funds, consisting of a quantity of doubloons, on board of a general ship, consigned to M., at New York; and forwarded to him the bill of lading, in which bill the doubloons were stated to be for the account and at the risk of H. Previous to the arrival of the ship at New York, H. failed, and assigned all his property to trustees for the benefit of certain other creditors; and upon the arrival of the vessel at New York, both M. and the assignees claimed the doubloons. On a bill of interpleader, filed by the master of the ship, *held*, that M. had obtained a specific lien upon the doubloons for the payment of his debt, and that the lien was not affected by the general assignment of H. for the benefit of other creditors. *Clark v. Mauran*, 3 Paige, 373.

587. Where a testator, previous to the revised statutes, died, leaving personal property insured against loss by fire, and M., a creditor, received a judgment against the executors, and levied his execution on the property in their hands, which property afterwards was destroyed by fire; *held*, that M. was entitled to priority of payment out of the insurance money, over a judgment in favour of other creditors subsequently recovered against the executors. *Mapes v. Coffin*, 5 Paige, 296.

D. Insolvent debtors; their discharge under the statute.

588. The policy of the present laws of this state is to relieve the unfortunate debtor from

imprisonment; but, at the same time, to compel him to surrender up all his property and effects, or so much thereof as is necessary to satisfy the just claims of his creditors. And the Court of Chancery will not permit him, by any shift or device, to place his property beyond their reach. *Eager v. Price*, 2 Paige, 334.

589. An insolvent may assign his property for the benefit of all his creditors, rateably, without depriving himself of the privilege of applying for a discharge from imprisonment for debt under the statute. *Corning v. White*, 2 Paige, 567.

590. A mere naked trustee, without interest, cannot become a petitioning creditor for an insolvent without the consent of the *cestui que trust*, except in those cases especially provided for by the statute. *In the matter of Sherryd*, 2 Paige, 602.

591. Where property has been fraudulently conveyed by an insolvent debtor who afterwards obtains his discharge under the act, his interest in the property passes to his assignees for the benefit of his creditors, although such property is not embraced in the inventory. *Ward v. Van Bokkelen*, 2 Paige, 289.

592. Under the insolvent law of April, 1813, it was necessary that two-thirds of the creditors residing in the United States should join in the petition to entitle the insolvent to a discharge from the debts due to his domestic creditors. *Salers v. Tobias*, 3 Paige, 238.

593. The only restraint upon this right of giving a preference to one creditor over another is the provision in the revised statutes, which deprives the insolvent debtor who gives such preference of the benefit of the insolvent laws. *Egberts v. Wood*, 3 Paige, 517.

E. Debtors absent or absconding.

594. Under the absconding and absent debtor act, an equitable interest of the debtor in real property can be attached by the sheriff, and the same passes to the assignee appointed under the act. *Lee v. Hunter*, 1 Paige, 519.

595. Where a legacy was bequeathed absolutely to the legatee, but by the will the executors were directed to retain it in their hands, and put it on interest, and to pay the annual interest to the legatee for life, unless he should, by a legal written instrument, require the payment of the principal of the legacy to himself, in which case the whole was to be paid to him; with power to the legatee to dispose of the legacy by will, if he did not receive it in his lifetime, and to be paid to his heirs if he did not receive it himself, or dispose of it by his will at his death, and the testatrix, by her will, declared that neither the legacy nor the interest thereof should be liable to any of the creditors of the legatee for the payment of his debts; *held*, that the absolute power of the legatee to compel a payment of the legacy to himself was such a beneficial power as would pass to his assignees, under the title of the revised statutes relative to the assignment of the estates of non-resident, absconding, insolvent, or imprisoned debtors; and that the legacy might be reached by a creditor's bill, and applied in satisfaction of a judgment against the legatee. *Hallet v. Thompson*, 5 Paige, 583.

XIII. DEED.

A. Execution and delivery of a deed. B. Construction of deeds.

A. Execution and delivery of a deed.

596. A protestation in the attesting clause of a deed has no effect upon it, provided it is not at variance with the terms of the deed, or can have no influence in qualifying or changing its meaning. *Wright v. Taylor*, 1 Edw. 226.

597. The certificate of the acknowledgment of a mortgage was, that "S. S. H., who is to me well known, personally appeared before me and acknowledged," &c., held a sufficient compliance with the act, though it did not set forth in terms that the mortgagor was "well known to the officer to be the person described in, and who executed the mortgage." *Troup v. Haight*, 1 Hopk. 239.

598. General usage, long continued and unquestioned, has great weight in the construction of this act, though such construction be not given upon adverse litigation. *Ibid.*

599. More especially when that construction has been adopted by many law officers. *Ibid.*

B. Construction of deeds.

600. Where a grantor in a quit-claim deed covenants to warrant the premises against all persons claiming by or under himself, and subsequent to such conveyance he acquires the legal title to the premises, the same will ensure to the benefit of the grantee. *Sweet v. Green*, 1 Paige, 473.

601. And where the premises have been conveyed by the grantee to a *bona fide* purchaser without notice, the original grantor cannot set up against such purchase, fraud or mistake in the insertion of the covenant of warranty in the original deed of conveyance. *Ibid.*

602. By the grant of a mill, or the grant of land with the mill thereon, the waters, flood-gates, &c., which are necessary for the use of the mill, pass as incident to the principal subjects of the grant. *Le Roy v. Platt*, 4 Paige, 77.

603. Where lands belonging to the owner of a mill are overflowed by the water of the mill pond which supplies the mill, a conveyance of the mill, with the waters and water courses, &c., gives a right to the grantee to continue to overflow lands of the grantor which are not conveyed to the same extent that they were overflowed by the waters of the mill pond at the time of the conveyance. *Ibid.*

604. Where a corporation received a grant of land from the crown of Great Britain, in 1705, and immediately entered by virtue thereof, claiming title to the whole premises, under the grant, adverse to the whole world, and continued such adverse possession under claim of right for sixty years; it was held, that such corporation acquired a perfect title to the premises, covered by the grant as against the rightful owner. *Begardus v. Trinity Church*, 4 Paige, 178.

605. Where an error was made in a deed from a father to his son, by describing the lands as being in the northwest instead of the northeast corner; the son conveyed the property absolutely to creditors of the father in satisfaction

of their debt, and the error was continued in the deed to them. The defendant, a judgment creditor of the father, persevered in a levy upon the land in the northeast corner, after being notified of the error; *held*, that the judgment did not attach upon the land thus conveyed. The defendant was perpetually enjoined, and costs were given against her. *Gouverneur v. Titus*, 1 Edw. 477.

XIV. DESCENT.

606. Under the statute of distributions, brothers and sisters of the half blood are entitled, equally with those of the whole blood, to a share in the personal estate of the intestate, without regard to the ancestor from whom it was derived. *Champlin v. Baldwin and others*, 1 Paige, 562.

607. And if such personal property had been invested in land by the intestate, the land would have descended in the same manner. *Ibid*.

608. An unborn child after conception is to be considered in case for the purpose of enabling it to take an estate, or for any other purpose which is for the benefit of the child if it should afterwards be born alive. *Marcellis v. Thalheimer*, 2 Paige, 35.

609. But, as it respects the rights of others claiming through the child, if it is born dead, or in such an early stage of pregnancy as to be incapable of living, it is to be considered as if it had never been born or conceived. *Ibid*.

610. Where the mother dies before the birth of the child, and the latter is delivered by the Cæsarean operation, it is considered in existence before its birth, for its own benefit, to take the estate of the mother by descent, but not for the benefit of the father, to enable him to hold as tenant by the courtesy. *Ibid*.

611. Children born within the first six months after conception are presumed to be incapable of living, and therefore cannot take and transmit property by descent, unless they actually survive long enough to rebut that presumption. *Ibid*.

612. The party who claims property through the child is bound to establish the fact that it was born alive; and if the child never breathed, there is no legal presumption in favour of the fact. *Ibid*.

613. Under the statute of descents which was in force previous to the revised statutes, there was no representation among the collateral heirs of a decedent beyond brothers and sisters' children. *Harman v. Osborn*, 4 Paige, 336.

614. Where the trustees of a legacy for an infant *feme covert*, which is invested on bond and mortgage in their names as trustees, take a release of the equity of redemption in the mortgaged premises, the nature of the infant's property is not changed so as to alter the course of descent upon her death during her minority; and the proceeds of the mortgaged premises belong to the husband, as her personal representative, and not to her heirs at law. *Rogers v. Paterson*, 4 Paige, 409.

XV. DEVISE.

- A. Construction of a devise; contingent remainder.
- B. Devise of lands for payment of legacies.

A. Construction of a devise; contingent remainder.

615. A remainder is vested in interest, where the person is in being and ascertained, who will, if he lives, have an absolute and immediate right to the possession of the land upon the ceasing or failure of all the precedent estates, provided the estate limited to him in remainder continues to exist; that is, where the remainder man's right to an estate in possession cannot be defeated by third persons, or contingent events, or by the failure of a condition precedent, if he lives, and the estate limited to him by way of remainder continues until all the precedent estates are determined. *Hawley v. James*, 5 Paige, 318.

616. The remainder is contingent, although the remainder man is in being and ascertained, so long as it remains uncertain whether he will be entitled to the estate limited to him in remainder if he lives, and such estate continues until all the precedent estates have ceased. But the existence of a power to appoint the remainder among a class of persons who are known and ascertained, which remainder is limited to the whole class in default of such appointment, does not render the remainder to the class contingent; the remainder is vested in the class, subject to be divested, as to some of the class, by the execution of the power of appointment. *Ibid*.

617. Where the testator did not intend to vest the estate in any of the remainder men, until the power of appointment in their favour was executed by his trustees, but made the whole right of the remainder men absolutely dependent upon the decision of his trustees in their favour, as to their moral characters and merits, at the time appointed by the testator for the vesting of the remainders in possession; *held*, that the remainders were contingent during the continuance of the precedent estate. *Ibid*.

618. A contingent remainder may be limited upon a term in gross, or upon a remainder which is limited upon such a term, if the contingent remainder itself is so limited that it must necessarily vest in interest, if ever, within the period of two lives in being at the creation of estate, or at the termination thereof. *Ibid*.

B. Devise of lands for payment of legacies.

619. Where lands charged with payment of legacies have been sold by the devisee to different purchasers, such lands will be charged in the inverse order of their alienation. *Jenkins v. Freyer*, 4 Paige, 47.

XXI. EVIDENCE.

- A. Written evidence: (a) Judicial proceedings; (b) Private writings; (c) Matters judicially noticed.
- B. Parol evidence to explain, vary, or contradict written instruments.

- C. *Of witnesses, their examination, competency, and credit.*
 D. *Presumptive evidence.*
 E. *Perpetuation of testimony.*

(a) *Judicial proceedings.*

620. The probate of a will of personal property is evidence of the due execution of the will. *Van Rensselaer v. Morris*, 1 Paige, 13.

621. A record cannot be read as evidence in a suit, unless both parties, or those under whom they claim, were parties to the suit in which the record was filed. *Dale and others, Executors of Fulton, v. Roswell*, 1 Paige, 35.

622. A decree in a suit in which executors are parties is not binding upon the heirs of their testator, unless such heirs are also parties to the suit. *Ibid.*

623. The recitals in an insolvent's discharge are not the only evidence of the regularity of the proceedings; neither does an omission to state in the discharge the performance of an act which was required by the statute to be done, raise a legal presumption that it was not done. *Sellers v. Tobias*, 3 Paige, 338.

624. The answer of infants by their guardian is a pleading merely, and not an examination for the purpose of discovery; it is not evidence, therefore, in their favour, although it is responsive to the bill, and sworn to by their guardian *ad litem*. *Bulkley v. Van Wyck*, 5 Paige, 536.

625. A complainant cannot, by any form of pleading, compel an infant to become a witness against himself. *Ibid.*

626. The final decree of a Court of Equity may be given in evidence in another suit, although such decree has not been formally enrolled. *Bates v. Delaven*, 5 Paige, 299.

(b) *Private writings.*

27. An agent being dead, a written statement of an account made by him at the time of a settlement is evidence against the principal. *Van Rensselaer v. Morris*, 1 Paige, 13.

(c) *Matters judicially noticed.*

628. A Court of Chancery will judicially notice the fact that Courts of law recognise and protect the rights of assignees suing in the name of their assignor. *Southgate v. Montgomery*, 1 Paige, 41.

B. *Parol evidence to explain, vary, or contradict written instruments.*

629. Bill in the usual form for the foreclosure of a mortgage for one thousand dollars; defence that the bond and mortgage were not made to secure any money, but to secure the reconveyance of a certain other lot of land, which the mortgagee had conveyed to the mortgagor for a special object, and which was to be reconveyed. This defence was supported by no writing, and only by parol proofs and by circumstances; and no fraud, accident, mistake, or surprise alleged. The parol testimony overruled. *Meads v. Lansing*, 1 Hopk. 124.

630. It cannot be introduced defensively, nor as proving an independent collateral agreement. The cases in which oral testimony has been ad-

mitted to control written instruments, are not to be further extended. *Ibid.*

631. A receipt is always susceptible of explanation. *Van Rensselaer and others v. Morris*, 1 Paige, 13.

632. Parol evidence is admissible to show that a deed, absolute in its terms, was intended by the parties as a mortgage. *Whittick v. Kane and others*, 1 Paige, 292.

633. The admission of a person in possession of land made under a mistake of law, and which is wholly inconsistent with his written evidence of title, cannot be received for the purpose of destroying his title to the land. *Hawley v. Bennett*, 5 Paige, 104.

(c) *Of witnesses, their examination, competency, and credit.*

634. Where, to a bill in Chancery filed to obtain an account of mercantile transactions, the defendant put in an answer alleging that one A. B., a third person, not a party to the suit, was a partner in trade with the complainants, carrying on business in his own name, and that the concern conducted by him was largely indebted to the defendant, and on a replication being filed, denying the truth of the answer, A. B. was examined as a witness for the defendant, and proved all the allegations made by the defendant; it was held, that A. B. was a competent witness, notwithstanding the effect of his testimony was to charge the complainants with a debt for which he was individually liable, and of the liability of the complainants for the payment of which, there was no proof independent of such testimony. *Gregory v. Dodge*, 14 Wend. 593.

635. Where the only interest a witness has in a cause in which he is sworn is in the question, the objection goes to his credibility, and not to his competency. *M'Clarn v. Hopkins*, 1 Paige, 18.

636. An interest to exclude a witness from being sworn must be a direct interest in the event of the suit. *Ibid.*

637. Where M. purchased the interest of C. in certain mortgaged premises, under a judgment and execution, in a suit by M. against H., who pretended to hold a subsisting mortgage against the premises given by C.; it was held, that C., on being released by M., was a competent witness to prove that the mortgage had been paid. *Ibid.*

638. A purchaser, with full knowledge of the claim of third persons, is an incompetent witness for the vendor in a suit between him and such persons. *Brown v. Lynch and Lynch*, 1 Paige, 147.

639. The answer of a corporator to a bill of discovery cannot be read in evidence against the corporation. *Phillips v. Wickham*, 1 Paige, 590.

640. The declarations of corporators, although officers of the corporation, are not evidence against the corporation. *Ibid.*

641. Corporators who have no personal interest in the controversy are competent witnesses in favour of the corporation. *Ibid.*

642. No witness is bound to answer a question which would either criminate himself, ren-

der him infamous, or subject him to a penalty or forfeiture. *In the matter of Kip*, 1 Paige, 601.

643. A witness who is neither a nominal nor real party to the suit is not excused from giving evidence, although his testimony might be used against him in a civil suit; unless it will subject him to some loss or disadvantage in the nature of a penalty or forfeiture. *Ibid.*

644. The answer of a wife cannot be read as evidence against her husband; nor can she be examined as a witness against him. *City Bank v. Bangs*, 3 Paige, 36.

645. Neither the answer or the evidence of the wife can be used for the purpose of influencing a decision for or against her husband. *Ibid.*

646. The wife may be examined as a witness between other parties, although the husband has a collateral interest in opposition to the party calling her. *Ibid.*

647. Where a bill was filed to correct an alleged mistake in a deed from D. B. to the defendant, and to obtain a perpetual injunction restraining the defendant from proceeding at law to recover the land alleged to have been included in the deed by mistake, or from disturbing an aqueduct across the premises in controversy, the complainant having purchased from D. B. subsequent to the conveyance to the defendant, and subject to a right previously granted to W., to take water from a mill dam to grind bark at his bark mill, and to a passage or right of way over the premises in dispute, which right was granted to W. subsequent to the conveyance to the defendant, but previous to that to the complainant; held, that W. was an incompetent witness for the complainant. *Rogers v. Dibble*, 3 Paige, 238.

648. It seems, that an heir at law, who is liable for the debts of the decedent to the extent of the real estate descended to him, if the debts cannot be collected out of the personal estate, but who is so situated that he cannot be sued for such debts until the creditors have exhausted their remedy against the personal representative, is not a competent witness for the personal representative, in a suit by the creditor for the recovery of a debt of the decedent, to prove that the debt has been paid. *Scott v. Young*, 4 Paige, 542.

649. The corporators and trustees of a municipal corporation are competent witnesses in behalf of the corporation. *Trustees of Watertown v. Cowen*, 4 Paige, 510.

650. Where upon a bill for an account as to certain commercial transactions, the defence set up is, that the claim for which the suit is brought was a partnership transaction, in which a third person was jointly interested with the complainants as a copartner, and that the account has been adjusted and settled up to a certain period, such third person is a competent witness for the defendant to prove the existence of the copartnership and the settlement of account. *Gregory v. Dodge*, 4 Paige, 557.

651. A copartner of the complainants who is not made a party to the suit is also a competent witness for the defendant to prove the existence of a demand against the copartnership, which the defendant wishes to avail himself of as a set-off. *Ibid.*

652. Where one partner assigns all his interest in the demands and effects of the firm to his copartner, and the latter brings an action at law in the name of both for a copartnership demand, the defendant in such action cannot on the trial at law examine the assignor as a witness, neither can he give in evidence admissions or the answer of the assignor to a bill of discovery, made subsequently to the assignment and notice thereof, to prove a set-off, or establish any other defence in such action. *Norton v. Woods*, 5 Paige, 249.

D. Presumptive evidence.

653. Where the purchaser of mortgaged premises had admitted the existence of the lien within twenty years, and promised to discharge the mortgage, it was held sufficient to rebut the presumption of payment arising from the lapse of time. *Park v. Peck and others*, 1 Paige, 477.

654. Such admissions of the purchaser are also legal evidence against all his judgment creditors, whose judgments have been recovered subsequent to such admissions. *Ibid.*

E. Perpetuation of testimony.

655. Under the act to perpetuate the testimony of witnesses, (1 R. L. 454.) a witness is bound to give evidence in the same cases and to the same extent that he would be were he called as a witness upon the trial of the cause. *In the matter of Kip*, 1 Paige, 601.

656. The act does not authorize the examination of a witness who could not be compelled to testify upon the trial. *Ibid.*

XVII. EXECUTION.

657: This Court has the power to issue all process to carry its decrees into effectual execution. *Ludlow v. Lansing*, 1 Hopk. 231.

658. The statute authorizing the Court out of which an execution issues to discharge the defendant, upon his executing an assignment of his property for the benefit of the party at whose suit he is imprisoned, extends to an execution for the collection of money only, issued out of the Court of Chancery. *Van Wezel v. Van Wezel*, 3 Paige, 38.

659. But the statute does not authorize the discharge of a party in execution for a fine imposed for contempt of Court, or where he is committed for the non-performance of some act or duty which it is in his power to perform. *Ibid.*

660. The purchaser under a rule, on execution of an interest in land under a subsisting contract, after the time for redemption is past, has a right, as against the defendant in the execution and those claiming under him, to be substituted in his place as to the possession and all his legal rights connected therewith; and during the time allowed for redemption, the defendant and those claiming under him may be restrained from committing waste. *Tulbot v. Chamberlain*, 3 Paige, 219.

661. No execution can be issued out of the Court of Chancery against the body or the property of a party, except upon a decree or upon a positive order of the Court. *Van Ness v. Cantine*, 4 Paige, 55.

662. A party who is equitably entitled to costs must apply to the Court, and obtain a positive order for their payment, before he can take out an execution for the same. *Ibid.*

663. Exemption from imprisonment on execution, under the act to abolish imprisonment for debt and to punish fraudulent debtors, extends to a decree against the complainant for costs on the dismissal of a creditor's bill, filed for the purpose of obtaining satisfaction of a judgment founded on contract. *Merrill v. Townsend*, 5 Paige, 80.

XVIII. EXECUTORS AND ADMINISTRATORS.

A. Power, duty, and liability.

B. Actions by and against; account; allowances; when charged with interest and costs.

C. Administration when and to whom granted; when letters of administration may be taken out and produced.

A. Power, duty, and liability.

664. Only the executor or administrator can represent the personalty, and he alone can give a valid discharge, upon payment of demand due the testator or intestate. *Jenkins v. Fryer*, 4 Paige, 47.

665. Where an executor mixed the funds of the estate with his own, and loaned out the same from time to time on interest, without keeping separate accounts thereof; it was held to be a violation of his duty, by which he became liable to pay interest on the moneys belonging to the estate. *Kellett v. Rathbun*, 4 Paige, 102.

B. Actions by and against; account; allowances; when charged with interest and costs.

666. Where the husband has received a legacy due to his wife, and has given security to refund in case of a deficiency of assets, the executor cannot, in a suit by the husband and wife against him to recover the rents and profits of her real estate, show such deficiency; and set off the same against the claim for such rents and profits; the demands not being due in the same right. *Mollan v. Griffith*, 3 Paige, 403.

667. Where a bill is filed for the recovery of a legacy, and the executors are called upon either to admit assets or to render an account of the estate, if they, in their answer, neither deny the sufficiency of assets nor set out an account of the estate, the Court will presume that the estate in their hands is sufficient for the payment of the legacy, and will make a decree accordingly. *Smith v. Smith*, 4 Paige, 271.

668. Where a bill has been filed against the executors or administrators and the devisees or heirs of a deceased debtor, by one of the creditors, in behalf of himself and others who

may elect to come in under the decree, and a general decree for an account and payment of the debts and legacies, or debts of the testator or intestate has been obtained, a separation creditor or legatee cannot file a new bill for the same purpose, except he would not come in under such decree, or where he is entitled to more extended relief than he could have obtained in the former suit; in which cases he may file a new bill as supplementary to the former suit. *Brooks v. Gibbons*, 4 Paige, 374.

669. A bill in Chancery may be filed by the distributees to compel the executor or administrator to distribute the estate of the decedent according to the sentence or decree of the surrogate made upon a final accounting before him. *Stiles v. Burch*, 5 Paige, 132.

670. An administratrix who has been superseded will not be allowed to withdraw from a suit in which she is defendant. *Curew v. Morcott*, 1 Edw. 9.

671. Where a part of an intestate's estate consisted of stock, and the administrator, in 1819, had it transferred into his own moneys, without being enabled to separate them; held, that he was a trustee of the stock for the next of kin, must account for the dividends *pro tanto*, and be charged with interest upon the dividends from the times they were respectively received. The accounts of the stock were to be stated from 1819; and if the administrator had since sold out and invested the avails elsewhere, they were to be followed, and whatever dividends or income he had received from reinvestments were also to be accounted for with interest. *Garniss v. Gardiner*, 1 Edw. 128.

672. As a general rule, executors, administrators, and trustees are liable to pay simple interest where they unnecessarily retain the money in their hands, hold it an unreasonable time, mix it with their own private funds, use it in the way of trade, or derive any personal advantage from it. *Ibid.*

673. It is only in special cases and under peculiar circumstances, which must be proved, that interest is to be compounded against them. It is confined to cases of wilful omission of duty, and is not adopted in a case of negligence. *Ibid.*

674. A person in a fiduciary situation shall never be permitted to make gain to himself of the trust property in his hands. *Ibid.*

C. Administration when and to whom granted; when letters of administration may be taken out and produced.

675. A person who is the next of kin cannot sustain a suit in equity, for the recovery of personal property belonging to the decedent, without taking out letters of administration upon the estate, although he is exclusively entitled to the beneficial interest therein. *Jenkins v. Fryer*, 4 Paige, 47.

676. It is not the business of equity to undertake the administration of estates in the first instance, nor to take the administration out of the hands of persons duly appointed, and who are in no default. *Matthews v. Matthews*, 1 Edw. 565.

677. As to sales by executors or administra-

tors under the provisions of the revised statutes. *M' Durmet v. Lorillard*, 1 Edw. 273.

XIX. FRAUD.

A. Acts considered fraudulent at common law or in equity.

B. Frauds against the statute: (a) Parol agreements; (b) Agreements and conveyances fraudulent as against creditors and purchasers.

A. Acts considered fraudulent at common law or in equity.

678. If the delivery of goods is procured by the fraud of the vendee, the title will not pass to him, and the vendor can reclaim the goods if they have not passed into the hands of a *bona fide* purchaser. *Lupin and others v. Marie and Varet*, 2 Paige, 169.

679. A purchaser, however, from such fraudulent vendee, to secure antecedent debts or responsibilities, cannot hold the goods as against the vendor. *Ibid.*

680. If the delivery of the goods was conditional, the title does not pass until the condition is performed. *Ibid.*

681. But a *bona fide* purchaser without notice of the fraud will be protected even in the case of a conditional delivery. *Ibid.*

682. Where a merchant in good credit, who knows himself to be insolvent, fraudulently conceals that fact from the vendor, and purchases goods without intending to pay for them, or for the purpose of assigning them to his confidential creditors, such sale may be set aside as fraudulent. *Ibid.*

683. Where the vendee applied to the vendor to purchase a lot of wild land, and represented to him that it was worth nothing except for the purposes of a sheep pasture, when he knew there was a valuable mine on the lot, of the existence of which the vendor was ignorant; *held*, that this was such a fraud as would avoid the purchase. *Livingston v. The Peru Iron Company and others*, 2 Paige, 390.

684. Although a simple suppression of the truth by one of the parties to a contract may not be sufficient to authorize a Court to set it aside, yet if any thing is said or done to mislead or deceive the other party to the same, the Court will grant relief against the contract. *Ibid.*

685. Where two or more persons engage in a fraudulent transaction to injure another, neither law or equity will relieve them, as against each other, from the consequences of such transactions. *Bolt v. Rogers*, 3 Paige, 154.

686. Where the owner of real estate suffers another to purchase the estate from a third person, and to erect valuable buildings thereon, under the erroneous belief that he has a good title, and intentionally conceals from the purchaser his claim to the property, such owner will not afterwards be permitted to enforce his legal rights against such purchaser. *Town v. Needham*, 3 Paige, 546.

687. Where an administratrix sold real estate of the decedent under a surrogate's orders, in which estate she was entitled to dower, and in the terms of sale it was stated that a clear and satisfactory title would be given, and the purchaser paid the full value of the premises, under a belief that he was obtaining a perfect title; *held*, that the silence of the administratrix as to her claim of dower was such a fraud upon the purchaser as to preclude her from afterwards setting up such claim against him or his assigns. *Dougrey v. Topping*, 4 Paige, 94.

B. Frauds against the statute: (a) Parol agreements.

688. Possession of land taken by a vendee, and continued for upwards of eight years, although not provided for by the contract of sale, is an act of part performance taking a case out of the statute, if it satisfactorily appear that such possession was in pursuance of the contract. *Wood v. Young*, 5 Wend. 620.

(b) Agreements and conveyances fraudulent as against creditors and purchasers.

689. A conveyance by a parent, made *bona fide*, of all his real estate to a daughter for the benefit of herself and her brothers and sisters, will not be set aside in favour of a creditor, (who was one at the time of the conveyance,) by whose advice and procurement the settlement was made; the creditor having then had ample security for the moneys due to him by mortgages upon specific portions of the estate, but which, after a lapse of ten years, proved insufficient at a forced sale to satisfy his demands. Nor will the creditor be permitted to raise the *residuum* of his debts by sale of the lands not covered by his mortgages. *Pell et al. v. Fredwell*, 5 Wend. 661.

690. Where A., in embarrassed circumstances, executed a mortgage to B., his brother-in-law, of various articles of personal property, worth probably over \$500, remained in possession of the property, and subsequently disposed of a valuable portion of it; which mortgage was executed for the ostensible purpose of indemnifying B. against a responsibility assumed for A. to the amount of \$100, but was conditioned for the payment of \$300; it was *held*, on a bill filed by the creditors of A., that the mortgage was fraudulent, although, previous to the attaching the *liens* of the creditors, the mortgage was reduced down to the sum for which the mortgagee was bound as surety, and the property was actually delivered. *Bailey v. Burton*, 8 Wend. 239.

691. Until assignment by an insolvent debtor petitioning for his discharge, the property inventoried by him remains in him, and his interest in it passes by a conveyance voluntarily made, or by operation of law, notwithstanding his petition. *Ibid.*

692. C., a merchant in failing circumstances, executed to trustees sundry deeds of assignment of his property, in trust, to pay his creditors, who were thereby ranked into classes, and were to be paid in a certain order of priority. One of the deeds declared a trust to pay a certain sum annually, for a limited time, to C., the

debtor; and all the assignments were subject to this trust. By another of the deeds any creditor who would attach any of the debtor's property was to be excluded from the benefits of the trusts, which last provision was subsequently annulled. Afterwards, fearing that the assignments might not prove valid, C. confessed a judgment to the same trustees, upon the same trusts for creditors, but without the reservation in his own favour, which judgment was intended to be resorted to only in case the assignment should not be adjudged valid. *The assignment was adjudged void.* The judgment was held good. *Mackie v. Cairns*, 1 Hopk. 373.

693. The intention to use the judgment only in case the assignment should be adjudged invalid, does not infect the judgment with the vices of the assignment. *Ibid.*

694. An insolvent debtor may pay some creditors in preference to others; and may secure such payments by a judgment in favour of trustees for such creditors. *Ibid.*

695. But he can make no assignment of any part of his property in trust for himself. *Ibid.*

696. Such an assignment is void, not only for the portion reserved, but for the whole; not only in equity, but in law. *Ibid.*

697. The deed which contained the clause against attaching creditors was also void for that cause. *Ibid.*

698. This being an appeal from a Circuit Court in equity, the decree below was reversed; and the appellants, though they failed on other grounds, were allowed their costs out of the fund in Court. *Ibid.*

699. Where S., being indebted to several persons, was, in September, 1817, sued for a default in paying over moneys received as a commissioner of loans, and judgment was recovered against him on the 31st of January, 1818, and on the 1st of January, 1818, S. conveyed to L. his farm and all his personal property, for the nominal consideration of \$8501.25, \$4000 of which was paid in Virginia lands, which had been purchased by L. twenty years before, but which he had never seen or possessed, and there was no proof of his payment of the residue of the consideration, and S. continued in possession of the property so conveyed to L.; it was held, that this conveyance was fraudulent and void as against the creditors of S. *Lee v. Hunter and Hallenbeck*, 1 Paige, 519.

700. Where a debtor, with an intention of defrauding his creditors, executed a conveyance of his property without any valuable consideration being paid by the grantee, the conveyance is void as against such creditors, although the voluntary grantee was not privy to the fraud. *The Mohawk Bank v. Atwater*, 2 Paige, 54.

XX. GIFT.

701. A promissory note or a bond is a proper subject of a gift *causa mortis*; and the delivery may be to a third person, for the use of the intended donee. *Constant v. Schuyler and others*, 1 Paige, 316.

702. But claims of this kind are admitted with great caution; and where some doubt was thrown on the transaction, a signed issue was awarded. *Ibid.*

703. As to a gift, there must be an intention to give, but this intention is to be executed and carried into effect by an actual delivery. *Taylor v. Fire Department of New York*, 1 Edw. 394.

704. J. B. T. (not a fireman) was killed at a fire; and the firemen raised a subscription for the relief of his family, which was received by their respective foremen. By resolutions of the engineers and foremen, the money was invested by a committee in bank stock, in the name of the "Fire Department Fund," and the dividends were paid to the widow and children for a limited period; held, to be no consummated gift vesting in the family. *Ibid.*

XXI. GUARDIAN AND WARD.

A. How appointed and removed.

B. Guardian's power over the person and estate of his ward.

C. How a guardian shall account, and of actions against them.

A. How appointed and removed.

705. The Court will not appoint any of its officers as such to act as guardians; nor appoint any person without his written consent. *McVicar v. Constable*, 1 Hopk. 103.

706. The statute authorizing surrogates to appoint guardians for infants does not require notice of the application. *Moorehouse v. Cook*, 1 Hopk. 326.

707. But in certain cases, such notice is proper to be given. *Ibid.*

708. As between an uncle and a stranger, other things being equal, the uncle is to be preferred as guardian. *Ibid.*

709. The common law of guardianship in socage never prevailed in Chancery. *Ibid.*

710. Where there are several guardians of an infant's estate, they may act separately or in conjunction. They are jointly responsible for joint acts, and each is separately answerable for his separate acts and defaults. *Kirby v. Turner*, 1 Hopk. 309.

711. Such guardians having, with a surety, given a joint and several bond for faithful performance, their rights and duties as guardians are not thereby varied. *Ibid.*

712. They are not by such bond made sureties for each other. *Ibid.*

713. But the surety is liable for their joint defaults, and for the separate defaults of each. *Ibid.*

714. In construing such bonds, the penalty and condition are to be taken together, and the words jointly and severally, though in the penalty only, will operate throughout; and they are to be taken distributively, according to the nature of the case in which defaults may occur. *Ibid.*

715. Where there are several guardians, the statute requiring the surrogate upon the ap-

pointment of guardians to take from every guardian a bond with surety, &c., is complied with by taking one joint and several bond from all the guardians with surety. *Ibid.*

716. The statute did not intend to place joint guardians in the relation of sureties for each other. *Ibid.*

717. In this case, the ward, after full age, gave a separate release to T., one of the guardians, who had not her property in possession, reserving her right against A. T., another guardian, who wasted it; *held*, that the release is a discharge in favour of T., and of the surety so far as T. is concerned. *Ibid.*

718. But the release is not available in favour of A. T.; and the surety still remains liable for A. T.'s defaults. *Ibid.*

719. The release has the same construction in regard to sureties as in regard to principals. *Ibid.*

720. The maxim of the common law, that a release of one joint debtor is a release of all, is not applicable to cases of joint trusts, where the party released was not in default. *Ibid.*

721. In this case the suit was dismissed with costs against the guardian T., who was released, and also against the representatives of D., another guardian who had never acted; both A. T. and the surety were declared to be liable for the amount of property received and wasted by A. T., and an account was directed. *Ibid.*

722. A person who had been appointed general guardian of a minor was afterwards appointed a special guardian of the same minor, in a suit for the petition of lands of which the minor was a part owner. The usual bonds with sureties were given upon both appointments. The lands were sold, and the share of the moneys belonging to the minor were paid to the guardian. The ordinary bond of the general guardian does not embrace the receipt and disposition of the moneys arising from the sale of the land. *Muir v. Wilson*, 1 Hopk. 512.

723. Fixed habits of intemperance constitute a sufficient reason for the removal of a guardian. *Kettleas and wife v. Gardner and wife*, 1 Paige, 488.

724. And it is improper that the wife of a husband addicted to such habits should be the guardian, she being subject to his control. *Ibid.*

725. An adult husband is entitled to the guardianship of the person of his wife during her minority. *Ibid.*

726. Where the guardian entered into a speculation with the husband of his ward, who was also an infant, in relation to her estate, and obtained a mortgage thereon from both, the Court removed the guardian from his trust, and ordered the mortgage to be delivered up and cancelled. *In the matter of Cooper and wife, infant's*, 2 Paige, 34.

727. It seems, that the insolvency of the guardian and of one of his sureties is also a sufficient reason for the removal of the guardian. *Ibid.*

728. The Court will not appoint a guardian *ad litem* for an infant defendant, upon the nomination of the complainant. *Knickerbaker v. De Freest and others*, 2 Paige, 304.

729. When the complainant applies for the

appointment of a guardian for an infant defendant under the last clause of the 144th rule, he will be entitled to an order appointing such person guardian as shall then be designated by the Court, unless the infant, within ten days after service of a copy of such order, shall himself procure a guardian to be appointed. *Ibid.*

730. A copy of such order may be served personally upon the infant if he is of the age of fourteen years or upwards; and if he is under that age, then upon his general guardian, or his relative, friend, or other person with whom he resides. *Ibid.*

731. Upon the expiration of the ten days, upon filing an affidavit of the service of the order, and that no notice has been received of the appointment of a guardian *ad litem* by the infant, the complainant will be entitled to an order of course that the former order for the appointment of a guardian be made absolute. *Ibid.*

732. In partition causes where security is required from the guardian, the order must require the infant to procure a guardian to be appointed, and that he file the requisite security within the ten days, or that the order for the appointment of the person named by the Court will be made absolute upon his filing such security. *Ibid.*

733. Where the infant is a non-resident, special directions must be given as to the manner of service of the order, if any notice thereof shall be deemed requisite. *Ibid.*

734. The revised statutes have not divested the Court of Chancery of any of its powers as the general guardian of the persons and estates of infants; neither do they prevent the chancellor, in Court, from making an order for the appointment of a guardian or next friend according to the former practice of the Court. But where it can be done consistently with the forms of the Court, and without great inconvenience and expense, the Court will, in the exercise of its powers, conform to the spirit of the statutory provisions. *In the matter of Frits and others, infants*, 2 Paige, 374.

735. The revised statutes do not, in terms, require a next friend to be appointed for an infant plaintiff who joins with an adult, but it is as necessary in that case to have a next friend appointed as in the case of a sole plaintiff. *Ibid.*

736. The provision which directs the officer making the appointment of a next friend to take security to the infant in certain cases, extends to cases where the infant sues jointly with others. *Ibid.*

737. Where a great number of infant legatees had a common interest in the prosecution of a suit, the Court, on the application of the guardians of some of the infants, in behalf of all the rest, appointed a next friend to prosecute a suit in the names and for the benefit of all the infant legatees. *Ibid.*

738. Upon an application to sell the estate of an infant, under the statute, the Court will appoint his general guardian, if he has one, as the special guardian. *In the matter of Wilson and others, infants*, 2 Paige, 412.

739. Where, however, it appears that the general guardian cannot procure the requisite security, another person may be appointed the special guardian to sell the property. *Ibid.*

740. Where the guardian of infants has been appointed by a vice-chancellor, an application to remove such guardian, or to compel him to account by a summary proceeding, should be made to the vice-chancellor by whom he was appointed, or to his successor, and not to the chancellor. *Matter of Kennedy*, 5 Paige, 244.

741. A guardian of an infant who is under fourteen, appointed by the Court of Chancery, continues such guardian until the infant is twenty-one years of age, unless sooner removed by the Court appointing him; and the infant upon arriving at the age of fourteen cannot have a new guardian appointed as of course. *Matter of Dyer*, 5 Paige, 534.

742. The Court of Chancery has concurrent jurisdiction with a surrogate in removing a guardian appointed by the latter, for the causes specified in the revised statutes on that subject; but the surrogate has no jurisdiction to remove or discharge a guardian appointed by the Court of Chancery, or to compel such guardian to account either before or after his removal by the Court appointing him. *Ibid.*

743. A surrogate has no authority to remove a guardian, or to accept the resignation of a guardian appointed by himself, and appoint another in his place, or to compel a guardian to account, except in the particular cases specified in the statute on the subject. *Ibid.*

744. Where the surrogate appointed a new guardian in the place of the guardian appointed by the Court of Chancery, and proceeded to settle the accounts of the old guardian; *held*, that the whole proceedings were void for want of jurisdiction. *Ibid.*

B. Guardian's power over the person and estate of his ward.

745. Bill of foreclosure on certain mortgages made by W. E., cross bill by C. C., charging that W. E., as her guardian *ad hanc* during her minority, instituted a suit in the Supreme Court for the partition of these lands of which she was heiress, and obtained a judgment for a sale, and became himself the purchaser, and impeaching the judgment in partition as void of irregularity, and charging all the proceedings of W. E. to be fraudulent, and that the other defendants claiming under him had notice. *Held*, that whether this Court can or cannot treat the judgment in partition as void of irregularity, still as the proceedings of W. E. appear upon the whole case to be a tissue of actual fraud, his title is bad. *Gallatin v. Erwin*, 1 Hopk. 48.

746. W. E. mortgaged part of the lands to R. W. and C. W., and they assigned to the complainants in the original suit. W. E. also mortgaged to G., one of those complainants. *Held*, that if either the complainants, or if R. W. and C. W. the assignors to the complainants, were purchasers without notice, and for valuable consideration, the complainant may be protected by that fact. *Ibid.*

747. All the proceedings in the cases of special guardianship to sell infant's estates must be filed in the office where the order for the appointment of the guardian was entered. *In the matter of Seaman and others*, 2 Paige, 409.

748. The provision of the revised statutes

which authorizes the general guardian of an infant tenant in common, with the consent of the Court of Chancery, to agree to a sale of the estate, for the purpose of making partition, does not authorize the guardian to sell to a co-tenant, but only to join with the other tenants in common in a sale of the joint interest in the property. *In the matter of G. and E. Congdon, infants*, 2 Paige, 566.

749. The Court will not authorize the guardian to join in a sale, except on the report of a master that such sale is necessary and proper; and the guardian must give security for the faithful performance of his trust on such sale, and to bring the proceeds of the infant's share into Court, or to invest and account for the same as the Court shall direct. *Ibid.*

750. If a co-tenant wishes to buy the infant's share in an estate which cannot be divided, and is willing to give the fair value thereof, the general guardian should apply for liberty to sell, under the article of the revised statutes relative to the sale and disposition of infant's estates. *Ibid.*

751. A parent or guardian has the right to change the domicile of his child, or ward, provided such change is made in good faith; subject, however, to the power of the Court of Chancery to prevent an improper removal of an infant out of the state. *Wood v. Wood*, 5 Paige, 596.

752. The Court of Chancery has power to restrain a parent or guardian from removing an infant out of the jurisdiction of the state; but it will not interfere with the natural right of a parent over his child, except in a very special case. *Ibid.*

753. Where a father appointed a testamentary guardian for his children, who were under the age of seven, and directed the guardian to remove them to the state of Ohio, and to invest their property there upon certain trusts which were illegal by the laws of New York, where the children were residing with their father at the time of his death, and the widow refused to go with them to the state of Ohio, and asked to have them remain with her in this state, the Court restrained the guardian from taking the children from their mother, and removing them out of the state, until further order. *Ibid.*

754. Where a testamentary guardian holds a fund for the sole benefit of his wards in his character of guardian, to be invested for their use, the Court of Chancery may change the investment from that which is directed by the testator, when it is for the benefit of the infants that such change should be made, even without the consent of such guardian. *Ibid.*

755. Where a guardian invested money belonging to the complainants, who were his wards, upon a bond and mortgage in his own name, and afterwards assigned such bond and mortgage as a collateral security for an antecedent debt due from himself, and subsequently died insolvent; *held*, that the assignee of the bond and mortgage was not entitled to hold them as against the complainants, although he had no notice of their equitable right to the bond and mortgage at the time of the assignment; and that a payment to the assignee by the mortgagee,

after notice of the equitable rights of the complainants, would not protect him against their prior equity. *Everston v. Everston*, 5 Paige, 614.

756. Where a guardian held a bond and mortgage in his own right, and had in his hands moneys of his wards to the same amount to be invested for their benefit, and it was agreed between him and the mortgagor, that the money of the infants should be substituted for that which was due to himself upon the bond and mortgage, and that those securities should remain to secure the payment of the money belonging to them; *held*, that this was an equitable investment of the money of the infants upon the security of the bond and mortgage. *Ibid*.

757. A general guardian appointed in a surrogate's Court cannot receive funds out of Chancery without giving security in the latter Court. *Ferris v. Brush*, 1 Edw. 573.

C. How a guardian shall account, and of actions against them.

758. A guardian acting in good faith, but chargeable with some degree of negligence, omitting to invest the moneys of his wards, and mixing those moneys with his own, but not appearing to have employed the funds in trade or productive business, is charged with simple interest on the funds in his hands uninvested. *Clarkson v. De Peyster*, 1 Hopk. 424.

759. This is the most general rule. *Ibid*.

760. When profits are earned by the guardian from the trust fund, they belong to the ward; and in this case, an inquiry was directed to ascertain whether the guardian had made profits. *Ibid*.

761. Compound interest is allowed only in cases of gross delinquency. *Ibid*.

762. In this suit against the guardian, he was not compelled to produce before the master his books of account containing entries of his private concerns. *Ibid*.

763. If a guardian *ad litem* neglects his duty to the infant, whereby such infant sustains an injury, the guardian will not only be punished for his neglect, but he will also be liable to the infant for all the damages he may have sustained. *Knickerbocker v. De Frost and others*, 2 Paige, 304.

764. It is the special duty of a guardian *ad litem* to submit to the Court, for its consideration and decision, every question involving the rights of the infant affected by the suit. *Ibid*.

765. A strict compliance with the 154th rule, requiring guardians, receivers, and committees to file inventories and accounts, will be rigidly enforced. *In the matter of Seaman and others*, 3 Paige, 409.

766. In ordinary cases where a guardian, &c., neglects to comply with the rule, an order will be made requiring him, within twenty days after service of a copy of such order on him personally, or at his residence in case of his absence, to file the inventory and account, and to pay the expenses of the order and proceedings thereon, or that an attachment issue against him. *Ibid*.

767. And the order must also contain a pro-

vision requiring the register or assistant register to cause a copy of the same to be served, and to certify the default of the delinquent to the Court, if he fails to comply with the order. *Ibid*.

768. The sureties of a guardian may be joined with him as defendants in a bill of Chancery charging him with a breach of trust, and with having wasted the property intrusted to his care, and praying for an account and satisfaction of what may be found due; and it is not necessary that a decree should have been first obtained against the guardian alone, before proceeding against him and his sureties jointly. *Cudderback v. Kent*, 5 Paige, 92.

769. The act of 1815 relative to the sale of infant's estates does not confine the remedy of the infant to a common law action on the bond against the guardian or his sureties for a breach of the trust. *Ibid*.

770. It is no defence to a suit upon the bond of a guardian that such suit has been instituted without an order of the Court in which the bond was taken, directing it to be put in suit; but when such bond has been taken in a proceeding before the chancellor, he may by order restrain the proceedings improperly and without authority. *Ibid*.

771. The Court of Chancery has original jurisdiction in the case of an infant against the guardian and his sureties, where the condition of the bond has been broken, to decree an account against the guardian, and to make a decree over against the sureties to the extent of their liability, if the amount found due to the infant cannot be collected from such guardian. *Ibid*.

772. A party who has obtained his majority cannot, by petition, call upon the person who had acted as guardian to account; it must be done by a bill. *Matter of Hopson*, 1 Edw. 8.

773. Silence of parties for several years raises a presumption of satisfaction. Calling for accounts is not to be encouraged after the death of the accounting party, provided he lived long enough to have accounted, and there was no impediment. *Bertine v. Varian*, 1 Edw. 343.

774. Therefore, where a bill was filed against one guardian and the administrator of another to account, eleven years after one of the wards came of age, and eight years as to the other; it was *held*, that the complaint must be dismissed with costs. *Ibid*.

XXII. HEIRS AND DEVISEES—DISTRIBUTION.

775. Debts due by the testator are equitable liens upon his estate in possession of his heirs or devisees, prior in time to judgments recovered against them for their individual debts. *Morris and others v. Mowatt and others*, 2 Paige, 586.

776. But the judgment creditors of the heirs or devisees have a right to ask for the application of the personal estate, in the first place, to the satisfaction of the debts due by the testator, or that they be substituted in the place of the

creditors of the testator as to such personal estate. *Ibid.*

777. The revised statutes have prescribed a new mode, by a bill in equity, of proceeding against heirs and devisees to obtain satisfaction of the debts due from the estate. *Ibid.*

778. And a final decree in such suit has a preference, as a lien on the estate descended or devised, over any judgment or decree obtained against the heir or devisee for his personal debt. *Ibid.*

779. And a sale under an execution issued upon such decree will overreach not only all judgments and decrees which may have been recovered against such heirs or devisees, but also all mortgages and alienations of the estate made subsequent to the commencement of the suit. *Ibid.*

780. 'Whether a sale under an execution issued on the decree is necessary to give the purchaser a legal title, sufficient to protect him at law against a sale under a previous judgment against the heir or devisee? *Quære. Ibid.*

781. Where a devisee of an insolvent had a mortgage which was a prior lien on the premises devised, and she entered upon the premises as devisee, and received the rents and profits thereof; held, that as between her and the creditors of the testator, she was bound to account for the rents and profits, and to allow them in part payment of the mortgage. *Chalabre v. Corleyn and others*, 2 Paige, 605.

782. No bill can be filed against heirs or devisees of real estate, to obtain satisfaction of a debt due from the decedent, until the expiration of three years after the granting of letters testamentary or of administration on his estate. And if the fact that the suit is prematurely brought appears upon the face of the complainant's bill, the defendant's may demur; or they may insist upon that objection in their answer. *Bulla v. Gemung*, 5 Paige, 254.

783. Under the provisions of the revised statutes, a creditor of the decedent cannot file a bill against his heirs and personal representatives jointly, to obtain satisfaction of a debt out of the real and personal estate. And such a misjoinder of defendants will render the complainant's bill multifarious. *Ibid.*

784. To enable a creditor to sustain a bill in Chancery, against the heirs or devisees of his deceased debtor, after the expiration of the time limited for the commencement of proceedings against the real estate before the surrogate, under the provisions of the revised statutes, the complainant must distinctly state in his bill that the personal estate of the decedent was not sufficient to pay his debts; or that, after due proceedings before the surrogate and at law, he has not been able to collect his debts out of such personal estate. *Ibid.*

785. In such a suit against heirs or devisees, a general decree for the sale of the real estate and a distribution of the proceeds of such sale among the creditors of the decedent cannot be made; but each creditor must file his separate bill for the recovery of what such heirs or devisees are liable to pay to him, after satisfying all legal priorities and the proportionate claims of other creditors. And the proportion of

the debt and costs decreed against each heir and devisee is to be collected by execution, and not by a master's sale. *Ibid.*

786. Where the decedent at the time of her death left no relatives in the direct line of ascent or descent, and her nearest collateral relations were an aunt of the half blood of the decedent's father, and another aunt of the full blood on the side of the mother; held, that the two aunts were entitled to share equally in the distribution of the decedent's personal estate. *Hallett v. Hare*, 5 Paige, 315.

787. In successions to personal estates, relatives of the half blood in equal degrees of cognation to the intestate take equally with relatives of the whole blood; and they also take by representation, when representation would be allowed among relatives of the whole blood. *Ibid.*

788. The Court of Chancery considers that which is legally agreed to be done as done; and upon the principles of equitable conversion, the purchase money of land contracted to be sold in the lifetime of the owner thereof is, in equity, considered as a part of his personal estate; and it is to be distributed as such to his widow and next of kin, unless it is otherwise disposed of by his will. *Hawley v. James*, 5 Paige, 318.

XXIII. HIGHWAYS.

789. The laying out of a public highway across a man's land does not divest the title of the owner, but the title remains in him, subject to the public right of way over the same; and whenever the road ceases, the land will revert to the original owner or to his assignees. *Dumond v. Sharts*, 2 Paige, 183.

790. The privilege of making a railroad and taking tolls thereon, when granted to an individual or a company, is a franchise. The public have an interest in the use of the road, and the owners of the franchise are liable to respond in damages if they refuse to transport an individual or his property upon that road, without any reasonable excuse, upon being paid the usual rate of fare. *Beekman v. Saratoga and Schenectady Railroad Company*, 3 Paige, 45.

791. The Legislature may regulate the use of the franchise and limit the amount of the tolls, unless they have deprived themselves of that power by a legislative contract with the owners of the road. *Ibid.*

792. Whether the appearing before the jury of the owner of a yard or enclosure through which a road is laid out, and litigating his claim for damages, and subsequently appealing to the board of supervisors for an increased allowance for damages, does not amount to a legal consent to the laying out of such road within the meaning of the statute? *Quære. Lansing v. Caswell*, 4 Paige, 519.

793. Where a law passed previous to the revised statutes gave the trustees of an incorporated village the powers of commissioners of highways within the limits of the corporation, such powers must now be exercised in con-

formity to the provisions of the revised statutes; and from the decision of the trustees, in laying out, altering, or discontinuing a road or highway, an appeal lies to the judges of the County Court. *Ibid.*

794. If a regular appeal is made from the decision of commissioners of highways to the county judges, the commissioners cannot proceed and open the highway until the appeal is determined; although the judges refuse to proceed and decide upon the same under the supposition that they have not jurisdiction of the case. *Ibid.*

795. But where the appellants, after such refusal of the judges, appeared before the jury empanelled to assess their damages incurred by the laying out of the road, and litigated the question as to the amount of such damages, and subsequently applied to the board of supervisors to increase the amount of damages allowed by the jury; *it was held*, that they had thereby waived their appeal. *Ibid.*

796. The provisions of the revised statutes prohibiting the commissioners of highways from laying out a road through yards or enclosures extends only to such yards and enclosures as are necessary to the use and enjoyment of the dwelling house or manufacturing establishment to which they are appurtenant; and the statute must be construed in reference to the situation and nature of the property with which the yard or enclosure is connected. *Ibid.*

797. A railroad company is interested in the keeping up of the partition fences which separate the land taken for the use of their railway from the adjoining lands; and where there is no special provision on the subject in their act of incorporation, the company is bound to make and support one-half of the fences. *In the matter of the Rensselaer and Saratoga Railroad Company*, 4 Paige, 553.

798. In estimating damages which the owner of lands taken for the use of a railroad will sustain by the running of the road through his lands, he should be allowed for the expense of making and maintaining only one-half of the partition fence, as the other half the railroad company are liable to make and maintain. *Ibid.*

XXIV. HUSBAND AND WIFE.

- A. (a) *Marriage*; (b) *Voluntary settlements*.
- B. *The husband's interest in his wife's estate, and his power over it; and how the wife's equity to a suitable provision out of it will be secured.*
- C. *The wife's power over her separate estate; how far she is considered a feme sole in regard to it during coverture; and of her consent to the acts of her husband in relation to it.*
- D. *Dower; title of the widow; of what lands, how endowed; remedy; election; bar.*
- E. *Adultery; divorce; articles of separation; alimony; legitimacy of children.*

A. (a) *Marriage.*

799. A marriage procured by abduction, terror, and fraud will be annulled by this Court. *Ferland v. Gojon*, 1 Hopk. 478.

800. In a bill alleging parties to be husband and wife, proof of a formal solemnization or contract of marriage is not necessary. Cohabitation, acknowledgment by the parties, reception as man and wife, and common repute are sufficient to raise a presumption of marriage. *Jenkins v. Bisbee*, 1 Edw. 377.

(h) *Voluntary settlement.*

801. A post-nuptial contract between husband and wife, by which property is set apart for her separate use, although void at law, will be sustained in equity. *Garlick v. Strong*, 3 Paige, 440.

802. Where the husband, who was about to sell his estate, agreed with his wife, and with the knowledge of the purchaser, that if she would join in a deed of the premises so as to release her dower, she should receive a certain portion of the purchase money as her separate property, free from the control of her husband; and the purchaser gave a note to the wife for her share of the purchase money; and the agent for the wife, in whose hands the note had been placed for her use, loaned a part of the money received on the note, and took a bond and mortgage directly to the wife; and the husband afterwards assigned the mortgage to the original purchaser of the estate without the assent of the wife or her agent; *held*, that in equity the bond and mortgage belonged to the wife, and that she was entitled to the money due thereon for her separate use. *Ibid.*

B. *The husband's interest in his wife's estate, and his power over it; and how the wife's equity to a suitable provision out of it will be secured.*

803. If the wife is entitled to the income of property bequeathed to her separate use during coverture, and the husband obtains possession of it for the purposes of the trust, he will be decreed to pay to her the income. *Collins v. Collins*, 2 Paige, 9.

804. Where a debt due to the wife before marriage has never been reduced into possession by the husband, it is considered the property of the wife, so as to be subject to her equity for the support of herself and children. *Smith and others v. Kane and wife*, 2 Paige, 303.

805. If a creditor asks the aid of a Court of Chancery to reach property of the husband which is not subject to an execution at law, he must take such property subject to the wife's equity, if she has any therein. *Ibid.*

806. The wife's equity to a support for herself and children out of her estate, which has not been reduced into possession by the husband, is paramount to the rights of the assignee of the husband under the insolvent act. *Mumford and others v. Murray*, 1 Paige, 620.

807. Where the property of the wife is in the hands of an officer of the Court of Chancery, she may apply by petition for a reasonable allowance out of such estate. *Ibid.*

808. But if she has appropriated to her own use property which belonged to the assignee, the amount thereof must be refunded to him out of her estate. *Ibid.*

809. This Court will not decree a specific performance of an agreement made by a hus-

band in relation to the real estate of his wife to which she was not a party. *Squire and wife v. Harder and others*, 1 Paige, 494.

810. He can make no agreement which will affect her rights without her consent. *Ibid.*

811. An adult husband may file a bill in Chancery for the partition of his wife's estate, although she is an infant. *Sears and wife v. Hyer and others*, 1 Paige, 463.

812. He has a valid and subsisting interest of his own in the premises, and may, therefore, join with her in the suit. *Ibid.*

813. Where lands of the wife who is an infant are sold under a decree in partition, the husband is not entitled to the proceeds, but the Court will secure the fund for her use until she becomes of age, and consents to her receiving the same. *Ibid.*

814. Where the wife was entitled to an equitable allowance out of the separate estate of her husband, who was a lunatic, but of whose person and estate no committee had been appointed, the Court ordered her separate property to be transferred to the assistant register, and that the income thereof be paid to her upon her separate receipt, until the further order of the Court. *F. Carter v. J. K. Carter*, 1 Paige, 463.

815. Where the husband applies to a Court of Equity for the control of his wife's property, the Court will protect her interests, and make such a decree as is most for her benefit. *Fabre and wife v. Colden*, 1 Paige, 166.

816. Upon a bill filed by the wife, Chancery will interpose to restrain the husband or his assignees from proceeding at law to possess themselves of her property in action, and will compel them to allow her a suitable provision out of the same for her support. *Van Epps v. Van Deusen*, 4 Paige, 64.

817. The assignee also takes the assignment of the wife's estate, subject to her equitable claim thereon for the support of herself and infant children, if she has no other sufficient means for that purpose; provided she asserts her claim or institutes a suit in Chancery for the recovery of such estate before the assignee has reduced it into possession. *Ibid.*

818. An assignment by the husband, under the insolvent laws, vests in the assignee the personal estate of the wife in action, unless the same is secured to her as her separate property. But the assignee takes the legal interest, subject to the wife's rights by survivorship, if the husband dies before the assignee has reduced such property into possession. *Ibid.*

819. The husband can collect demands due to his deceased wife only in the character of her administrator; and by the revised statutes, he is required to give the like bond and security as other administrators. *Jenkins v. Freyer*, 4 Paige, 47.

820. Although a husband holds a bond and mortgage made out in favour of his wife, and receives the interest, yet this is not a reduction into possession; and if she dies, he cannot sue upon it without taking out letters of administration, even though he may be exclusively entitled. *Hunter v. Hallett*, 1 Edw. 388.

821. If a husband dies without having administered to his wife's choses in action, and administration is granted to another, the latter becomes a trustee for the husband's representative. *Ibid.*

C. *The wife's power over her separate estate; how far she is considered a feme sole in regard to it during coverture; and of her consent to the acts of her husband in relation to it.*

822. A conveyance by a *feme covert*, with warranty, although acknowledged according to the statute, will not operate by way of estoppel, so as to pass to her grantees her subsequently acquired interest in the property conveyed. *Teal v. Woodworth*, 3 Paige, 450.

823. Where a wife unites with her husband in a mortgage of her real estate merely as a security for the payment of his debt, she is entitled to have his interest in the estate, as tenant by the courtesy, first sold and applied to the payment of the debt, in exoneration of her estate or interest in the mortgaged premises. *Neimcewicz v. Gahn*, 3 Paige, 614.

824. This equity is paramount to the claim of a judgment creditor who has only a general lien upon the husband's interest in the premises subsequent to the mortgage. *Ibid.*

825. If the fact, that the wife executed the mortgage as the surety of her husband merely does not appear upon the face of the instrument, it may be established by parol proof. *Ibid.*

826. Where a wife becomes a surety for her husband, by the creation of a valid lien upon her own property or estate, she is entitled to the same equitable rights as other sureties. *Ibid.*

827. The wife, by her next friend, may file a bill against her husband, or against her husband and a third person, to protect her separate estate, or to prevent her husband and others from depriving her of a support out of property which belongs to her in equity, although the husband has the right at law to sue for and control such property. *Dewall v. Greenhaven*, 5 Paige, 581.

828. But where a bill is filed by the husband, in the name of himself and wife, for the recovery of her property, it is his suit, and if he releases to the defendants the demand for which the suit was brought, the suit cannot be continued in the name of the husband and wife, but must be dismissed. And if the execution of such release was a fraud upon the rights of the wife, she must commence a new suit by her next friend. *Ibid.*

829. A bill filed by the husband, in the name of himself and wife, although for a claim in right of his wife, is considered as the bill of the husband. If he dies before a decree in the cause, the widow may proceed in the suit, or not, at her election; and if she refuses to proceed, she is not liable for costs. *Ibid.*

830. A wife cannot be joined as a complainant in a bill against her husband without her consent, although the suit is prosecuted in her name by her next friend. *Randolph v. Dickerson*, 5 Paige, 517.

831. A married woman, upon the joint petition of herself and her husband, was allowed to mortgage a legacy payable to the wife at a

future day, for the purpose of raising money, (to be invested in mercantile business.) The profits to be applied to the support of the wife and her children. *Matter of Stewart*, 1 Edw. 168.

832. But this was not allowed until the husband had made a settlement of the legacy upon the wife and her children. The deed of settlement was approved of by the Court, and the draft of it was filed in the office of the clerk. *Ibid.*

833. A deed of a married woman to a guardian of her infant husband is looked upon with jealousy, and the Court will require a personal examination of the wife to know if it be done without coercion. *Ferris v. Brush*, 1 Edw. 572.

834. Where a wife's property is involved in a suit, she must join in a petition for maintenance *pendente lite*; and it must not only appear to be done with her consent, but also clearly show that the money is wanted for maintenance. Therefore, when a petition was signed by the solicitor of the husband and wife, and sworn to by the husband only, and merely stated "a necessary occasion" for the allowance, the same was deemed insufficient. *Minnott v. Graham*, 1 Edw. 575.

D. Dower; title of the widow; of what lands, how endowed; remedy; election; bar.

835. If the owner of the legal estate purchases in a mortgage executed by husband and wife, with the intention of protecting himself against the claim of dower to the extent of that encumbrance, the widow can only be endowed of the equity of redemption, and she is bound to contribute her share towards the payment of the mortgage. *Russell v. Austin*, 1 Paige, 192.

836. A defendant continues seized of his real estate sold under a judgment and execution, until the time for redemption expires; and where he dies before the time for redemption expires, his widow will be entitled to arrears of dower. *Ibid.*

837. Arrears of dower against the purchaser of the premises in which dower is claimed, can only be recovered from the time of the purchase. *Ibid.*

838. Where there is an outstanding mortgage upon the premises, the arrears of dower will be computed by deducting from one-third of the rents and profits over and above the necessary repairs, taxes, &c., one-third of the interest on the amount due on the mortgage at the time the defendant acquired title to the premises. *Ibid.*

839. Where a mortgage has been executed by husband and wife, she can only be endowed of the equity of redemption. *Ibid.*

840. To entitle the wife to dower, the husband must have been seized during the coverture of a present freehold, as well as of an estate of inheritance in the premises. *Dunham v. Osborne and others*, 1 Paige, 634.

841. Seisin of a vested remainder is not sufficient where the husband dies or aliens his interest in the premises during the continuance of the particular estate. *Ibid.*

842. Where lands descend to the son on the death of the father, and dower is assigned to the mother, if the son dies during the life of the

mother, his widow can only be endowed of the remaining two-thirds. *Ibid.*

843. But if the lands are conveyed to the son by the father, the widow of the son will be entitled to dower in the other third also, after the death of the mother. *Ibid.*

844. Where the estate has been sold on an execution against the husband, who afterwards died, leaving a widow entitled to dower, the widow of the purchaser will be entitled to dower in the whole premises, subject to the dower right of the first widow in one-third thereof. *Ibid.*

845. The revised statutes, however, have now given the widow a better remedy for her dower, and a more extended right to damages for arrears than was provided by the former law. *Ibid.*

846. In a suit at law, if the dowress dies before her right is established, her personal representatives have no remedy either for costs or for the mesne profits. But if the husband died seized, the death of the dowress pending a suit in this Court for her dower will not deprive her personal representatives of the arrears due at the time of her death; but they may revive the suit for the purpose of obtaining such arrears of dower. *Johnson v. Thomas*, 2 Paige, 377.

847. But where the husband did not die seized of the premises, if a suit in Chancery abates, by the death of the complainant, before her right to dower is established, the personal representatives are not entitled to any arrears of dower, and, therefore, cannot revive. *Ibid.*

848. A legal jointure, settled upon an infant before marriage, is a legal bar of her dower; and by analogy to the statute, a competent and certain provision settled upon the infant in bar of dower, to which there is no other objection but its mere equitable quality, is an equitable bar of dower. *McCarlee v. Teller and wife*, 2 Paige, 511.

849. To make a mere equitable jointure binding on the infant, the provision should be as beneficial to her, and as certain, as that required in the legal jointure, to constitute a legal bar. *Ibid.*

850. The equitable provision, to bar dower, must be a provision to take effect in possession or profit immediately on the death of the husband, and to continue during the life of the widow; and it must be a reasonable and competent livelihood for the wife, in reference to the circumstances and situation in life of the parties, the value of the husband's estate, and the extent of the portion received with the wife on her marriage. *Ibid.*

851. An estate for life, or during the widowhood of the grantee, is a base or determinable freehold, and if an adult actually accepts such an estate in lieu of dower, it will constitute a legal bar; but if such an estate is settled upon an infant, who has no legal capacity to consent to an acceptance of such a qualified freehold, it will not bar her dower. *Ibid.*

852. Where the husband entered into an antenuptial contract with an infant and her guardian, by which she was to receive a certain annual sum during her widowhood in lieu of

dower, it was held, that she was not bound by the agreement, and might disaffirm the same and claim her dower, after the death of her husband. *Ibid.*

853. But by the revised statutes the distinction between legal and equitable jointures is abolished, and any estate or pecuniary provision made for the benefit of the wife, whether an adult or an infant, in lieu of dower, will, if assented to by her in the manner prescribed in the revised statutes, now constitute a legal bar of her dower. *Ibid.*

854. Where a wife who is an infant unites with her husband in a deed of conveyance of his real estate to trustees for the payment of his debts, under an ignorance of her legal rights, being informed at the time she signed and acknowledged the deed that the same would not prejudice her rights; such deed cannot afterwards be set up against her as a bar to her right of dower in the land so conveyed. *Sanford v. M'Lean*, 3 Paige, 117.

855. A rule, under a judgment against the husband, obtained before marriage, will divest the right of dower of his wife in the land sold. *Ibid.*

856. Where, upon a bill filed to restrain a widow from proceeding at law to recover her dower, the complainant fails in defeating her claim to dower, it is not the practice for the Court to proceed to the assignment of the dower, but to dismiss the bill upon the merits, and to allow the defendant to proceed at law. *Ibid.*

857. Where a husband, for the purpose of depriving his wife of any share of his personal property after his death, purchased real estate from his son at a price far beyond its value, and gave his bond and mortgage for the purchase money, the collection of which was not to be enforced during the life of the husband; held, that the transaction was valid, and that the widow could not have the bond and mortgage set aside as fraudulent as against her. *Holmes v. Holmes*, 3 Paige, 363.

858. The owner of personal property, as against every person except creditors, may make such disposition thereof as he pleases, either by will or otherwise. He cannot, therefore, commit a fraud upon his wife or children by disposing of it after his death in any manner he may think proper. *Ibid.*

859. A wife cannot relinquish her dower in the real estate of her husband by executing a release thereof to him, or in any other way than by joining with him in a conveyance to a third person. *Carson v. Murray*, 3 Paige, 484.

860. The purchaser of premises sold under a decree for partition takes the same subject to the right of dower of the wife of one of the tenants in common, unless the wife was a party to the suit; but where an actual partition is made, the wife's dower will attach upon the portion of the premises allotted to her husband. *Wilkinson v. Parish*, 3 Paige, 653.

861. On a bill for the recovery of dower, if the right of the widow is admitted by the answer, the Court will proceed at once to assign the dower, and to take an account of the arrears, if it is a case in which she could recover damages at law. But if her right is disputed, the

Court will retain the bill, and direct a suit at law to ascertain the title. *Badgley v. Bruce*, 4 Paige, 98.

862. A widow's right of dower before assignment is a mere right or chose in action, and not an estate or freehold in the land, or such an interest as can be sold on execution against her. *Tompkins v. Fonda*, 4 Paige, 448.

863. Before assignment and entry, a widow cannot convey her dower right to a stranger, by any of the ordinary modes of conveying freehold estates, so as to vest the legal interest in her grantee. *Ibid.*

864. But if the widow is in possession, or is entitled to an assignment of dower immediately, the want of a mere formal assignment of her dower is not considered material in equity. And her interest in such a case may be reached upon a creditor's bill, and applied to the complainant's judgment. *Ibid.*

865. The widow's right of dower before assignment is a thing in action, within the meaning of the statute authorizing the Court of Chancery to decree satisfaction of a judgment, out of personal property, money, or things in action of a defendant, after the return of an execution unsatisfied. *Ibid.*

866. If lands descend to a son charged with the right of dower of his mother, which is afterwards decreed to her, and he then dies in her lifetime, his widow is only entitled to dower in two-thirds of the premises. *Reynolds v. Reynolds*, 5 Paige, 161.

867. Previous to the adoption of the revised statutes, the widow was not entitled to dower in lands in which the husband was seized of a mere equitable estate or interest during ~~his~~ ^{her} lifetime, or at the time of his death. But the legislature, in the revised statutes, has adopted the principle of giving to the widow her equitable dower in the descendible equitable interests of her husband of which he died seized, and the widow is entitled in equity to dower in this species of real estate, when it has not been aliened by the husband in his lifetime. *Hawley v. James*, 5 Paige, 318.

868. Where lands belonging to several tenants in common had been divided into lots for the purpose of sale, and the several owners, with their wives, joined in a conveyance of the lands to a trustee, for the purpose of enabling him to give conveyance with more facility to such persons as might contract for the purchase of lots from time to time; held, that the widow of one of the owners who afterwards died was entitled to equitable dower in the husband's undivided interest in such of the lots as had not been sold at the time of his death, but not in the lots which had been contracted to be sold, and which had not been conveyed by the trustee, in the lifetime of the husband. *Ibid.*

869. A devise of all the testator's real and personal estate to a trustee to be sold and converted into money, and to pay the widow an annuity out of the income of the mixed funds composed of the proceeds of the real and personal property, is not of itself sufficient to show that the testator intended this provision for the widow to be in lieu of dower, so as to compel her to elect between such annuity and her dower

in the real estate. *Wood v. Wood*, 5 Paige, 596.

870. Where the testator devised certain lands to his widow, and also bequeathed to her an annuity in lieu of her dower in his real estate, and the widow, within two months after his death, executed a deed of relinquishment of the provisions made by the will, and elected to take the dower, and procured the deed to be recorded, and gave notice of such election to the testators, executors and trustees, who recognised her right to dower, and made payment to her out of the rents and profits of the estate on account of her dower; *held*, that this was a valid election by the widow to take her dower, and was equivalent to an actual entry on the land, or the commencement of proceedings for the recovery of her dower within the provisions of the revised statutes. *Hawley v. James*, 5 Paige, 318.

871. If a widow gives notice to the person who is in possession of the lands of which she is endowable, of her election to have her dower instead of the testamentary provisions in lieu of dower, and such person thereupon admits her right, and pays her a part of the rents and profits of the land, as and for her dower therein, it is in equity a valid election by her, and is equivalent to an entry on the lands, or an assignment of dower for the purpose of determining such election. *Ibid.*

872. It is not necessary for the purpose of making a valid election by the widow that she should make entry upon, or commence proceedings for the recovery of dower in every distinct parcel of the lands in which she is entitled to claim dower. It is sufficient, if she has not accepted of the provision made for her in lieu of dower, that she actually commences proceedings within the year, for the recovery or assignment of her dower in any part of the lands as to which her right of election exists; or that she enters upon any part of such lands, claiming her dower therein. *Ibid.*

873. To constitute a case of election under the revised statutes, the jointure or other provision made for the wife in lieu of dower must be a provision in which she has a beneficial interest; a mere power in trust for the sole benefit of others is not sufficient, although such power in trust is declared by the will of the testator to be in lieu of the widow's right of dower. But the testator may make the execution of a power in trust for the benefit of others dependant upon the relinquishment by the widow of her right of dower in his real estate. *Ibid.*

874. The Court can neither compel a husband who has married a woman having a dower right, nor the wife, to join in a deed releasing it. *In re: matter of Lane*, 1 Edw. 349.

875. A bequest in lieu of dower and the acceptance of the same amount to a matter of contract and purchase, and the wife is to be paid the bequest in preference to other legacies, and without abatement. But the debts are to be paid first. *Ishart v. Brown*, 1 Edw. 411.

876. A husband conveyed real estate in fee without his wife's joining; afterwards by will he bequeathed to the wife a third of the re-

mainder of his real and personal estate, "as and for her right of dower during her life;" she accepted it. *Held*, that it was a relinquishment of her claim for dower out of the reality which had been conveyed by the husband alone, as well as of the lands whereof the husband was seised at the time of making the will. *Steele v. Fisher*, 1 Edw. 435.

877. A suit in partition cannot take away a wife's right to dower; on a partition, such right attaches to the husband's severalty share; and if a sale is decreed, the lands should be sold subject to it, unless she will voluntarily release. The master's deeds will not carry it. *Matthews v. Matthews*, 1 Edw. 565.

878. No act of the husband's, without the wife's consent or misconduct, can bar her dower. *Ibid.*

E. Adultery; divorce; articles of separation; alimony; legitimacy of children.

879. A *feme covert* who sues for a separation or limited divorce must file her bill by *prochein ami*. *Wood v. Wood*, 8 Wend. 357.

880. Where a bill was filed by a *feme* in her own name, it was *held*, that she was not entitled to an allowance from her husband to carry on the suit. *Ibid.*

881. A final decree of divorce *a mensa et thoro* is not made merely upon taking the bill *pro confesso* in the usual form. The real facts of the case must first be ascertained. *Barry v. Barry*, 1 Hopk. 118.

882. The law of England concerning divorces is chiefly the ecclesiastical law, and not the common law of that country, and it has never been adopted in this state. *Burtis v. Burtis*, 1 Hopk. 557.

883. Our statutes concerning divorces are original regulations, and they do not adopt or introduce the English law of divorces. *Ibid.*

884. We have no judicature authorized to adjudge, by a substantive and effectual sentence, that a marriage is illegal, and to separate the parties. *Ibid.*

885. This Court cannot dissolve a marriage, or decree a divorce, for the cause of corporal impotence. *Ibid.*

886. Where a bill was filed by a husband against his wife for a divorce, and a monthly allowance was ordered to be made to the wife by the husband, for alimony during the pendency of the suit, it was *held*, that she was entitled to this allowance up to the termination of the suit by a final decree, and not merely to the time of the trial, which resulted in her favour. *Germond v. Germond*, 1 Paige, 83.

887. Where the decree is in favour of the wife, she will be allowed against her husband her costs, and all the reasonable disbursements and expenses made in her defence. *Ibid.*

888. In a suit brought by either husband or wife for a divorce on the ground of adultery, the wife prosecutes and defends without a guardian or next friend, as a *feme sole*; and her affidavit is admissible against the husband as to any matter of proceeding in the cause. *Kirby v. Kirby*, 1 Paige, 261.

889. An injunction, a receiver, and a writ of

ne *exant* may all be resorted to in the same suit, to aid the Court in doing justice between the parties. *Ibid.*

890. A husband, by committing adultery, subjects himself and his property to the jurisdiction of the Court of Chancery, so far as to enable the Court to order his property to be applied to the support of his family, both during the litigation and afterwards. *Ibid.*

891. And the power of the Court extends to compelling the husband to apply a portion of his daily earnings to the same object, during the pendency of the suit. *Ibid.*

892. Where a divorce was decreed in a suit brought by the wife against her husband for adultery, an annuity equal to the annual value of one-third of the husband's property, at six per cent., was allowed to the wife during her natural life, for her alimony. *Peckford v. Peckford*, 1 Paige, 274.

893. If her conduct had been discreet, prudent, and submissive to her husband, the allowance to her would have been greater. *Ibid.*

894. The Court of Chancery has no power to decree an absolute or a partial dissolution of the marriage contract, even with the consent of the parties, except in the special cases provided for by statute. *Palmer v. Palmer*, 1 Paige, 276.

895. Neither the act of 1813, concerning divorces, (2 R. L. 200.) nor the act of April, 1824, (6 vol. Laws of N. Y. 249.) confers upon the Court of Chancery power to grant a divorce *a mensa et thoro*, unless the charges contained in the complainant's bill are satisfactorily established. *Ibid.*

896. The usual course, where the bill is taken as confessed, is to order a reference to a master to report as to the facts. *Ibid.*

897. If the bill is filed by the husband for a divorce *a mensa et thoro*, and he obtains a decree, the wife will not be entitled to a maintenance out of his property. *Ibid.*

898. Where the husband filed a bill against his wife for a divorce *a mensa et thoro*, and the wife in her answer denied every allegation of improper conduct charged in the complainant's bill, and also set up cruel and inhuman conduct, on the part of her husband towards her, and in consequence thereof consented to a decree of separation from bed and board for ever, in which a suitable provision should be made for herself and children, the Court refused to decree a divorce from bed and board. *Ibid.*

899. A wife may compromise a suit brought against her husband for a divorce; and the Court will only interfere so far as to see that she is not overreached or imposed upon in the settlement. *Kirby v. Kirby*, 1 Paige, 565.

900. The solicitor for the wife cannot insist upon proceeding with the suit against her consent, upon the ground that his costs are not paid. *Ibid.*

901. Where the husband and wife are living together pending a suit for a divorce *a mensa et thoro*, and the wife is in no danger from personal violence, the Court will not break up the family by placing the children under the inclusive control of either party. *Collins v. Collins*, 9 Paige, 9.

902. In a suit against the husband for a

divorce, if he suffers the bill to be taken as confessed, and a divorce is granted, costs follow of course. *Graves v. Graves*, 2 Paige, 68.

903. The wife is also entitled to alimony if her circumstances render such an allowance either necessary or proper. *Ibid.*

904. The reference to the master to ascertain the truth of the facts charged in the bill is to satisfy the Court, and to prevent collusion between the parties; and the husband cannot set up any matter in opposition to the wife's claim for costs or alimony, which if set up by an answer would have been a sufficient ground for refusing a divorce. *Ibid.*

905. Cohabiting with the wife, after a knowledge that she has been guilty of adultery, will be such a condonation or forgiveness of the offence as to bar the suit for a divorce. *Wood v. Wood*, 2 Paige, 109.

906. Forgiveness of the injury by implication, from the fact of cohabitation, ought not to be held a strict bar in all cases against the wife, as she is, to a certain extent, under the control of her husband. *Ibid.*

907. The charge of adultery, whether by way of crimination or recrimination, should be stated in the pleadings in such a manner that the adverse party may be prepared to meet it on the trial of the issue. *Ibid.*

908. The adultery must be charged with reasonable certainty as to time and place, and the name of the person with whom it was committed, if known, should also be stated. *Ibid.*

909. If the name of the person with whom the adultery was committed is not known to the party making the charge, that fact should be averred, and the time, place, and circumstances of the adultery should be stated. *Ibid.*

910. If the charge of adultery is not sufficiently explicit, the objection may be made when a feigned issue is applied for. *Ibid.*

911. Although the defendant denies the adultery charged in the bill, she may also set up the adultery of the husband, or any other matter, in bar of the suit. *Ibid.*

912. On a bill for a divorce, if the wife is an infant, she must prosecute or defend by her next friend or guardian. *Ibid.*

913. Where an infant defendant put in an answer to a bill of divorce by her solicitor, the proceedings were, on her application, set aside for irregularity, and she was permitted to put in a new answer by her guardian. *Ibid.*

914. Where the wife is the defendant in a suit for a divorce, if she denies on oath the charge of adultery, or shows a valid defence by reason of condonation or otherwise, she is entitled to a reasonable allowance for her support pending the litigation, and to enable her to defend the suit. *Ibid.*

915. Where upon a bill filed by the husband for a divorce *a vinculo matrimonii*, a decree dissolving the marriage contract was made, and after enrolment both parties joined in a petition to the Court, requesting that the enrolment of the decree might be opened and vacated, and the decree reversed, the Court granted an order according to the prayer of the petition, and dismissed the complainant's bill; but without prejudice to the rights which third persons might

have acquired under the decree. *Colvin v. Colvin*, 2 Paige, 385.

916. A *feme covert* cannot file a bill against her husband in her own name, except in the single case of a bill to obtain a divorce on the ground of adultery. *Ibid.*

917. A bill to obtain a separation merely must be filed in the name of the next friend of the wife; and if it is not so filed, the defendant may demur. *Wood v. Wood*, 2 Paige, 454.

918. No allowance for costs or alimony can be made to the wife, if it appears upon the face of her bill that it is improperly filed, and that she can obtain no decree thereon. *Ibid.*

919. By the common law of this state the Court of Chancery had no jurisdiction to decree a separation between a husband and wife for cruel treatment, or on account of a mere canonical disability. *Perry v. Perry*, 2 Paige, 501.

920. A marriage merely voidable is valid for all civil purposes, until its nullity has been pronounced by the proper tribunal; but by the common law the sentence of nullity, when pronounced, renders the marriage void from the beginning. *Ibid.*

921. That part of the common law of England which renders a marriage contract absolutely void in certain cases forms a part of the law of this state, and may be enforced by the appropriate tribunals, independent of any statutory provisions. *Ibid.*

922. The cruelty which entitles the injured party to a decree of separation is that kind of conduct which endangers the life or health of the complainant, and renders cohabitation unsafe. *Ibid.*

923. Upon a bill filed by the husband against the wife for a divorce upon the ground of adultery, the husband, upon the application of the wife, will be ordered to pay her a gross sum to defray the expenses of her defence, and also a reasonable sum for alimony during the pendency of the litigation, although affidavits are presented on the part of the husband showing the guilt of the wife. *Osgood v. Osgood*, 2 Paige, 631.

924. But the application of the wife for an allowance to enable her to make her defence and for alimony will be denied, unless she denies in her petition, on oath, the truth of the charge of adultery, or shows therein some valid defence to the husband's suit. *Ibid.*

925. In a suit commenced in Chancery by the husband for a divorce upon the ground of adultery, the Court has power to decide upon the legitimacy of the children begotten and born after the commission of the adultery charged in the bill. *Cross v. Cross*, 3 Paige, 139.

926. The legitimacy of a child begotten before the commencement of the suit for a divorce must be presumed until the contrary is shown; and such presumption can only be rebutted by the most conclusive evidence that the husband was not the father of the child. *Ibid.*

927. Sexual intercourse will be presumed where personal access is not disproved, unless such presumption is rebutted by satisfactory evidence to the contrary. *Ibid.*

928. Where sexual intercourse is either proved or presumed, the husband must be deemed the father of the child, unless it was

either physically or naturally impossible that such intercourse should have produced such child. *Ibid.*

929. Although actual adultery with other persons is established at or about the commencement of the usual period of gestation, yet if access by the husband has taken place, so that by the laws of nature he may be the father of the child, it must be presumed to be his, and not the child of the adulterer. *Ibid.*

930. Although it is an act of great unkindness, and of unreasonable oppression, on the part of the husband, to refuse to permit his wife to attend a particular church, of which she is a member, such refusal is not alone a sufficient ground to justify a separation. *Lawrence v. Lawrence*, 3 Paige, 267.

931. The proportion of the husband's estate or income to be assigned to the wife for alimony, either pending the litigation, or on a final decree for a divorce or separation, is in the discretion of the Court. *Ibid.*

932. In fixing the amount of alimony, the Court must take into consideration the nature and amount of the husband's means, the claims his children and others have upon him for sustenance and education, and his ability to support himself by his own exertions. *Ibid.*

933. The alimony allowed to the wife for her support pending the litigation is always much smaller in proportion than that which is assigned to her as a permanent provision after she has established her right to a divorce or separation. *Ibid.*

934. Upon a proper application, a wife may be permitted to file a bill against her husband for a separation by her next friend in *forma pauperis*. But this will not be done until the Court has ascertained, by the report of a master, that she has probable cause for filing such bill. *Robertson v. Robertson*, 3 Paige, 367.

935. Where a husband and wife agreed to separate, and articles of separation were executed by them, and also by a trustee, which articles contained a permission for the payment of an annuity of \$125 per annum to the wife during her life as alimony; in consideration of which she agreed to release her right to dower in the estate of her husband; and afterwards the husband made his will, and therein directed his executors to sell his real estate, and to invest one-third part of the nett proceeds of the sale at interest, and to pay such interest to his wife during her life, which provision he declared should be in full recompense for and a bar of her dower in such real estate; held, that the wife was entitled to the provision secured to her in the articles of separation, and also to the provision made in her favour in the will of her husband. *Carson v. Murray*, 3 Paige, 483.

936. A valid agreement may be made between husband and wife, through the medium of a trustee, for an immediate separation, and for a separate allowance to the wife for her support. *Ibid.*

937. But an agreement for a separation cannot be supported, unless the separation has already taken place, or is to take place immediately upon the execution of such agreement. *Ibid.*

938. An agreement for a separation will be rescinded, if the parties afterwards cohabit, or live together as husband and wife by mutual consent, for ever so short a time. *Ibid.*

939. A stipulation in the articles of separation reserving to the parties the right of visiting each other, in case of sickness, by mutual consent, if not afterwards carried into effect, will not render the agreement void. *Ibid.*

940. In a bill for separation on account of cruel treatment, the complainant cannot insert a charge of adultery, and ask for a decree dissolving the marriage contract, if that charge should be sustained. *Smith v. Smith*, 4 Paige, 39.

941. Where a decree for a divorce was obtained by the husband upon a personal service of the *subpoena* upon his wife in the state of New Jersey, and the complainant shortly after the decree married another woman, who was ignorant of the irregularity in obtaining the divorce, the Court permitted the defendant to come in and make a defence to the suit; but for the protection of the rights of the second wife, the decree was directed to remain in full force until the result of the litigation was known. *Dunn v. Dunn*, 4 Paige, 426.

942. In a suit for a divorce, on the ground of adultery, if the defendant relies upon a condonation of the injury, or upon the adultery of the complainant, as a bar to the divorce, she must either insist upon that defence in her answer, or set it up by the way of plea. *Smith v. Smith*, 4 Paige, 433.

943. Although the defendant, in her answer, denies the adultery charged in the bill, she may also insist that if any act of adultery has been committed by her, there has been a condonation or forgiveness of the offence; and she may also, in her answer, charge acts of adultery, on the part of her husband, in bar of the suit. *Ibid.*

944. Where it appears in any stage of the suit previous to a final decree, that the adultery complained of in the bill has been actually forgiven, and has not been revived by subsequent misconduct, or that it was committed with the concurrence or by the procurement of the complainant, a divorce will not be granted. If there is reason, therefore, to suspect that such a defence exists, although the defendant neglects to set up the same, the chancellor *ex officio* may direct an inquiry to ascertain the fact. *Ibid.*

945. Condonation is a forgiveness of the injury; and a repetition of the offence revives a condoned adultery. *Ibid.*

946. Where an adulterous intercourse has once been established, if the parties thereto continue to reside together, it may be presumed that the criminal connexion still subsists, although there is no positive evidence of the fact. *Ibid.*

947. The adultery of the complainant, although committed after the commencement of his suit for a divorce, is a bar to such suit; and where the adultery of the complainant is committed after the answer of the defendant has been put in, the defendant will be permitted, if she applies immediately after the discovery of the facts, to set up that defence in a supple-

mental answer, or by a cross bill in the nature of a plea *puis darrien continuance*. *Ibid.*

948. Where the master, upon a reference to take proof of the adultery charged in a bill for a divorce, received the testimony of a physician, disclosing information which he had acquired in attending upon the defendant in a professional character, and which information was necessary to enable the witness to prescribe for his patient; it was held, that such testimony must be rejected by the Court, in deciding whether the defendant had been guilty of the adultery, as charged in the bill. *Johnson v. Johnson*, 4 Paige, 460.

949. A voluntary cohabitation of a wife with her husband, with full knowledge of an act of adultery committed by him, is legal evidence of a forgiveness of the offence, so as to bar a suit for a divorce. *Ibid.*

950. An act of cruelty alone, on the part of a husband, will not, in this state, revive a condoned adultery, so as to entitle the wife to a decree dissolving the marriage contract. *Ibid.*

951. To revive a condoned adultery so as to entitle the injured party to a divorce, the subsequent misconduct of the defendant must appear to have been of the same character. But the complainant, in a suit for a divorce on account of subsequent misconduct of the defendant, may give the condoned adultery in evidence, in support of the charge for the new offence. *Ibid.*

952. A *feme covert* cannot make a valid agreement with her husband for a separation except under the sanction of the Court of Chancery, and in a case where the conduct of her husband has been such as to entitle her to a decree for a separation. *Rogers v. Rogers*, 4 Paige, 516.

953. The law does not authorize or sanction a voluntary agreement for a separation between husband and wife; it merely tolerates such agreements when made in such a manner as to be capable of being enforced by or against a third person acting in behalf of the wife. *Ibid.*

954. Where a bill is filed by the wife for a separation, and pending the suit, the husband makes a separate provision for her upon a contract between them to live separate, the Court will not enforce a mere verbal agreement to discontinue the suit founded upon such contract. *Ibid.*

955. Pending a suit commenced by the wife against her husband for a separation on account of cruel treatment, the allowance for temporary alimony will be estimated according to the expense of board and clothing at the place where her connexions reside; if she selects that as the place of her residence after her separation from her husband, unless the expense of living there is disproportionate to the property of her husband. *Germond v. Germond*, 4 Paige, 643.

956. The allowance for temporary alimony, pending the suit of the wife for a separation, will be limited to the actual wants of the wife, until the result of the suit in her favour establishes her right to a more liberal allowance. *Ibid.*

957. Where the parties were white persons, and the complainant was charged by the oath

of the defendant as the putative father of her bastard child, and the complainant thereupon, believing the child to be his, married her to obtain his discharge from the proceedings against him under the bastardy act, and he subsequently ascertained that the child was a mulatto, and that she swore it to be his, she then having been delivered and seen the child; *held*, that the complainant was entitled to a decree declaring the marriage contract void, on the ground that his consent was obtained by fraud. *Scott v. Stansfeldt*, 5 Paige, 43.

958. If a party, knowing that he cannot be the father of a bastard child, is induced to marry the mother to avoid a prosecution, it is no ground for annulling the marriage contract on the ground of fraud, although he should afterwards be able to establish the fact that the child was not his. *Ibid.*

959. Although it is impossible that a white man should have a mulatto child by a white woman, yet if the former, before the birth of the child, believing it to be his child, marries the mother on the ground of such belief, it seems he cannot have a decree annulling the marriage, notwithstanding her concealment of the fact from him that she had received the embraces of a negro about the time she was receiving his. *Ibid.*

960. In a suit brought by the wife for a divorce, she cannot, previous to the decree dissolving the marriage, make any valid agreement as to her allowance for alimony. And the Court will not sanction any such agreement made by her, unless it satisfactorily appears that the allowance made in her favour for alimony is as much as she is fairly entitled to, under the circumstances of the case, and from her husband's situation as to property. *Daggell v. Daggell*, 5 Paige, 509.

961. A sentence of nullity, declaring a marriage invalid on the ground of the physical incapacity of the defendant, cannot be pronounced upon a bill taken as confessed for want of an appearance or answer, without examining the defendant on oath before the master to whom it is referred to take the proofs of the facts and circumstances stated in the complainant's bill. *Devenbagh v. Devenbagh*, 5 Paige, 534.

962. To authorize a sentence of nullity, the physical incapacity of the defendant must have existed at the time of the marriage, and must be incurable; and both these facts must be established by the most satisfactory evidence, although they are admitted by the defendant. *Ibid.*

963. The Court of Chancery will not decree a marriage void on the ground of the impotence of the defendant, until a surgical examination has been had for the purpose of ascertaining whether the alleged incapacity is incurable, if the defendant is within the jurisdiction of the Court. *Ibid.*

964. Upon a bill filed to annul a marriage on the ground of impotence, the Court has the necessary power, and will compel the parties to submit to such a surgical or other examination as may be necessary to ascertain the facts necessary to a correct decision of the cause; but

in a suit brought against a female, the Court will not compel her to submit to a further examination, if it appears that she has been already sufficiently examined by competent surgeons, whose testimony can be obtained by the complainant, to show that her physical incapacity is incurable. *Ibid.*

965. It seems, that on a feigned issue, to try the question of adultery, acts of cruelty, which led strongly to the conclusion of the adultery's being contemplated, may be received in evidence. *Mulick v. Mulock*, 1 Edw. 14.

966. A judge is right, upon the trial of a feigned issue, in allowing proof of acts of cruelty for the purpose of showing: 1. That the affections of a husband were alienated from the wife. 2. A course of abuse from the time of his connexion with another woman down to and terminating in a separation from his wife. 3. That such cruelty resulted from such connexion, and was part of a plan contrived between them to drive the wife from home, in order that the improper intimacy might be more easily carried on. *Ibid.*

967. Cases of adultery are generally made out from circumstances leading to the fact, by fair inference and necessary conclusion. *Ibid.*

968. Cruelty and adultery are entirely distinct causes of divorce; and they cannot be combined in the same bill as substantive causes of complaint. *Ibid.*

969. An allowance to a wife of alimony and money to carry on a suit instituted for a divorce, is almost a matter of course. Affidavits in opposition are admitted for the purpose of fixing the amount to be allowed. *Wright v. Wright*, 1 Edw. 62.

970. Temporary alimony and money to carry on the suit will be allowed, notwithstanding the opposite party puts in a plea denying the marriage. *Smith v. Smith*, 1 Edw. 255.

971. The propensity to drink to intoxication is not, in itself, a ground for divorce *a mensa et thoro*. If the consequences of intoxication produce bodily injury, or endanger the wife's personal safety, then the Court will interfere. *Mason v. Mason*, 1 Edw. 278.

972. Occasional sallies of passion, from whatever cause, do not amount to legal cruelty, so long as there is no threat of bodily harm. *Ibid.*

973. To constitute *sævitia* of the civil law, bodily injury or an act of personal violence is not necessary. It is made out, if there be a series of unkind treatment, accompanied by words of menace, creating a reasonable apprehension that bodily injury must result to the wife, unless prevented. Still the causes for apprehension must be weighty, and show an impossibility that the duties of the married life can be discharged. *Ibid.*

974. It is a serious question how far a husband who marries after a feigned issue, and before a decree, can have any benefit of a verdict of adultery given against the wife. *Stanford v. Stanford*, 1 Edw. 317.

975. A wife is entitled to temporary alimony up to a final decree, notwithstanding a jury upon a feigned issue has given a verdict of adultery against her. *Ibid.*

976. Although there was an appeal to the

chancellor from an order allowing the sufficiency of a next friend, still it did not stay the vice-chancellor from granting alimony. *Robertson v. Robertson*, 1 Edw. 360.

977. Although a husband files a bill for an absolute divorce after a wife has filed one for a separation, still she is entitled to temporary alimony and money to litigate. *Monroy v. Monroy*, 1 Edw. 389.

978. Amount of alimony may be fixed by the Court without a reference. *Ibid.*

979. Where a wife files a bill for a limited divorce, and the husband then files one against her for an absolute divorce, on account of adultery, he cannot stay the wife's suit in order to have his own first heard. *Ibid.*

980. *It seems*, that where a divorce bill, taken *pro confesso*, shows apparent condonation, but states circumstances which go to negative a forgiveness, the master has a right to take proof upon the question of condonation. *Johnson v. Johnson*, 1 Edw. 439.

981. Condonation is not, in all cases, a bar to the remedy. It amounts only to a forgiveness, accompanied with an implied condition of not repeating the injury; and when the forgiveness proceeds from the wife, it is upon the idea of her being treated with conjugal kindness. On a breach of the condition in either case, the right to prosecute for the former injury revives. *Ibid.*

982. Nor need the subsequent injury be of the same sort, or be proved in the same manner, or be sufficient of itself, when proved, to warrant a divorce. *Ibid.*

983. Condonation is less binding on the wife than the husband. *Ibid.*

XXV. INFANT.

- A. *Of the acts of infants; when void or voidable.*
- B. *How far bound in equity, and how favoured.*
- C. *Sale of infant's estate.*

- A. *Of the acts of infants; when void or voidable.*

984. Where D., in April, 1818, sold land to B., an infant, and the infant, upon the execution and delivery of the deed to him, gave to D. a bond and mortgage upon the premises for the purchase money; and the deed and mortgage were both duly acknowledged and recorded, and one-half of the purchase money was paid to D. by B. at the time of the purchase; and B., the infant, immediately went into possession of the premises, and continued in possession until after he arrived at the age of twenty-one years; and then sold the same to R., who conveyed them again to other persons; and all the purchasers had full knowledge of the mortgage which was assigned by D. to L. in 1819; it was held, that the mortgage was a legal charge upon the land, and that if the premises did not sell for a sum sufficient to discharge the amount due upon the mortgage, with the costs of the suit, B. would be liable to pay the balance. *Lynde v. Budd and others*, 3 Paige, 191.

985. The contract with the infant was not

void, but voidable at his election, when he became of age. *Ibid.*

986. He might then have relinquished the property, and claimed a repayment of the money paid by him to the grantor at the time of the purchase. *Ibid.*

987. But by continuing in possession after twenty-one, and conveying the land with warranty, he affirmed the contract, and made himself liable for the payment of the residue of the purchase money. *Ibid.*

988. The deed and mortgage, being executed at the same time, formed but one contract; and the infant could not affirm such contract as to the deed, and avoid it as to the mortgage. *Ibid.*

989. A conveyance made by an infant is voidable only; and the avoidance of it is a personal privilege. *Eagle Fire Company v. Lent*, 1 Edw. 301.

990. The act of avoidance of a deed executed by an infant must be as solemn and notorious as the making of it. *Ibid.*

991. Four persons, of whom two are infants, conveyed real-estate to M. in fee; M. mortgaged the whole to the complainants, and then sold (subject to the mortgage) to C. The latter got one of the infants, on coming of age, to release to him. Upon a bill filed by the complainant for foreclosure and sale, C. set up that M. had only a right in half the property at the time of the mortgage, because of infancy of two of the grantors; held, that the mortgage was a valid security upon the share conveyed by the infant, whose subsequent release was a confirmation of the title under which the mortgage had been given; and the mortgage was also good against the remaining share until the other infants should do something in avoidance of the deed. But the master was to give notice of the situation of the title at the time of sale. *Ibid.*

992. A conveyance by an infant *feme covert*, although executed and acknowledged in the manner prescribed by the statute, is void. *Sanford v. McLean*, 3 Paige, 117.

993. After marriage, an infant *feme covert* cannot bind herself by any deed or contract, either in law or equity, except under the sanction of the Court of Chancery, or in the cases specially provided for by statute. *Ibid.*

- B. *How far bound in equity, and how favoured.*

994. An agreement being made for the quieting of mutual claims to real property between persons who, on one side, were adults, and some of whom, on the other side, were infants; and that agreement being executed by the former party, and the execution of it being refused on the part of the infants, who, however, availed themselves of the agreement at law; held, that the infants shall be put to their election either to confirm the agreement or to relinquish all pretensions under it. *Overbach v. Heermance*, 1 Hopk. 337.

995. A suit may be commenced in the name of an infant without his knowledge or consent. The Court, however, on a proper application, will refer it to a master to ascertain whether such a suit is for the benefit of the infant; and if the master reports that it is not for his benefit,

will stay the proceedings. *Fullon et al. v. Roosevelt*, 1 Paige, 178.

996. It seems, an infant who has no means of indemnifying a responsible person for costs, will be permitted to sue, by his next friend, in *forma pauperis*. The Court, however, will, in the first place, see there is probable cause for the proceeding, and will appoint a proper person as *prochein ami*. *Ibid*.

997. The Court will protect the rights of infants, where they are manifestly entitled to something, although their guardian *ad litem* neglects to claim it in their behalf. *Stephens and others v. Van Buren and Wyckoff*, 1 Paige, 479.

998. Where a bill is filed on behalf of an infant by his next friend, the infant cannot be personally charged with the costs, unless when he arrives at twenty-one he adopts the proceeding, and elects to prosecute the suit. *Waring and others v. Crane and Canfield, Executors*, 2 Paige, 79.

999. Where the suit is terminated before the infant becomes of age, the next friend will be chargeable with the costs, unless there be a fund belonging to the infant, under the control of the Court, and it appears that the suit was brought in good faith, and with a *bona fide* intent to benefit the infant; in which case the Court may direct the costs to be paid out of the fund. *Ibid*.

1000. If the suit was improperly brought, and the infant when he arrives at twenty-one elects to abandon it, he may apply for a reference to ascertain the fact, and the bill will then be dismissed with costs, to be paid by the next friend. *Ibid*.

1001. But if the suit was properly instituted for the benefit of the infant, and at twenty-one he elects to abandon it, he must, upon the dismissal of the bill, pay the costs of his next friend, as well as those of the adverse party. *Ibid*.

1002. An infant is only liable for necessities, when he has no other means of obtaining them except by the pledge of his personal credit. If the infant is under the care of a parent or guardian, who has the means and is willing to furnish what is actually necessary, he cannot, without the consent of such parent or guardian, make a binding contract for articles which under other circumstances would be deemed necessities. *Cline and others v. L'Amoureux, Committee of Stafford*, 2 Paige, 419.

1003. Where a person deals with an infant, he is bound, at his peril, to inquire and ascertain the real circumstances of the infant, and whether he is in a situation to bind himself by a contract for necessities. *Ibid*.

1004. Where the defendant, an innkeeper, persisted in harbouring an infant, and furnishing him with supplies against the will and contrary to the express directions of his guardian, who was endeavouring to reform his dissipated habits, the Court of Chancery would not permit the defendant to retain the fruits of his improper conduct. And the defendant having obtained a judgment bond from the infant during his minority, and another a few days after he became of age, but which was overreached by an in-

sition, finding him incompetent to contract on account of habitual drunkenness, both judgments were decreed to be set aside and cancelled. *L'Amoureux, Committee of Stafford, v. Crosby*, 2 Paige, 422.

1005. The guardian *ad litem* of an infant defendant should not consent to a general reference to a master to take an account against the infant, until he has ascertained that the right of the infant can be protected on such reference. *Jenkins v. Freyer*, 4 Paige, 47.

1006. If the father of an infant child, without authority, receives or takes possession of the property of the infant, he will, in equity, be considered as the guardian of the infant, and may be compelled to account as such; and the rule is the same where a mere stranger or wrongdoer takes possession of the property of an infant, and receives the rents and profits thereof. *Van Epps v. Van Deusen*, 4 Paige, 64.

1007. No decree can be made against infants upon the admissions of their guardian *ad litem* in the answer. *James v. James*, 4 Paige, 115.

1008. A guardian of poor infants must be first appointed to defend a suit before any application can be made to the Court for the purpose of their suing as paupers. *Matter of Byrne*, 1 Edw. 141.

C. Sale of an infant's estate.

1009. Petition for the sale of real estate of infants, being improved farms and an unproductive village lot; denied as to the farms. *Petition of Mason*, 1 Hopk. 122.

1010. Infants' estates are not generally to be sold, either under the act of 1814 or 1815; the expectations of an increased income is not a sufficient motive; there must be some special reason for the measure. *Ibid*.

1011. Whether wild lands exposed to waste of timber will be ordered to be sold! *Quære. Ibid*.

1012. No order for the sale of the real estate of an infant will be granted, unless the report of the master is made in full compliance with every requisite of the 88th general rule of the Court. *Matter of John Stiles*, 1 Hopk. 341.

1013. Where property which was the only estate belonging to two infant children had been sold, under a decree of foreclosure, for half its value, to satisfy a debt nearly equal to the amount of the bid, a resale was ordered upon security being given that the premises should produce fifty per cent. advance upon such resale, and that the interest on the whole purchase money should be paid to the purchaser, together with all the reasonable costs and expenses which he had paid in consequence of the purchase, or to which he had been subjected, either in opposing the application for a resale, or in investigating the title to the premises. *Duncan and others, Trustees, v. Dodd and others*, 2 Paige, 99.

1014. It is a sufficient ground to authorize a sale of an infant's property, that it is held in common with adults, and that the value of the estate is small, in comparison with the expense of a partition suit, to which it must otherwise be subjected. *In the matter of G. and E. Congdon, infants*, 2 Paige, 566.

1015. Although a husband cannot be appointed guardian to sell the estate of his infant wife,

yet a third person may be appointed, with the consent of the husband, to join with him in the sale. *In the matter of Lansing*, 3 Paige, 265.

1016. A petition to sell the real estate of infants must be in the form prescribed by the 156th rule; and the master should not act upon the petition unless it is in the proper form, as required by the rule. *Ibid.*

1017. The master to whom the petition is presented should ascertain the ages of the infants, and the actual value of the estate proposed to be sold; and he should also ascertain and certify what is the requisite sum in which the security to each infant should be given, according to the 157th rule. *Ibid.*

1018. The master to whom a petition for the sale of an infant's estate is referred should briefly report the result of his inquiries, and a statement of the facts, either by a reference to the petition or otherwise; and he should not take down and return to the Court the testimony at length. *In the matter of Morrell*, 4 Paige, 44.

1019. The master should not rely upon the petition as the evidence of the facts he is directed to ascertain and certify to the Court; but he should examine witnesses as to these facts. *Ibid.*

XXVI. INJUNCTION.

- A. *In what cases granted, and against whom.*
- B. *To stay waste or trespass.*
- C. *To stay proceedings at law.*
- D. *Injunction for other purposes.*
- E. *When dissolved, continued, or renewed.*
- F. *When made perpetual.*
- G. *Breach of injunction.*
- H. *Sale pending an injunction.*

A. *In what cases granted, and against whom.*

1021. Where there is an unlawful diversion of a stream of water from the mills and hydraulic works of a party, it is a proper case for the allowance of a preliminary injunction, as the injury if persisted in might be irreparable. *Case v. Height*, 3 Wend. 632.

1022. Where to a bill in Chancery, charging that certain goods were sold at auction, to be paid for in approved endorsed notes at six months, and that such goods were delivered to the buyer, in pursuance of a usage existing in the city of New York, to deliver them when called for, and afterwards to call for the notes to be given in security for the payment of the goods, averring such delivery to be conditional; the defendant answered, denying the purchase upon the terms stated in the bill, and alleging that the goods were bought under a special agreement, by which he was at liberty to settle for such purchases as he should make at the auction sales of the complainants, in the notes of his customers endorsed by himself, at such reasonable time after the purchases as should suit his convenience, and insisting that the delivery of the goods to him was absolute, and that the complainants had no lien; it was held, that

the delivery of the goods was absolute, and that the complainants were not entitled to an injunction, staying the proceeds of the sales of the goods in the hands of an assignee under a voluntary assignment, executed within ten days after the sale, for the benefit of certain favored creditors of the assignors. *Furniss v. Hone*, 8 Wend. 247.

1023. On a sale of mortgaged premises, if a defendant in possession will not, on being shown the master's deed, deliver them up, an order may be taken requiring him to deliver possession; and on disobedience of that order, an injunction may issue. *Ludlow v. Lansing*, 1 Hopk. 231.

1024. The writ of injunction is used only for the protection of rights which are clear, or at least free from reasonable doubt. *Snowden v. Noah*, 1 Hopk. 347.

1025. A preliminary injunction before answer rests in the discretion of the Court, and ought not to be granted unless the injury is pressing and the delay dangerous. *The New York Printing and Dying Establishment v. Fitch*, 1 Paige 97.

1026. It will not be granted to restrain a party from running a steamboat and landing their passengers at the dock of another. *Ibid.*

1027. Wherever the Court of Chancery has power to make an order in consequence of possessing jurisdiction over the subject-matter of the suit or proceeding, and which a person is bound to obey, in consequence of his being either actually or constructively a party to the suit, it may enforce obedience to such order by the process of injunction founded upon a petition merely, although no bill has been filed against such person. *In the matter of Hemisip*, 2 Paige, 317.

1028. The filing of the petition in such cases is a substitute for a bill, and is a substantial compliance with the statute. (2 R. L. 179, sec. 71.) *Ibid.*

1029. The provision of the statute prohibiting the issuing of an injunction until the bill is filed relates only to those cases where the Court obtains its jurisdiction of the cause in no other way than by a proceeding by bill. *Ibid.*

1030. Where the bill was dismissed by a vice-chancellor, and an appeal was entered from that decree, but the subject-matter of the suit was sold intermediate the entering of the decree and the appeal, the chancellor refused to grant an injunction against the purchaser, who was not a party to the suit, on petition; but permission was given to file a supplemental bill before the chancellor, and to move for an injunction thereon against the purchaser. *Bloomfield v. Snowden and others*, 2 Paige, 355.

1031. It is not the practice to allow an injunction affecting the rights of a party who has appeared, on an *ex parte* application to the Court on a supplemental bill; but regular notice of the application should be given to such party. *Ibid.*

1032. If a temporary injunction is necessary to prevent irreparable injury before regular notice of the application for a general injunction can be given, the Court will grant an order to show cause, and allow such temporary injunc-

sion in the mean time; but the temporary injunction falls, of course, if the order to show cause is not made absolute. *Ibid.*

1033. Whenever the injunction will probably produce a serious loss or damage to the defendant, by the suspension of the proceedings enjoined, the officer allowing the injunction should require security from the complainant, under the last clause of the thirty-first rule, to pay such damage; or he should, at least, take the complainant's own bond. *Sullivan v. Judah*, 4 Paige, 444.

1034. Where a bill is filed against several joint plaintiffs in a suit at law, to stay the proceedings there, it will be sufficient to stay the proceedings if the injunction is served on the attorney and on one of the joint plaintiffs, although it is not served on all; but the *subpoenas* must be served on each defendant, unless he elects to appear voluntarily. *Seebor v. Hess*, 5 Paige, 88.

1035. The Court will not grant a preliminary injunction to stay the defendant from selling the complainant's farm upon execution, where the bill alleges that the judgment is not a legal lien on the premises; as a notice of the pendency of the suit, filed in the clerk's office, is all that is necessary to make any decrees which may be obtained in the cause binding upon the purchaser under the execution. *Osborne v. Taylor*, 5 Paige, 515.

B. To stay waste or trespass.

1036. Injunction to stay waste will not be continued where the complainant's title is denied, especially if there has been delay and negligence in trying the title at law. *Higgins v. Woodward*, 1 Hopk. 349.

1037. An injunction will lie to restrain trespasses in order to quiet the possession, or where there is danger of irreparable mischief, or the value of the inheritance is put in jeopardy. *The New York Printing and Dying Establishment v. Fitch*, 1 Paige, 97.

1038. The Court does not interfere to prevent a mere trespass, unless the complainant has been in the previous undisturbed enjoyment of the property, under claim of right, or where, from the irresponsibility of the defendants, or otherwise, the complainant could not obtain relief at law. *Hart v. Mayor, &c. of Albany*, 3 Paige, 213.

1039. Where the right of a party is doubtful, the Court will not grant an injunction to prevent an illegal interference with such right, until it is established at law. *Ibid.*

1040. The Court of Chancery interferes only to prevent future waste; except in cases where there are some special grounds for equitable interference as to waste already committed. *Winship v. Pitts*, 3 Paige, 259.

1041. In ordinary cases, the account for waste already committed is merely incidental to the relief by injunction against future waste, and is directed upon the principle of preventing a useless multiplication of suits. *Ibid.*

1042. It is not waste for a tenant to erect a new edifice upon the demised premises, provided it can be done without destroying or materially injuring the buildings or other improve-

ments already existing thereon. But the tenant has no right to take down valuable buildings, or to make improvements or alterations which will materially and permanently change the nature of the property, so as to render it impossible for him to restore the same premises, substantially, at the expiration of the term. *Ibid.*

1043. The ancient doctrines of the common law in relation to waste have been relaxed in favour of modern tenancies, particularly as to buildings erected for the purposes of trade and manufacture. *Ibid.*

C. To stay proceedings at law.

1044. Where a bill is filed to restrain proceedings on a judgment recovered at law, the Court will not require the complainant to bring the amount of the judgment into Court, unless it is shown there is danger of the complainant's insolvency. *Rogers v. Rogers et al.* 1 Paige, 426.

1045. An officer out of Court has no right to allow an injunction to stay proceedings under a decree. *Dyckman and M'Chain v. Kernochan and others*, 2 Paige, 26.

1046. Upon an application under the statute (9 R. L. 110, sec. 61.) to rectify certain irregularities in the sale of real estate made by an administratrix under an order of a surrogate, it was held, that an injunction to stay proceedings at law could not be granted until the report of the master came in as to the facts, and the names and residences of the persons entitled to the estate as heirs or devisees, or as persons claiming under them. *In the matter of Hemmip*, 2 Paige, 316.

1047. Upon the appearance of the parties entitled to the estate, a temporary injunction may be granted to stay the proceedings at law until the question as to the fairness of the surrogate's sale is determined by the Court; and a reference will be made to a master to examine the witnesses as to this point. *Ibid.*

1048. A master has no authority to allow an injunction to stay proceedings at law after judgment, except upon the terms prescribed by the statute; and if the injunction has been issued without depositing the amount of the judgment, and giving the bond as required by the statute, it will be set aside for irregularity. *S. and J. F. Jenkins v. Wilde and others*, 2 Paige, 394.

1049. If the suit at law is not at issue, the master should direct the provision directed by the thirty-third rule to be inserted in the injunction, unless the injunction is founded on a mere bill of discovery. *Ibid.*

1050. If issue has been joined in a suit at law, the master should take the bond and security, as directed by the statute in such cases, and direct that it be filed with the proper officer, before the issuing of the injunction. *Ibid.*

1051. Where there has been a verdict, the master should ascertain and direct the amount to be deposited; and if a judgment has been obtained, he should not only direct the amount of the judgment to be deposited, but should also take a bond and security to answer the damages and costs, in case the injunction should be dissolved. *Ibid.*

1052. None but the Court after verdict or judgment can dispense with the actual deposit

of the debt and costs before the issuing of the injunction. *Ibid.*

1053. If the register or clerk discovers that the statute relative to injunctions has not been complied with by the injunction master, he should not issue the process without the special directions of the Court. *Ibid.*

1054. Where a number of persons, claiming to have a title to property which was in litigation, entered into an agreement, and severally advanced money to carry on the litigation, and some of them afterwards brought suits at law to recover back the moneys so paid, the Court refused to sustain an injunction to stay the proceedings at law. *Teller v. Van Deusen*, 3 Paige, 33.

1055. No injunction can be granted to stay a suit at law, unless the complainant states in his bill the situation of the suit, as required by the thirty-third rule. *Ibid.*

1056. Where there was an express agreement between the lessee and the agent of the lessor, that the rent should cease if the building leased should be casually destroyed, and that a stipulation to that effect should be inserted in the lease, but which stipulation was inadvertently omitted, and the premises were afterwards accidentally burned, the lessor was perpetually enjoined from prosecuting any suit or proceeding for the recovery of rent which accrued subsequent to the destruction of the premises; and the lease was decreed to be given up and cancelled. *Gates v. Green*, 4 Paige, 355.

1057. If a person institutes a suit in the name of another without his consent, and without any legal or equitable right to do so, the person in whose name the suit is thus instituted is entitled to have the proceedings stayed, upon application to the appropriate tribunal. *In the matter of Merritt*, 5 Paige, 125.

1058. A proceeding by *scire facias*, by the executors of a deceased plaintiff, to revive a judgment abated by his death, is a proceeding in the same suit or action in which the judgment was recovered. And to obtain an injunction to stay the executors from proceeding upon such *scire facias*, the complainant must deposit the amount of the judgment, or give security for the payment thereof, according to the statute. *Dickey v. Craig*, 5 Paige, 283.

D. Injunction for other purposes.

1059. Upon application for an injunction against a bank, under the act of the 21st day of April, 1825, concerning fraudulent bankruptcies by incorporated companies, the proof may be summary. *Attorney-general v. Bank of Chenango*, 1 Hopk. 596.

1060. An affidavit of the complainant, that he believe his statement of the acts or defaults of the bank to be true, is not sufficient proof. *Ibid.*

1061. Where hydraulic works are erected on both banks, the owners of the works are each entitled to an equal share of the water. If the owner of the mills on either side attempts to deprive the other of the use of his share of the water, of which he has been in the quiet enjoyment, and thus to destroy his mills, a preliminary injunction will be granted, as the injury might be irreparable. *Arthur and Wright v. Cane and Harwood*, 1 Paige, 447.

1062. An injunction to restrain the corporation of the city of New York from opening a street will not be granted, unless it is shown by the complainant's bill that the proceedings are void, or that there is some particular act of fraud, or *prima facie* evidence of corruption on the part of the corporation, distinctly stated in the bill, and positively sworn to by the complainant. *Champlin v. Mayor, &c. of New York*, 2 Paige, 573.

E. When dissolved, continued, or renewed.

1063. An injunction which had been ordered by the master was dissolved, the remedy being at law, &c. *Davis v. Deklyn*, 1 Hopk. 135.

1064. An injunction ought not to issue *ex parte* to transfer possession from one to another. *Ibid.*

1065. An answer denying all knowledge and belief of the alleged fraud is not sufficient whereon to dissolve an injunction against ejectments prosecuted on such deed. *Apthorpe v. Comstock*, 1 Hopk. 143.

1066. An injunction is, in such case, properly auxiliary to the relief sought, as this Court takes the whole controversy into its own hands, to prevent double litigation, and give more effectual relief than can be done at law. *Ibid.*

1067. Where the complainant suffered three years to elapse without compelling an answer from one of several defendants, and the other defendants, in their answer, charged collusion between the complainant and the defendant who had not answered; it was held, that under such circumstances, the fact that all the defendants had not answered could not be urged as an objection to the dissolution of an injunction, unless the complainant denied upon affidavit all collusion, and stated sufficient reasons for not compelling an answer from all the defendants. *Ward v. Van Bokkelen*, 1 Paige, 100.

1068. An injunction on coming in of the answer will not be dissolved, unless the defendants positively deny all the equity of the bill. A denial from information and belief is not sufficient. *Ibid.*

1069. The answers of all the defendants in a suit must be perfected before an injunction will be dissolved, provided all the defendants are implicated in the same charge, and the complainant has taken the requisite steps to compel the answers. *Noble and others v. Wilson and others*, 1 Paige, 164.

1070. And where exceptions to the answer of one of the defendants are submitted to, if the exceptions go to the merits, an injunction will not be dissolved. *Ibid.*

1071. The same rule holds where the exceptions are allowed by the master. *Ibid.*

1072. If the exceptions to the answer have not been submitted to by the defendants, nor allowed by the master, the Court will look into them to see they are not frivolous. *Ibid.*

1073. If frivolous, they will furnish an objection to a motion to dissolve an injunction. *Ibid.*

1074. On a motion to dissolve an injunction, the Court will not listen to an objection of misjoinder of complainants, where the merits of the case are clearly against the defendant. *Th*

Tradesman's Bank and Chemical Bank v. Merritt, 1 Paige, 302.

1075. A defendant cannot object that another person, not a party to the suit, is also enjoined. *Ibid.*

1076. If such a person makes a proper application, the Court will discharge the injunction, so far as it affects his interest. *Ibid.*

1077. An injunction against a corporation cannot be dissolved on bill and answer, unless the answer is duly verified by the oath of some of the corporators who are acquainted with the facts stated therein. *The Fulton Bank v. N. Y. and Sharon Canal Company and others*, 1 Paige, 311.

1078. An injunction will not be amended, unless the proposed amendments are distinctly stated to the Court, and verified by the oath of the complainant; nor unless a sufficient excuse is rendered for not incorporating them in the original bill. *Rodgers v. Rodgers*, 1 Paige, 424.

1079. The application to amend must be made as soon as the necessity of the amendment is discovered. *Ibid.*

1080. Where the equity of an injunction bill is not charged to be in the knowledge of the defendant, and the defendant merely denies all knowledge and belief of the facts alleged therein, the injunction will not be dissolved on the bill and answer alone. *Rogers v. Rogers and others*, 1 Paige, 426.

1081. Where the injunction may produce serious injury to the defendant, if the officer allowing the same neglects to take security from the complainant to pay such damages as may be sustained, the defendant may apply to the Court for relief. *The Cayuga Bridge Company v. Mages and others*, 2 Paige, 116.

1082. It is no objection to an application to dissolve an injunction on bill and answer, that a replication has been filed. But if the testimony has been taken in the cause, the Court will order the application to stand over until the hearing on the merits, unless special circumstances render delay improper. *Grandin and others v. Le Roy and Smith*, 2 Paige, 509.

1083. Where an injunction has been granted upon a bill of discovery in aid of a defence at law, it is a matter of course to dissolve the injunction as soon as the answer of the defendant is perfected, whether the facts charged in the bill are admitted or denied. *King v. Clark*, 3 Paige, 76.

1084. Notwithstanding the complainant waives the necessity of an answer on oath from a defendant, the answer must be sworn to if the defendant wishes to move to dissolve an injunction upon the bill and answer. *Dougrey v. Flopping*, 4 Paige, 4.

1085. Where the whole equity of the bill is denied, it is no answer to an application to dissolve an injunction, that the defendant has also incorporated into his answer other matters, which are scandalous, or otherwise irrelevant. *Livingston v. Livingston*, 4 Paige, 111.

1086. An injunction is not dissolved, neither does it become inoperative, by the abatement of the suit in which it is issued. *Hawley v. Bennett*, 4 Paige, 163.

1087. If the suit abates by the death of the complainant or defendant, the party against whom the injunction issued, or his representatives, may have an order requiring the complainant, or his representatives, to revive the suit within a limited time, or that the injunction be dissolved. *Ibid.*

1088. Although it is irregular to serve an injunction upon a party without serving him also with the *subpoena* to appear and answer the bill, it is too late to give notice of an application to dissolve the injunction on that ground after a *subpoena* has been served on him. *Seebor v. Hess*, 5 Paige, 85.

1089. The neglect of the complainant to serve the *subpoena* and injunction on some of the defendants named in the bill, is not a ground for dissolving the injunction as to the defendants on whom the service has been made. *Ibid.*

1090. In an injunction cause, if there has been any negligence in serving the *subpoena*, or procuring the appearance of a part of the defendants, those who have appeared and answered may have the injunction dissolved on their answers alone. *Ibid.*

1091. It is always a good answer to an application to dissolve an injunction, that the equity of the bill upon which the injunction rests is not denied by the defendant, although no exceptions have been filed. *Wakeman v. Gillespy*, 5 Paige, 112.

1092. It is not a valid objection to an application to dissolve an injunction upon bill and answer, that the personal representatives of a deceased co-defendant, who was jointly implicated in the fraud charged in the bill, have not yet put in their answer, unless they are charged with knowledge of the fraud of their testator or intestate. *Ibid.*

F. When made perpetual.

1093. An administrator, who is applying to a surrogate for leave to sell real estate in order to pay debts, will be restrained by perpetual injunction, where a decree for foreclosure and sale of the same premises has been had in this Court and is in force. *Breevort v. M'Jimey*, 1 Edw. 551.

G. Breach of injunction.

1094. An injunction is not waived by a delay in applying for an attachment for its violation. *Dale and others, Executors of Fulton, v. Roosevelt*, 1 Paige, 35.

1095. Where executors obtained a decree for a perpetual injunction, restraining R. from prosecuting any action at law against such executors, or other representatives of their testator, for the recovery of the arrears of an annuity; held, that the prosecution of a suit at law against the heirs of the testator, who were not parties to the suit in this Court, to recover the same annuity, was not a breach of the injunction. There is no privity between an executor and the heir or devisee of the land. *Ibid.*

1096. The breach of an injunction regularly issued is a contempt of the Court; and in a proceeding against a party for such contempt, the Court will not look into the merits of the cause

in which the injunction issued. *The People v. Spalding*, 2 Paige, 326.

1097. Where a suit abates by the death of the complainant, those who succeed to his rights may apply to the Court to punish a breach of an injunction, committed either before or after his death, as soon as they have filed a bill of revivor, or taken any other steps to revive the suit, and without waiting until a decree of revivor is actually obtained. *Hawley v. Bennett*, 4 Paige, 163.

1098. It is no answer to a proceeding as for a contempt for the breach of an injunction, so far as the rights of the adverse party are concerned, that the breach was committed under the advice of counsel. *Ibid*.

1099. No person can apply to the Court to punish a party for a breach of an injunction, in the nature of a civil remedy, unless he has some interest in the subject-matter of the injunction, or has a right to prosecute for the breach thereof, except in the case of infants, lunatics, &c. *Ibid*.

1100. Where a partner is enjoined, in general terms, from intermeddling with the property and effects of the firm, it is not a breach of the injunction for him to give a confession of judgment for a debt *bona fide* due to the creditor of the firm, for the purpose of enabling such creditor to obtain a preference in payment by levying upon the partnership effects. *M'Credie v. Senior*, 4 Paige, 378.

1101. A party will be in contempt for a breach of an injunction, if the officer by whom the injunction was allowed acted within his powers and jurisdiction under the rules of the Court, although it was erroneously granted, and for an insufficient cause. But the Court will take into consideration the fact that the injunction was erroneously granted, and without sufficient equity to sustain it, in determining the extent of the punishment to be imposed upon the party who has been guilty of a breach thereof. *Sullivan v. Judah*, 4 Paige, 444.

H. Sale pending an injunction.

1102. Where the sheriff had levied on perishable property, and the execution was stayed by injunction, the chancellor allowed him to sell the property, and pay the proceeds to the register, to abide the further order of the Court. *Heath v. Hand and others*, 1 Paige, 329.

XXVII. INTEREST.

A. On what debts, and in what cases interest is payable.

B. When foreign interest is allowed.

C. Of simple interest; mode of computation where partial payments are made; and of usury.

A. On what debts and in what cases interest is payable.

1103. By the course of this Court, when a master's report stating a balance of accounts is confirmed, interest is allowed upon the sum re-

ported due from the date of the report. *Hunt v. Norton*, 1 Hopk. 344.

1104. The idea of an equitable rate of interest less than the rate established by law, has never been adopted in this state. *Clarkson v. Depeyster*, 1 Hopk. 424.

1105. The allowance of interest on a judgment recovered at law for a tort is not a matter of course under a decree in equity; although in a proper case a Court of Equity will direct interest to be allowed on such judgment. *Stafford v. Mott*, 3 Paige, 190.

1106. In an action of debt at law on a judgment for a tort, interest may be recovered by way of damages for the detention of the debt. *Ibid*.

1107. If the mortgagee, after a sale of part of the mortgaged premises, consents to an adjournment of the sale as to the residue of the property, without any agreement as to the interest, he must receive the money raised by the first sale, and will not be allowed to claim interest on his whole debt up to the time of the second sale. *Lawrence v. Murray*, 3 Paige, 400.

1108. Upon the equity of the statute allowing interest to be collected upon executions issued upon judgments rendered on contracts or on prior judgments, complainants in Chancery are entitled to interest upon decrees in similar cases; and the decree should be so drawn as to direct the payment of interest upon the amount decreed, until such amount is paid according to the directions of the decree, so that the interest may be levied upon the execution. *Ryckman v. Parkins*, 6 Paige, 543.

1109. Where a creditor's bill is to obtain satisfaction of a judgment against the defendant in an action of tort, upon which no interest could be levied upon the execution at law, the complainant is not entitled to interest in this Court, until the final decree directing the payment of the debt and costs out of the defendant's property, except in those cases where the defendant has fraudulently assigned or transferred his property, which might otherwise have been reached by an execution upon the judgment. *Ibid*.

1110. As a general rule, the Court of Chancery does not allow interest on unliquidated demands or judgments upon which interest could not be levied upon an execution at law. *Ibid*.

1111. A mere offer to pay off a judgment, made by a person who is ready to purchase the property, is not a sufficient tender to the judgment creditor to vary the running of interest. *Jones v. Moore*, 1 Edw. 632.

B. When foreign interest is allowed.

1112. Where a contract is made in reference to the laws of another country, and is to be performed there, the interest is to be calculated agreeably to the laws of the place where the contract is to be performed. *Hoford v. Nichols and others*, 1 Paige, 290.

1113. As a general rule, interest is payable according to the laws of the place where the contract is made. *Ibid*.

1114. In the absence of any agreement as to the subject, a debt is presumed to be payable

at the place where it was contracted, and where the creditor resides; and interest is to be computed according to the rate allowed by the laws in force at the place. *Stewart and others v. Ellice*, 2 Paige, 604.

C. Of simple interest; mode of computation where partial payments are allowed; and of usury.

1115. Where a contract for the sale of land in this state was made between two of its citizens, one of whom removed to Pennsylvania, where the contract was afterwards executed, by giving a deed, and taking a mortgage on the premises, to secure the payment of the purchase money, in which mortgage the New York rate of interest was reserved, which was greater than that of Pennsylvania; *it was held*, that the giving the deed and taking the mortgage was only a consummation of the original contract made in this state, and that the mortgage was not void for usury. *Hosford v. Nichols and others*, 1 Paige, 220.

1116. Whether a contract, made in this state for the sale of lands in another state upon credit, reserving interest at the legal rate of the state where the lands are situated, would be void if the rate of interest exceeded that allowed by our laws? *Quære. Ibid.*

1117. Where a party comes to Chancery to avoid a usurious contract, he must consent to pay the sum actually loaned, with interest, or the Court will not grant him any relief. *Fulton Bank v. Beach*, 1 Paige, 429.

1118. And where the proofs in a cause are regularly closed, the Court will not open them to enable the defendant to re-examine a witness, in order to establish the usury, unless he agrees to pay the sum actually lent. *Ibid.*

1119. So the Court will not allow an answer to be amended for the purpose of setting up a defence of usury, unless the defendant consents to pay the amount equitably due. *Ibid.*

1120. Where M., being in embarrassed circumstances, and pressed with executions against him, applied to S. for a loan of \$800, and S. refused the loan, unless M. would consent to purchase from him one hundred and twenty-four acres of wild land, at \$550, which was much above its real value, and M. finally accepted this proposition, and gave S. a bond and mortgage for \$1350, payable in twelve equal annual instalments, with annual interest; *it was held*, that this loan was usurious. *Morgan v. Schermerhorn*, 1 Paige, 544.

1121. A party who comes to Chancery for relief against a usurious contract must pay or offer to pay the amount actually due, before he will be entitled to an injunction to restrain proceedings at law, or to an answer as to the alleged usury. *Ibid.*

1122. But if the defendant puts in his answer without making this objection, the Court will not afterwards dissolve the injunction, if the complainant is still willing to pay the amount actually due. *Ibid.*

1123. Where, upon a loan of money, a premium or profit beyond the legal rate of interest is either directly or indirectly secured to the lender, the loan will be usurious, unless it is

attended by some contingent circumstances which subject the money lent to evident hazard. *Colton v. Dunham and Wadsworth*, 2 Paige, 267.

1124. A mere nominal contingency, attended by no real hazard of the principal of the money lent, will not divest the transaction of its usurious character. *Ibid.*

1125. The ordinary risk of the death or insolvency of the borrower is not such a hazard of the money lent as will authorize the lender to reserve a profit on the loan beyond the legal rate of interest. *Ibid.*

1126. If there is a negotiation for a loan or advance of money, and the borrower agrees to return the amount advanced at all events, it is a contract of lending within the meaning of the statute against usury; and if a profit beyond the legal rate of interest is reserved or agreed to be paid, the contract is usurious. *Ibid.*

1127. In the absence of any agreement, a creditor receiving a partial payment of a debt has the right of applying it first to the satisfaction of the interest then due, before it is applied to the discharge of any part of the principal. *Hart and others v. Dewey and others*, 2 Paige, 207.

1128. Merchants can, by agreement, prescribe the mode of charging and crediting interest upon the several items in running accounts between them, provided the mode adopted is not intended to be, and is not in fact, a cover for usury. *Ibid.*

1129. Under the provisions of the revised statutes, it is not necessary for a complainant who applies to this Court for relief against a usurious contract, either to pay or to offer to pay the principal or the interest of the money actually loaned; provided the answer of the defendant on oath is waived by the bill. *Livingston v. Harris*, 3 Paige, 528.

1130. The complainant cannot call upon a defendant for a discovery as to the usury charged in the bill, unless he pays or offers to pay the amount equitably due, exclusive of the legal interest. *Ibid.*

1131. Where the holder of a mortgage against D., which was not yet due, offered to make a large discount if payment should be made immediately, and D., not being able to procure the money himself, agreed with the complainant that he should raise the amount, and take an assignment of the mortgage to himself, and should have a part of the discount for his services in obtaining the money; *held*, that such agreement was not usurious, and that a mortgage subsequently given to D., which included the complainant's share of such discount, was valid. *Vroom v. Dilmas*, 4 Paige, 526.

1132. If the security upon which a suit is instituted is a mortgage or other specialty, the defendant cannot avail himself to a defence of usury, under a general answer, denying the complainant's right, as claimed by the bill. But the defence of usury must be distinctly set up in the plea or answer of the defendant, and the terms of the usurious contract must be distinctly and correctly set out. The proof must also correspond with the allegations in the plea or answer. *Ibid.*

1133. The owner of the premises, against which a usurious mortgage is attempted to be enforced in the Court of Chancery, must himself set up the defence of usury in his answer. He cannot avail himself of a defence set up in the answer of a co-defendant from whom he purchased, who has no interest in or lien upon the mortgaged premises, and who is not a necessary party to the suit. *Ibid.*

1134. A promissory note, payable one year after date, with interest to be paid quarter-yearly, is valid. *Mowry v. Bishop*, 5 Paige, 98.

1135. The making of the interest on a loan of money payable semi-annually or quarter-yearly, and before the principal loan becomes due, does not render the security taken on such loan usurious. *Ibid.*

1136. An agreement to pay interest upon the interest which may thereafter accrue cannot be enforced, although it does not render the contract for the loan usurious; but an agreement to pay interest on arrears of interest which have already become due is valid. And if compound interest is voluntarily paid by the debtor, it cannot be recovered back. *Ibid.*

XXVIII. JUDGMENT.

A. *Priority and lien of judgments and executions.*
B. *When a judgment may be impeached or inquired into.*

A. *Priority and lien of judgments and executions.*

1137. In Chancery, a judgment recovered in a Court of law is considered as binding upon the real parties in the suit, although not the nominal parties on the record. *Southgate v. Montgomery*, 1 Paige, 41.

1138. And if a purchaser under the judgment has notice of the equitable title before his purchase and the actual payment of the money, he cannot protect himself as a *bona fide* purchaser. *Ibid.*

1139. A payment on a judgment discharges the lien on the land to the extent of the payment; and the lien cannot be restored by any subsequent agreement between the parties. *De La Vergne v. Evertson and others*, 1 Paige, 181.

1140. A judgment is not a specific lien upon the real estate of the debtor. *Rogers and others v. Rogers and others*, 1 Paige, 188.

1141. Where certain lands upon which a judgment is a lien are advertised for sale under such judgment, part of which lands have been previously sold by the debtor, and there are other lands of the debtor unsold, but the lien of the judgment would expire before such other lands could be advertised and sold, the owner of the judgment in such case would not be bound, upon the requisition of the purchaser from the debtor, to abandon the sale of the lands so advertised. *James v. Hubbard and others*, 1 Paige, 228.

1142. The proper course for such purchaser would be to offer to pay the amount of such judgment, and to take an assignment of the same; and then, by filing a bill against all the

parties in interest before the expiration of the lien of the judgment, it seems such purchaser would be able to preserve the lien so far as to compel contribution upon equitable principles. *Ibid.*

1143. A judgment creditor cannot enforce his judgment against the land of a subsequent purchaser, so long as there are other lands of the debtor sufficient to satisfy the judgment. *Ibid.*

1144. Where there are successive purchasers there is no contribution, and their lands are chargeable with the judgment against the debtor in the inverse order of alienation; that is, the lands last sold are to be first charged. *Ibid.*

1145. In such cases the equities between the several purchasers are equal, yet the first purchaser, having the prior equity, is preferred. *Ibid.*

1146. The priority of equity is not determined by the date of the conveyance, but by the contract for the purchase of the land and the payment for the same. *Ibid.*

1147. A judgment creditor is not bound to decide at his peril upon the equitable rights of the owners of different portions of the land upon which he has a lien. *Ibid.*

1148. If the land of the purchaser who has a prior equity is first sold, he can compel the other purchasers to refund to him the amount they were benefited by such sale. *Ibid.*

1149. If a judgment creditor discharges from the lien of his judgment a part of the lands which ought to be first resorted to, the owner of other parts of the lands who has a prior equity will be entitled to a deduction from the judgment of the value of the lands so discharged before his lands are resorted to for the satisfaction of such judgment. *Ibid.*

1150. Where certain lands belonging to E. were sold under a loan office mortgage, and W., by request, bid off the same for E., E. being absent; E., a few days after the sale, refunded the money to W. at the time of the sale; P., one of the commissioners of loans, held a judgment against W.; T., together with his co-commissioners in June, 1819, executed a deed to W.; in March, 1819, T. issued an execution against W., and in August, 1824, caused the mortgaged premises to be sold under his judgment, and bid in the same himself. In September, 1819, W. executed to E. a release of all his interest in the premises; and it was agreed between them that no deed should be executed to W. by the commissioners. T. purchased in the premises under his judgment with a full knowledge of E.'s rights. *Held*, that the purchase by T. could not be sustained, and that he could not retain the lien of his judgment upon the premises. *Ells v. Towsky*, 1 Paige, 280.

1151. Under these circumstances, if the deed had been executed by the commissioners at the time of the sale, the title would have been in E. as a resulting trust, and W. could only have held the deed as a security by way of mortgage for the money advanced by him. *Ibid.*

1152. The lien of a judgment does not in equity attach upon the mere legal title to land existing in the defendant, when the equitable title is in a third person. *Ibid.*

1153. The purchaser of lands under a judgment obtains all the right of the defendant to the premises, and no equity can be set up against

him on account of notice, which did not affect the title to the land in the hands of the judgment debtor. *Sweet v. Green*, 1 Paige, 473.

1154. A bill filed in this Court against heirs or devisees has the same effect as the commencement of a suit at law in preventing the alienation of the estate. But if a judgment at law is obtained before the decree in this Court, the plaintiff in such judgment thereby obtains a prior lien on the legal estate in the hands of the heirs or devisees. *Purdy v. Doyle and others*, 1 Paige, 558.

1155. Where a suit is commenced against five heirs for the debt of their ancestor, and the writ is only served upon three, but the plaintiff proceeds and takes judgment against all as joint debtors, he obtains a lien only upon the estate of those upon whom the process was served. *Ibid.*

1156. Where a creditor has obtained a lien upon real estate by a judgment at law, if he subsequently brings an action of debt on his judgment, and recovers a new judgment, he will lose his first lien. *Ibid.*

1157. Where a debtor who gave to his endorser a judgment for his security, and afterwards another person became the endorser in the place of the former one, and took an assignment of the judgment as his security, with the assent of the debtor; *held*, that such judgment was valid, and took priority over a junior judgment, although the assignee of the first judgment was not compelled to pay the notes endorsed by him until after the docketing of the junior judgment. *Norton v. Whiting and others*, 1 Paige, 578.

1158. A judgment continues to be a lien on real estate, after the expiration of the ten years, as against the defendant in the judgment or his grantee without valuable consideration, but not as against bona fide purchasers or encumbrancers. *The Mohawk Bank v. R. and P. Atwater*, 2 Paige, 54.

1159. In Chancery the general lien of a judgment is controlled by equity, so as to protect the rights of those who are entitled to an equitable interest in the lands or in the proceeds thereof. *White v. Carpenter and others*, 2 Paige, 217.

1160. A party who has a specific equitable lien on real property, or the proceeds thereof, is entitled to a preference over the general lien of a creditor under a subsequent judgment. *Ibid.*

1161. Where L., being entitled to one undivided third part of his father's estate, exchanged with W. one-half of his interest in said estate for some Virginia lands; and L. conveyed to S. all his interest in his father's estate in trust, to pay W. \$3000 out of the proceeds thereof in full satisfaction for the Virginia lands; and if any more was realized out of said estate, the surplus was to be retained by S. as a compensation for his services; and S. afterwards failed, and W. filed a bill for the payment of the \$3000, or that L.'s estate might be sold to pay the same; and L. then, with the consent of W., conveyed said estate to M. in trust to sell the same, and in the first place to pay W. his demand of \$3000, and then to pay the residue to certain creditors named in a schedule, provided such creditors released their claims against S. by the first of May thereafter; and in case any

of such creditors refused to execute releases, their share was to be paid to S. or to his assigns; three of the creditors named in the schedule having neglected to comply with the condition, S., on the 18th May, 1818, conveyed to H. all the interest intended for those creditors; H. was afterwards discharged under the insolvent act, and his assignees conveyed all his interest in the property to E.; after the conveyance from L. to S., and before the execution of the trust deed to M., P. F. recovered a judgment against S. in the Supreme Court; in May, 1822, E. purchased this judgment for \$328, the amount then due thereon; and at the time of the purchase, S. gave his note to E. for the whole or a part of the judgment, and E. agreed that if the note was paid, the judgment should only be enforced against the property conveyed in trust to M.; E. afterwards sold under the judgment all the right of S. in the estate so conveyed to M., and purchased the same himself for \$25; at the sale W. gave notice of his claim for \$3000 upon the estate; it was held, that the judgment of P. F. only attached upon the interest S. had in the real estate of L. after satisfying W.'s debt; and as E. had notice of W.'s claim previous to the sale under the judgment, the only effect of such sale was to turn E.'s general lien upon the surplus into a specific lien to the extent of his bid. *Ibid.*

1162. A judgment, as soon as it is docketed, becomes at law a general lien on all the real estate of the debtor, not only as against himself, but also as against all other persons deriving title through or under him subsequent to such judgment. *Morris and others v. Muvatt and others*, 2 Paige, 586.

1163. The lien, however, may in some cases be displaced by the execution of a power which overreaches the judgment. *Ibid.*

1164. But if a purchaser, acquiring a title under the execution of such power, has notice that the power is improperly or inequitably executed, a Court of Chancery will enforce the lien of the judgment, as against such title. *Ibid.*

1165. So the lien of the judgment may be removed by a decree of the Court of Chancery, where the judgment debtor holds the legal estate in the land merely as a naked trustee for another, or where there is a subsisting equitable claim against the premises which is prior in point of time to the lien of the judgment. *Ibid.*

1166. In equity, the purchaser under a judgment takes the land subject to all equitable claims, prior in point of time to the judgment, of which he had notice at or prior to the sheriff's sale. *Sanford v. McLean*, 3 Paige, 117.

1167. The lien of a judgment creditor upon the lands of his debtor is subject to all equities which existed in favour of third persons against such lands at the time of the recovery of the judgment. *Keirsted v. Avery*, 4 Paige, 9.

1168. The Court of Chancery will protect the equitable rights of third persons against the legal lien of a judgment, and will limit such lien to the actual interest which the judgment debtor has in the estate. *Ibid.*

1169. Where B. sold to M. lots 12 and 13 in the Binghampton patent, who gave B. a mortgage thereon to secure the payment of the purchase money; and M. afterwards sold lot No. 12 to W., for a sum a little less than the amount due B., to secure the payment of which W. gave M. a mortgage on lot 12, conditioned to pay the purchase money for that lot to B., to be applied on B.'s bond and mortgage; and previous to the sale to W., B. recovered a judgment against M.; and after the sale, N. recovered a judgment against him, and subsequently to the recovery of N.'s judgment, R. E. H. and several others recovered judgment against M.; and R. E. H. then obtained an assignment of the bond and mortgage given by W. to M.; *it was held*, that as between N. and R. E. H., N. had an equitable right to have the bond and mortgage of W. applied in part payment of the mortgage of B.; and that it was not competent for M. to make an agreement with R. E. H. to apply the bond and mortgage of W. in a different manner, so as to destroy or impair the prior lien of N. on lot No. 13; *it was further held*, that the equitable right of N. to have the mortgage of W. applied in payment of the mortgage of B. could only be destroyed by some new agreement between W. and M., as to its application or disposition, made before the equitable right of N. accrued. *Baring v. Moore*, 4 Paige, 166.

1170. When an equitable claim, to be relieved from an encumbrance on land, attaches itself to the legal estate of the owner of the land, such equity will be bound by the lien of a judgment against such owner, and will pass to the purchaser of the legal estate at a sheriff's sale under such judgment, so as to entitle him, in equity, to relief against the encumbrance. *Kellogg v. Wood*, 4 Paige, 578.

1171. In the case of a mere equitable interest of a judgment debtor in lands held for him in trust, and which are liable to be sold on execution under the provisions of the fourth section of the statute of uses, the judgment is only a lien upon the estate of which the trustee was seised to the use of the judgment debtor at the time of the issuing of the execution; and not upon that of which he was so seised at the time of docketing the judgment, as in the case of lands of which the debtor is seised as of a legal estate. *Ibid.*

1172. Where the owner of land which is subject to a mortgage conveys the same with warranty, the covenant of warranty runs with the land, and is bound by the lien of a judgment against the grantee of the land, or his assigns; and if the grantor subsequently acquires title to the land, under a foreclosure of the mortgage, such title enures to the benefit of a purchaser at the sheriff's sale under the judgment, and such grantor is estopped from questioning the title of such purchaser. *Ibid.*

1173. The original grantor is also bound to indemnify the purchaser at the sheriff's sale against the mortgage, if it remains unpaid, or where the lien thereof is continued by the substitution of a new mortgage for the purchase money on a foreclosure. *Ibid.*

1174. Where the ten years' lien of a judg-

ment has expired, if a purchaser colludes with the judgment debtor to deprive the creditor of his lien upon the lands purchased, knowing that the judgment is unpaid, or if he purchases under circumstances indicating an intention to deprive the creditor of the means of collecting his judgment, such purchaser will not be protected as a *bona fide* purchaser of the land discharged of the lien of such judgment, although he pays the full value of the land. *Petit v. Shepherd*, 5 Paige, 493.

1175. A mere notice of the existence of a judgment of more than ten years' standing will not deprive a purchaser of the protection of the statute, as a *bona fide* purchaser of the land upon which the judgment was a lien. *Ibid.*

B. When a judgment may be impeached or inquired into.

1176. Equity will not relieve against a judgment when the defendant, by his own neglect, suffered it to pass against him, or omitted to avail himself of a defence which he knew of, and might have set up at law. This is well settled. *Loud v. Sergeant*, 1 Edw. 164.

XXIX. JURISDICTION.

1177. D. recovered a judgment at law against J. F., on which a *fiery facias* was issued, and returned *nulla bona*. *Donovan v. Finn*, 1 Hopk. 59.

1178. Robert F., deceased, had left legacies to J. F., and died, leaving goods, &c., more than sufficient to pay debts and legacies; but the legacies to J. F. were yet not paid. A bill in equity does not lie for D. against J. F. and the executors of Robert F., to have his judgment satisfied out of the legacies to J. F. *Ibid.*

1179. Where the subject of a suit is exclusively legal, equity has no jurisdiction, to enforce or to give a better remedy. *Ibid.*

1180. There must be some foundation for equitable interference; such as trust, fraud, &c. *Ibid.*

1181. This Court will take cognisance of a cause where the amount in controversy appears to be more than ten pounds sterling, though it be not more than fifty dollars, to which amount a justice of the peace has jurisdiction. *Fredenburg v. Johnson*, 1 Hopk. 112.

1182. Bill for an annual payment of \$25, being the interest on a mortgage of \$500, not yet payable, demurrer allowed; the sum being below that of which the Court will hold jurisdiction; and though by the statute the Court may order the whole to be paid, yet it is not bound to do so, nor can it appear in this stage of the proceedings whether it would so order. *Mitchell v. Tighe*, 1 Hopk. 119.

1183. It is a proper head of equitable jurisdiction to relieve against fraudulent deeds. *Spithorne v. Comstock*, 1 Hopk. 143.

1184. Complainant, a citizen of this state, being at Havana, made a contract with defendant A. there, a Spanish subject, for lands in Alabama. Partial payments were made, and partial conveyances executed. Defendant A.

sent a conveyance for some part of the land to the defendant T., his agent in New York, to be delivered on the payment of a certain sum claimed, which sum was more than the complainant admitted to be due. Bill for an account, both of payments made and of lands to be conveyed upon the foot of the contract, and to restrain the defendants from withdrawing the deed out of the jurisdiction, and for relief; *held*, that the Courts of Equity of this state have jurisdiction to enforce the contract. *Ward v. Arredondo*, 1 Hopk. 213.

1185. This Court, having the jurisdiction of the late Court of Probates, may exercise it by such methods of proceedings as are usual, and not forbidden by the constitution and laws. *Vanderheyden v. Reid*, 1 Hopk. 418.

1186. This Court now having jurisdiction of wills of personal goods, and also of wills of lands, may most fitly proceed in the same manner in both cases. *Ibid*.

1187. Where the conduct of the complainant had been immoral and reprehensible, and the delay of both parties had been great, these circumstances did not deprive him of relief under the special facts in the cause. *Legget v. Edwards*, 1 Hopk. 530.

1188. That relief granted on special terms. *Ibid*.

1189. The principle is, that the jurisdiction may be upheld whenever the parties, or the subject, or such a portion of the subject are within the jurisdiction, that an effectual decree can be made and enforced so as to do justice. *Ibid*.

1190. This Court has no jurisdiction to restrain a defendant in a suit at law, after verdict against him, and before judgment, from alienating his property. *Moran v. Dawes*, 1 Hopk. 365.

1191. Nor can the Court interpose though the declared object of the defendant be to defeat the fate of the impending judgment. *Ibid*.

1192. The mere intention of the defendant to sell his property, and convert it into money, does not subject the case to the laws concerning fraudulent conveyances. *Ibid*.

1193. Complainant claimed the possession and property of a British frigate sunk in the revolutionary war, on the ground that he had occupied her when derelict; and prayed an injunction against defendants who hindered his operations in attempting to raise the vessel. Defendants, by an answer, claim also to be the true occupants. Injunction dissolved, remedy being at law. *Davis v. Deklyn*, 1 Hopk. 135.

1194. This Court will not sustain a bill in aid of a *quo warranto*. *Attorney-general v. Bank of Niagara*, 1 Hopk. 354.

1195. The necessary contribution in a case arising under the act regarding corporations for manufacturing purposes, was *held* to constitute that case a case of equitable jurisdiction. *Penniman v. Briggs*, 1 Hopk. 360.

1196. A newspaper establishment is a subject of property and of contract, and the right to it may be protected by this Court. *Snowden v. Nash*, 1 Hopk. 347.

1197. A person, having sold an establishment, has no right to continue a publication as the same; but he may set up a different rival paper. *Ibid*.

1198. If the question whether the rival paper is the same or different be doubtful, that doubt is a sufficient reason to refuse an injunction, and to leave the parties to their remedies at law. *Ibid*.

1199. Courts of law have concurrent jurisdiction with the Court of Chancery in the examination of accounts between parties. *Southgate v. Montgomery and Rivers*, 1 Paige, 41.

1200. Where a party has elected a Court of law as the forum for the examination of the accounts, after a decision in such Court of law he cannot come into a Court of Equity, and have the same accounts re-examined. *Ibid*.

1201. Where there existed mutual accounts between M. and E., and E. sued M. in a foreign Court for a settlement, and judgment was rendered against E.; and afterwards a suit pending in the Supreme Court of this state, commenced and prosecuted by the assignees of M., in the name of M., against E., was referred to referees, who reported a balance due to E. from M., on which report judgment was entered in favour of E.; *it was held*, that the judgment against E. in the foreign Court was not binding upon E. as between him and the assignees of M.; and that if that judgment was binding upon E., as it was known to the assignees previous to the hearing before the referees, it should have been insisted upon by them at that hearing, and could not afterwards be a ground of relief in this Court. *Ibid*.

1202. Whenever the remedy at law is doubtful and difficult, a Court of Chancery has jurisdiction. *American Insurance Company v. Fish*, 1 Paige, 90.

1203. The act of Congress of March 3d, 1823, does not give exclusive jurisdiction of salvage and admiralty causes to the Superior Courts of the territory of Florida, organized by that act; and an act of the Legislature of that territory, creating a wrecker's Court, is valid. *Ibid*.

1204. Where such a Court, in making an award, made an order not within their jurisdiction, *it was held*, that this excess of jurisdiction only rendered the award void *pro tanto*. *Ibid*.

1205. Where there are difficulties in relation to an offset at law, relief will be granted to the party claiming the offset in Chancery. *M'Claren v. Pennington and others*, 1 Paige, 102.

1206. The Court of Chancery has no power to review, upon the merits, the proceedings of the commissioners of estimate and assessment of damages in opening streets in the city of New York. *Patterson v. The Mayor, &c. of the City of New York, and Peters*, 1 Paige, 114.

1207. Where the commissioners, after they had deposited a copy of their report in the clerk's office, pursuant to the one hundred and eighty-second section of the act of the 9th of April, 1813, (2 R. L. 417.) altered their assessment of damages, *it was held*, not to be necessary to deposit a new copy of their report in the clerk's office, or to publish a new notice to propose objections to the assessment. *Ibid*.

1208. But if it was necessary to file a new copy of the report, and publish a new notice, the omission to do so would only render the pro-

ceedings voidable; in which case the remedy would be by *certiorari*. *Ibid.*

1209. The Court of Chancery has no jurisdiction in such cases, unless the proceedings are wholly void. *Ibid.*

1210. Where the equities of the parties are equal, the party who has the legal right will prevail. *Coeell v. Tradesman's Bank*, 1 Paige, 131.

1211. If neither party has the legal right, the maxim, *qui prior est in tempore, potior est in jure*, applies. *Ibid.*

1212. A Court of Chancery relieve against a fraud, by converting the person guilty of it into a trustee for those who have been injured thereby. *Brown v. Lynch*, 1 Paige, 147.

1213. Where a party by erecting a dam raises a stream of water above its natural level, so as materially to injure mills above on the same stream, a Court of Chancery will decree that the dam be lowered, and that the party erecting the same pay all the damages occasioned by raising the water above its natural level. *Hammond and others v. Fuller and others*, 1 Paige, 197.

1214. Although a person has a perfect remedy at law to recover for the breach of an agreement connected with a note, if he cannot avail himself of it as a defence to an action on the note, he can come into Chancery to have the note cancelled, and to recover the balance, if any, which may be due him. *Reed v. Bank of Newburgh*, 1 Paige, 215.

1215. A Court of Chancery has jurisdiction to correct mistakes in policies of insurance, as well as in all other written instruments. *Phoenix Insurance Company v. Gurnee*, 1 Paige, 278.

1216. The evidences of the mistake in all instances should be clear and satisfactory. *Ibid.*

1217. Where two parties submit their differences to arbitrators, and agree to make the submission a rule of Court, in a Court of common law, pursuant to the act for determining differences by arbitrators, (1 R. L. 125.) the Court of Chancery will not entertain jurisdiction to set aside the award, unless injustice would be done. *Toppan v. Heath*, 1 Paige, 293.

1218. Where the defendant, by a fraudulent overdrawing, obtained the complainant's money and deposited it to his own credit in another institution, *held*, that the title to the property was not changed, and might be reclaimed by the owners; equity affording a relief in such a case. *Tradesman's Bank and the Chemical Bank v. Merrill*, 1 Paige, 302.

1219. This Court has jurisdiction to set aside and cancel deeds and other instruments fraudulently obtained, and which are attempted to be set up inequitably. *Thompson, Executor, v. Graham and others*, 1 Paige, 384.

1220. Where a sheriff, after collecting money on an execution, died insolvent, without paying over the same, and no person administered upon his estate, *it was held*, that no suit could be sustained in Chancery against the sureties of the sheriff upon his bond, to enforce the payment of the amount so collected by him. *Bank of Utica v. Dill and Compton*, 1 Paige, 466.

1221. If the judgment creditor has any re-

medy in such cases, the Supreme Court alone can furnish relief. *Ibid.*

1222. Where, to determine the liabilities of parties, it is necessary to require the accounts of several estates, *it would seem*, that the Court of Chancery alone has jurisdiction. *Feiler and Bouch, Executors, v. Wilmer and Olmstead*, 1 Paige, 637.

1223. Where certain persons are invested by statute with discretionary powers, Chancery will not interfere to correct mere errors of judgment, if the powers conferred have not been illegally or unconscientiously exercised. *Philips and others v. Wickham and others*, 1 Paige, 590.

1224. *It seems*, that the Court of Chancery cannot entertain a bill in the nature of a bill of review upon the ground of newly discovered facts, to review a decree which had been affirmed in the Court of Errors, unless such a right has been expressly reserved by the final decree of the Appellate Court. *Stafford v. Bryan*, 2 Paige, 45.

1225. Where one person conveyed land to another for the purpose of opening a street in the city of New York, and there was no other consideration for the conveyance but the benefit which the grantor was to derive from the opening of the street, and by subsequent events beyond the control of both parties the street could not be opened, a reconveyance of the land was decreed. *Quick v. Suyvesant*, 2 Paige, 84.

1226. If a deed or obligation is sought to be enforced in an event not foreseen or provided for by the parties, and contrary to their original intention, a Court of Equity will interfere to prevent such injustice. *Ibid.*

1227. In such a case the Court of Chancery will direct that to be done which the parties would themselves have directed had they foreseen the event. *Ibid.*

1228. Where, from any defect of the common law, want of foresight of the parties, or other mistake or accident, there would be a failure of justice, it is the duty of a Court of Equity to supply the defect or furnish the remedy. *Ibid.*

1229. But these principles, when acted on by the Court of Chancery, are subject to such limitations and restrictions as are necessary to protect the rights of *bona fide* purchasers and others who have superior equities. *Ibid.*

1230. Where there is a conveyance of a farm, and a turnpike road-passes across the farm, and the road is not excepted from the conveyance, the purchaser has no remedy in Chancery for a compensation for the land covered by the road; his remedy, if any, is at law upon the covenant of seisin. *Dumond v. Sharts*, 2 Paige, 162.

1231. The Court of Chancery has no general jurisdiction over its suitors, to compel them to pay costs due to their solicitors or counsel. *Lorillard v. Robinson and others*, 2 Paige, 276.

1232. The proper remedy of the solicitor or counsel to recover his bill of costs is by an action at law against the client. *Ibid.*

1233. The client may apply to the Court for the taxation of his solicitor's bill, and for a stay of the proceedings at law thereon, upon an undertaking to pay what shall be found due; and

in such cases the Court of Chancery may compel the client to perform such undertaking. *Ibid.*

1234. But this Court has no jurisdiction to order the taxation of the bill as between solicitor and client, on the application of the solicitor himself, if there is no fund under the control of the Court out of which payment can be made. *Ibid.*

1235. The Court of Chancery will not entertain jurisdiction of a cause, upon the ground that the complainant, by mistake, interposed a plea in a suit at law which did not cover his defence in such suit; where, by the ordinary practice of the Court in which the suit was pending, he would have been permitted to amend. *Graham v. Stagg*, 2 Paige, 321.

1236. A bill to foreclose a mortgage given to secure the payment of \$690 at the expiration of two years from the date, with interest semi-annually, upon which at the time of filing the bill and at the hearing there was only \$42 due for one year's interest, cannot be sustained, as the matter in controversy does not exceed the value of \$100. *Doue v. Sheldon and others*, 2 Paige, 323.

1237. And the Court could not entertain jurisdiction of the cause under the statute, although the master should report that the mortgaged premises were so situated that they could not be sold in parcels, and that the defendant was in possession, and was insolvent. *Ibid.*

1238. Whether in such case the Court would sustain the bill, if the complainant had no other remedy, as where the whole amount of the money secured to be paid by the mortgage was less than \$100, and the defendant was in possession and insolvent, and the mortgage contained no power of sale, or there were subsequent encumbrances? *Quare. Ibid.*

1239. The Court of Chancery has no original jurisdiction to try the validity of wills of personal estate. *Colton and others v. Ross and others*, 2 Paige, 396.

1240. The jurisdiction of the Court exists only in case of an appeal from the decision of the surrogate. *Ibid.*

1241. Where no appeal is made to the Court of Chancery, the probate of the will before the surrogate is final and conclusive as to the personal estate. *Ibid.*

1242. The Court of Chancery has no jurisdiction to set aside a will of real estate on the ground of the incompetency of the testator; and wherever the complainant has a perfect remedy at law, if the defendant raises the objection by demurrer to the bill, or insists upon it in his answer, the Court will refuse to sustain the suit. *Ibid.*

1243. The Court, however, frequently decides upon the validity of a will of real estate, where the question arises collaterally; but in such cases, if the heir insists upon the invalidity of the will in his answer, an issue will be awarded to try the question at law. *Ibid.*

1244. Where a party is within the jurisdiction of the Court, and the Court acquires jurisdiction of his person, it may, although the subject-matter of the suit is situated elsewhere, by injunction and attachment compel him to

desist from commencing a suit at law, either in this state or in any foreign jurisdiction; and may also, in the same manner, compel him to execute a conveyance or release in such form as is necessary to transfer the legal title to the property in question, according to the laws of the country where the same is situated, or as will be sufficient to bar an action in any foreign tribunal. *Mead v. Merritt and Peck*, 2 Paige, 402.

1245. The Court of Chancery, however, will not by injunction restrain a suit or proceeding previously commenced in a Court of a sister state, or in any of the federal Courts. *Ibid.*

1246. Where a person interested in a suit voluntarily compromises the same, without any fraud or imposition practised upon him, he cannot be relieved from the compromise, although he shows it was not beneficial for him, or shows that he had the right to recover in the suit in point of law. *Steele v. White*, 2 Paige, 478.

1247. Where a deed is alleged to be a forgery, and has been improperly certified as duly proved and recorded, the Court of Chancery may take jurisdiction of the cause for the purpose of settling the title to a large tract of land, and to prevent a multiplicity of suits. But in such a case it is proper to submit the question as to the genuineness of the deed to a jury, under the direction of the Court. *Apthorp and others v. Comstock and others*, 2 Paige, 482.

1248. Although the Court of Chancery, in the exercise of a sound discretion, may decide matters of fact without the intervention of a jury; yet, if important rights are depending on mere questions of fact, it may be proper to award a feigned issue for the trial of such questions of fact. *Ibid.*

1249. Although the same facts which will in equity discharge a surety on a simple contract, may be pleaded as a defence to an action against him in a Court of law; yet as the Court of Chancery had originally the exclusive jurisdiction in such cases, it will not relinquish its jurisdiction because the complainant may now have an adequate remedy at law. *Sailly v. Ellmore*, 2 Paige, 497.

1250. But if a suit at law has been commenced, and the defendant in that suit unnecessarily files a bill in Chancery to set up a defence of which he might avail himself at law, the Court may refuse to interfere by way of preliminary injunction; or it may refuse costs to the complainant on the final decree. *Ibid.*

1251. Where a right is claimed as existing by the common law, which is incapable of enjoyment except by the direct interposition of a judicial tribunal to give the remedy, if no tribunal has been organized for that purpose by the law-making power, we may fairly presume that no such right exists; but if the right is expressly declared by the legislative power, without creating or appointing any particular tribunal to administer the remedy, the power must be exercised by some of the existing tribunals of the country. *Perry v. Perry*, 2 Paige, 501.

1252. The twelfth section of the act of March, 1824, authorizing the Court of Chancery to decree a separation from bed and board on the

complaint of the husband, was not repealed in the recent revision of the laws. *Ibid.*

1253. After a defendant has answered a bill in Chancery, and submitted himself to the jurisdiction of the Court without objection, it is too late to insist that the complainant has a perfect remedy at law; unless the Court of Chancery is wholly incompetent to grant the relief sought by the bill. *Grandin and others v. Le Roy and Smith*, 2 Paige, 509.

1254. Whether the Court of Chancery has power to direct the application of real property, situated without the jurisdiction of the Court, in payment of a judgment recovered in one of the state Courts? *Quere. Mitchell v. Bunch*, 2 Paige, 606.

1255. The Court, however, has jurisdiction to compel a debtor who has been discharged from imprisonment for debt to discover his property, in order that it may, by the order of the Court, be applied in satisfaction of his debts. *Ibid.*

1256. Where the creditor, by an imprisonment of the debtor, can compel him to apply his property in payment of his debts, the Court of Chancery will not interfere. *Ibid.*

1257. If the person of the defendant is within the jurisdiction of the Court, the Court has jurisdiction as to his property situated without such jurisdiction. *Ibid.*

1258. And the jurisdiction is exercised by compelling the defendant either to bring the property in dispute within the jurisdiction of the Court, or to execute such a conveyance or assignment thereof as will be sufficient to vest in the grantee or assignee the legal title to, as well as the possession of the same, according to the laws of the place where the property is situated. *Ibid.*

1259. The Court of Chancery has jurisdiction to enforce the performance of contracts made in a foreign country, not only where the party proceeded against is domiciled here, but also where he is a foreigner, if he be within the jurisdiction of this Court at the time of the service of process upon him. *Ibid.*

1260. Where the agent of the owner of a lot of land contracted to sell the same, and also an additional piece of land which his principal did not own, but which both the agent and purchaser supposed belonged to him, and the deed included such additional piece; held, that a bill filed by the principal to restrain the purchaser from proceeding at law upon the covenants of assain, and to correct the mistake in the deed, could not be sustained. *Rankin v. Altherton*, 3 Paige, 143.

1261. Where the plaintiff brings a suit at law in a Court of the United States, and obtains judgment therein, he cannot, upon the return of an execution unsatisfied, file a bill in the Court of Chancery of this state against his debtor, to reach the equitable rights of such debtor which are not subject to a rule upon the execution at law. *Turbell v. Griggs*, 3 Paige, 207.

1262. Judgments of Courts of the United States in this respect stand upon no higher ground than the judgments of the Courts in sister states. *Ibid.*

1263. Independent of the provisions of the revised statutes, the Court of Chancery had jurisdiction, so far as the rights of the individual stockholders of a corporation were concerned, to call the directors to account, and to make satisfaction for losses arising from a fraudulent breach of trust. *Robinson v. Smith*, 3 Paige, 233.

1264. Although, upon a deed *inter partes*, a stranger cannot at law recover on a covenant contained therein for his benefit, yet a Court of Equity will give effect to stipulations of this kind in marriage articles, and other conveyances in trust, upon the application of the party for whose benefit the provision was intended. *Bleeker v. Bingham*, 3 Paige, 246.

1265. It seems, that the Court of Chancery will not interfere to prevent the trustees of a religious society from employing a particular individual as their clergyman, although his religious tenets should be at variance with those of the original founders of the society, and from whom its temporalities were derived. *Ibid.*

1266. The pew owners are only entitled to the use of their pews for the ordinary purpose of sitting therein during divine service. But they may maintain case, trespass, or ejectment, according to the circumstances, if they are improperly disturbed in the legitimate exercise of their legal right to use their pews in that manner. But in other respects, they have no greater rights in the church than the other members of the congregation. *Ibid.*

1267. The ordinary mode of obtaining the benefit of a lien on a ship is by a proceeding *in rem*, in the instance Court of Admiralty. But where the Court of Chancery has the administration of a fund arising from a sale of the ship, in a suit for the settlement of the accounts between the joint owners, that Court is authorized to take cognizance of such a claim, for the purpose of making an equitable distribution of the proceeds of the ship. *American Insurance Company v. Carter*, 3 Paige, 321.

1268. Where the Court of Chancery and a Court of law have concurrent jurisdiction of the subject-matter of a suit, if the plaintiff elects to proceed at law in the first place, the decision of the question in that Court will be conclusive as to the rights of the parties in a subsequent suit in Chancery, to the same extent that it would have been in a new suit at law in relation to the same matter. *Orcutt v. Orms*, 3 Paige, 459.

1269. Where land has been taken by the corporation of the city of New York for the purpose of opening a street, and the report of the commissioners of estimate and assessment has been confirmed by the Supreme Court, the Court of Chancery has no jurisdiction to restrain the corporation from opening the street, unless the proceedings are void, or there has been fraud or corruption on the part of the corporation. *Champlin v. Mayor, &c. of New York*, 3 Paige, 579.

1270. Where different mill owners have a common right to an artificial use of water for their respective mills, the Court of Chancery has jurisdiction so to regulate the common use

of the water as to preserve the right of each. *Belknap v. Trimble*, 3 Paige, 577.

1271. Where the complainants were the several owners of different mills situated upon the same stream, which mills depended upon a particular use of the waters of a pond at the head of the stream for their running, and such mill owners had been in the uninterrupted use and enjoyment of the water in a particular manner for more than twenty years; *held*, that the Court of Chancery had jurisdiction to establish their right to such use of the waters of the pond, and to restrain the defendant from disturbing them in such enjoyment. *Ibid.*

1272. The Court of Chancery has concurrent jurisdiction with Courts of law in suits for the recovery or assignment of dower. *Badgley v. Bruce*, 4 Paige, 98.

1273. A person cannot be restrained from making a reasonable improvement on his own premises, upon the ground that it cannot be made without endangering an edifice erected on the adjacent premises, if the owner of the adjacent premises does not possess any special privileges, protecting him from the consequences of such improvement, either by prescription or by grant from the person making the improvement, or from those under whom he claims title. *Lanala v. Holbrook*, 4 Paige, 169.

1274. The owner of land has a natural right to the use of the same in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots; and the owners of such adjacent lots have no right to destroy his land by removing these natural supports or barriers. *Ibid.*

1275. Where a person, in the exercise of ordinary care and skill, in making an excavation for the improvement of his own lot, digs so near the foundation of a house on the adjacent lot as to cause it to crack and settle, he will not be liable for the injury if such excavation would not have injured the adjacent lot in its natural state. *Ibid.*

1276. *After* as to ancient buildings, or those which have been erected upon ancient foundations, and which, by prescription, are entitled to an exemption from injuries resulting from the improvements on the adjacent lots, or as to those buildings which have been granted in their present situation by the owners of such adjacent lots, or by those under whom they derived their title. *Ibid.*

1277. Where a discretion is to be exercised, according to fixed and legal principles, by a body acting as a Court, if those principles have been mistaken or violated, it is a proper case for review and correction by the appropriate tribunal. But if the Legislature has intrusted the exercise of a discretionary power to the sole judgment and discretion of a particular person, or body of men, no Court is authorized to interfere with or control that discretion, provided it is exercised in good faith. *Walker v. Devereaux*, 4 Paige, 229.

1278. Upon a judgment creditor's bill the amount of the complainant's judgment, and the amount of the defendant's property as claimed by the complainant, should each exceed \$100, to constitute a matter in dispute, of which

the Court of Chancery will take cognisance. *Ibid.*

1279. The jurisdiction of the Court does not depend upon the amount which may ultimately be found due to the complainant; but upon the claim actually made by him. *Smets v. Williams*, 4 Paige, 364.

1280. Where the claim, as made by the complainant, exceeds \$100, but upon the hearing it turns out that he is actually entitled to less than that amount, the Court may make a decree in his favour for what is due; but in such case, he will not be entitled to costs, and he may be charged with costs in the discretion of the Court. *Ibid.*

1281. The Court of Chancery will not refuse to take jurisdiction of a suit, although the complainant has a perfect remedy at law, if both parties agree to submit the case to the decision of the Court, without objection as to jurisdiction. *Bank of Ulica v. City of Ulica*, 4 Paige, 399.

1282. The Court of Chancery has jurisdiction to protect its officers in the discharging of their duties by restraining proceedings at law against them for acts done by them under the direction of the Court, although such proceedings at law are instituted against them by persons who are not parties to the suit in Chancery. It has also jurisdiction to protect such third person against an abuse of power on the part of its officers, attempted to be exercised under pretence of an authority derived from the Court. *In the matter of Merrill*, 5 Paige, 125.

1283. The Court of Chancery has jurisdiction, upon a bill filed by the vendor, to decree a specific performance of a contract for the purchase of real estate, and to compel the vendee to pay the purchase money, although the complainant has a remedy at law upon the contract. *Brown v. Haff*, 5 Paige, 235.

1284. The Court of Chancery will not compel a purchaser to take a defective title, except where the purchase has been made at his own risk as to title, or where he has agreed to accept such a title as the vendor is able to give. It is sufficient, however, if the complainant can make a good title at the time of the decree, or when the master makes his report upon the title. *Ibid.*

1285. If a nominal plaintiff in an action at law, but who has no real interest in the suit, is the only witness by whom the defendant can establish his defence to such action, the defendant may file a bill in Chancery against the real plaintiff, to restrain the proceeding at law, and to have the controversy settled in this Court, where such nominal plaintiff may be examined as a witness. *Norton v. Woods*, 5 Paige, 249.

1286. Where a party who is sued at law has a legal defence, he must, as a general rule, avail himself of it in that suit; and it will be too late, after he has suffered a judgment to be recovered against him at law, to apply to the Court of Chancery for relief. *Ibid.*

1287. If the facts which constitute a legal defence to an action at law can only be established by a discovery from the plaintiff, and the defendant can, by the aid of such discovery,

avail himself of such defence at law, he should resort to that mode of defence to the action, or he may be precluded by the judgment. But in cases of that kind the Court of Chancery, if a satisfactory excuse is given for not resorting to a bill in the first instance, may grant relief after judgment has been obtained in the action at law: *Ibid.*

1288. The Court of Chancery has jurisdiction to set aside a conveyance which is a cloud upon the complainant's title; and may also interpose to prevent the giving of a conveyance, under pretence of right, which would operate as a cloud upon the title to real estate. *Petit v. Shepherd*, 5 Paige, 493.

1289. Where the complainant in a suit in Chancery is the real party in interest, the Court has no jurisdiction over third persons, who are not parties to the suit, to compel them on a summary application to pay the costs of the suit, or to refund moneys received by them under a decree which was afterwards reversed, and which they received in consequence of their having an equitable lien upon the moneys to be recovered in the suit, as security for a debt due to them by the complainant. *Field v. Maghee*, 5 Paige, 539.

1290. The Court of Chancery has jurisdiction to restrain proceedings elsewhere for an abuse of its process, and may compel the injured party to apply to this Court for redress. It is not necessary, therefore, to make it a condition of an order setting aside an attachment for irregularity, that no suit at law shall be brought; but it will be sufficient if a restraining clause is inserted in the order of this Court. *Gould v. Spencer*, 5 Paige, 541.

1291. Chancery can interpose to preserve property in dispute pending litigation in another Court, when the powers of the latter Court are insufficient for the purpose. *Schmidt v. Dietrich*, 1 Edw. 119.

1292. A bill of discovery to aid a suit at law, although the sum in controversy is under \$100, will be sustained. *Goldrey v. Becker*, 1 Edw. 271.

1293. Chancery will frequently relieve from the operation of conditions, subsequent or precedent, where compensation can be made in damages, and, by analogy, where no injury arises. *De Forest v. Bates*, 1 Edw. 394.

1294. A bill may be filed in this Court upon a judgment which has been obtained for less than \$100, provided the costs below have increased it above that sum. The words "exclusive of costs" in the statute mean the costs of the suit in this Court. *Van Tyne v. Bunce*, 1 Edw. 583.

1295. The jurisdiction which Chancery has over trusts may be exercised over the property or temporalities of religious societies (whether incorporated or not) as being trust property; and equity will see the trusts faithfully performed. *Bowden v. M'Leod*, 1 Edw. 588.

1296. A mere *pro forma* judgment, which is liable to be set aside, although execution may have been returned, will not enable this Court to retain a jurisdiction which is auxiliary to a Court of law any longer than such Court suffers its proceedings to stand. *Butchers' and Grocers' Bank v. Willis*, 1 Edw. 645.

XXX. LEASE.

Landlord and tenant.

1297. A covenant on the part of a lessor to renew a lease for years at the expiration of the term, is a covenant running with the land. *Piggott v. Mason*, 1 Paige, 412.

1298. A surrender and conveyance to the lessor of a sub-lease of part of the premises is no bar to a claim, on the part of the lessee or his assigns, for a renewal of the original lease according to the covenant. *Ibid.*

1299. The holder of the original lease is not entitled to a covenant for renewal in the new lease, as that would create a perpetuity. *Ibid.*

1300. Covenants of warranty and to convey contained in a lease of real estate run with the land, and are binding upon the heirs and assignees of the lessor. *Van Horne v. Crain*, 1 Paige, 465.

1301. A subsequent purchase by the lessor of an outstanding claim against the premises will enure to the benefit of the lessee by virtue of the covenant of warranty. *Ibid.*

1302. The same result follows where the purchase is made by an assignee of the reversion. *Ibid.*

1303. A lessee of buildings which are consumed by fire has no relief, either at law or in equity, against an express covenant to pay rent, unless he has protected himself by a stipulation in the lease, or the landlord has covenanted to rebuild. *Gates v. Green*, 4 Paige, 365.

1304. Where the complainant had purchased the rent and reversion of the lands of an attainted person, and had received rent from the tenant for more than forty years at a particular rate, and in a particular manner; *held*, that he was not entitled to a discovery from the tenant as to the amount of rent received by the original lease or as to the terms of payment. *Lensing v. Pine*, 4 Paige, 639.

1305. The Court of Chancery will not aid a landlord in obtaining a discovery from his tenant, as to the existence of the covenant in a lease, by means of which the interest of the tenant in the land may have become forfeited. *Ibid.*

1306. In the case of church leases from the trustees of charities, &c., where the lessors are in the practice of giving new leases to their tenants from time to time, upon the payment of a renewal fine, or a reasonable addition to the rent, the tenant in regard to third persons has a vendable interest in such imperfect right of renewal which a Court of Equity will recognise and protect, although such renewal depends upon the mere violation of the lessor. *Phyfe v. Wardell*, 5 Paige, 268.

1307. If a person who has particular or special interest in a lease obtains a renewal of the lease in consequence of his being in possession as tenant, or from his having such special interest, the renewed lease is in equity considered as a mere continuance of the original lease, for the protection of the rights of all parties who had any legal or equitable interest in the old lease. *Ibid.*

1308. Where the complainant, as the lessee of premises, a part of which had been let by him

to an under tenant, contracted with the defendants to sell his interest in the premises to them, for the purpose of enabling them to obtain a renewal without prejudice to the rights of the sub-lessee; and the defendants, in consequence of such agreement, obtained a new lease of the premises in their own names, and then evicted the sub-lessee, by which the complainant was compelled to make good the loss or damage sustained by him; *held*, that the complainant was entitled to a decree for a specific performance of the agreement, and to be indemnified against the claim of the sub-lessee; and that he had a lien, for the unpaid purchase money, upon the legal interest in the premises which the defendants had acquired under their new lease. *Ibid*.

1309. Where there is a covenant in a lease allowing a lessee to purchase the fee at a specified sum, it is a fair inference, in a bill filed for a specific performance, that the rent was fixed at the amount reserved in the lease as an inducement to purchase the fee under such covenant. *In the matter of Hunter*, 1 Edw. 1.

1310. The words, "shall have liberty to purchase," contained in such covenant, are to be construed as giving the right to clear title, free from a claim of dower and all other encumbrance. It means the whole title. *Ibid*.

1311. *It seems*, where a tenant covenants to pay rent, and the premises are burnt, he is still liable, and equity cannot relieve him. *Patterson v. Acherson*, 1 Edw. 96.

1312. But where a tenant covenants to yield up the premises in good repair at the end of the term, damages by fire to the manufacturing house excepted, "and in case of such accident the rent was to cease;" *it was held*, although upon such accident the rent ceased, still the term did not; the tenant would hold until the term had expired, and he was not liable in Chancery for a reasonable rent as for use and occupation. *Ibid*.

1313. Where a tenant covenants to pay all taxes, charges, and assessments, ordinary and extraordinary, which might, during the term of his lease, be charged or assessed upon the demised property or upon him, and he paid an assessment on account of a public sewer, for which a prior assessment had been paid by his landlord before the lease, but returned to the latter with interest afterwards, on account of an erroneous principle in the assessment; *held*, that the tenant had no remedy in equity upon the rule of accident. *Cram v. Munro*, 1 Edw. 123.

1314. Whether, as he paid the assessment, he can have relief in equity upon the ground of mistake? *Quære*. *Ibid*.

XXXI. LEGACY.

A. *What is a legacy; what passes by the bequest, and by what words; and where the legacy is specific, pecuniary, or general.*

B. *Payment of legacies; and of marshalling assets for that purpose.*

C. *When liable to abate or refund.*

D. *Action for a legacy.*

A. *What is a legacy; what passes by the bequest, and by what words; and where the legacy is specific, pecuniary, or general.*

1315. It is a general rule, that legacies chargeable upon the real estate, and payable at a future day, are not vested, and lapse by the death of the legatee before the time of payment arrives. *Birdsall v. Hewlitt*, 1 Paige, 32.

1316. But this rule has never been extended to a case where the estate was given to a stranger upon condition that he paid the legacy charged thereon; and the rule has been much limited even as between the legatees and heirs at law. *Ibid*.

1317. Where the time of payment of the legacy is postponed for the benefit of the estate, and not with reference to any particular circumstance in relation to the legatee, the legacy becomes vested at the death of the testator, and is transmissible to the personal representatives of the legatee, although he dies before the time of payment arrives. *Ibid*.

1318. Where there is a bequest in remainder after the determination of the particular estate, with an executory limitation over in case of the death of the legatee, the legatee takes only a contingent interest, which will be divested if he dies during the continuance of the particular estate, and the limitation over will take effect. *Adams v. Beckman and others*, 1 Paige, 621.

1319. Where specific chattels not necessarily consumed in the use are bequeathed for life, with a limitation over, the practice is to require from the first taker an inventory of the goods, specifying that they belong to him for the particular period only, and afterwards to the person in remainder. And security is not required from the first taker, unless there is danger that the articles will be wasted or otherwise lost to the remainder-man. *Covenhoven and others v. Skuler and others*, 2 Paige, 123.

1320. If there is a general bequest of a residue for life with remainder over, although it includes articles which are consumed in the using, the whole must be sold and converted into money, and the proceeds invested; and the interest only is to be paid to the legatee for life. *Ibid*.

1321. A mere misdescription of the legatee does not render the legacy void, unless the ambiguity is such as to render it impossible, either from the will or otherwise, to ascertain who was intended as the object of the testator's bounty. *Smith v. Smith*, 4 Paige, 271.

B. *Payment of legacies; and of marshalling assets for that purpose.*

1322. A legacy carries interest from the time it becomes payable. *Birdsall v. Hewlitt*, 1 Paige, 32.

1323. Where land is devised subject to the payment of legacies, and the devisee dies before payment, the legatees have a specific lien upon the income of the land after his death, as well as upon the land itself, and the legacies must be paid out of the same in preference to the creditors and legatees of such devisee. *Hallett and Davis v. Hallett and others, Executors*, 2 Paige, 15.

1324. If the estate and the income which ac-

crued after the death of the devisee, should prove insufficient for the payment of the legacies, the balance, to the extent of the rents and profits received by the devisee in his lifetime, will constitute a debt against the residue of his estate, to be paid in a due course of administration. *Ibid.*

1325. Where the legatees seek a sale of the estate to satisfy the legacies charged thereon, the devisee or his heirs cannot require them to litigate a claim of third persons which, if valid, is paramount to the title under the will of the deviser. *Ibid.*

1326. In such cases the right acquired under the will, whatever it may be, must be sold subject to all paramount claims. *Ibid.*

1327. If the personal estate of a deceased debtor is not sufficient to pay his debts and legacies, and his executor exhausts the personal estate in the payment of creditors whose debts are chargeable both on the real and personal estate, a legatee, as between himself and the heir at law of the decedent, is entitled to stand in the place of such creditors *pro tanto*, and to recover the amount of his legacy, or so much thereof as the personal estate would have paid, out of the real estate descended to the heir. *Mullan v. Griffith*, 3 Paige, 402.

1328. Where the personal estate has been exhausted by the executor, in the payment of debts charged upon the real estate descended to the heir at law, the legatee, and not the executor, is the proper person to file a bill for marshalling the assets, and to obtain payment of the legacy out of the real estate. *Ibid.*

1329. Where a legacy is given to a class of individuals, in general terms, as to the children of A., and no period is fixed for the payment of the legacy, it will be considered as due at the death of the testator; and only the children of A., who were either born or begotten previous to that time, will be entitled to a share in the legacy. *Jenkins v. Freyer*, 4 Paige, 47.

1330. But a child in *ventre sa mere* at the death of the testator is considered as in *esse*; and if it should afterwards be born alive, it would be equally entitled with those children who were born in the lifetime of the testator. *Ibid.*

1331. Where, by the will, there is a postponement of the division of a legacy given to a class of individuals until a period subsequent to the testator's death, every person who answers the description, so as to come within that class at the time fixed by the testator for the division, will be entitled to a share, although not in *esse* at his death, unless there is something in the will to show that the testator intended to limit the legacy to such only of the class as would answer the description at the time of his death. *Ibid.*

1332. Where a testator, after devising all his real estate to his son, charged with the support of his wife, directed that his son should, at the expiration of three years from the date of his testator's decease or the decease of his wife, pay certain sums for the lands which the testator had given him, and the widow of the testator survived him more than three years, and then died; it was held, that the legacies were payable

immediately upon her death. *Miller v. Philip*, 5 Paige, 573.

1333. The revised statutes (9 R. S. 109, 56 sec. and p. 104, sec. 25,) requiring six weeks advertising, &c., upon a sale of real estate by an executor for payment of debts and legacies, in pursuance of the authority given by a will, applies only where the will is silent as to the manner of sale. *M'Dermut v. Lortillard*, 1 Edw. 273.

1334. Therefore, where executors had power to sell, in order to meet legacies "at such time and in such manner as to them should seem most advantageous," and they sold upon an advertisement of three weeks; held, to be a valid case. *Ibid.*

C. When liable to abate or refund.

1335. Under the provision of the revised statutes, giving to a post-testamentary child the same portion of the real and personal estate of the father as would have descended or have been distributed to such child if the father had died intestate, all the devisees and legatees must contribute rateably, in proportion to the value of the real or personal estate devised or bequeathed to them respectively, to make up the distributive share of such post-testamentary child; and in making such contribution, no distinction is to be made between specific, general, and residuary legatees, but each legacy is to abate rateably in proportion to its amount or value. *Mitchell v. Blain*, 5 Paige, 588.

1336. Even a legacy given to the widow of the testator in dower must be taken into account in estimating the amount which the other legatees are bound to contribute to make up the share of a post-testamentary child in the estate of the father. But as between the widow and such child, the latter cannot take a child's portion of the real estate discharged of the widow's rights of dower, and also a rateable proportion of a legacy given by the testator to the widow in lieu of such dower. *Ibid.*

D. Action for a legacy.

1337. It is a general rule that a residuary legatee, or other person prosecuting for a distributive share of the estate, should make all the other persons interested in the distribution parties to the suit, in order that only one account be taken. *Pritchard v. Hicks and another, Executors*, 9t. 1 Paige, 270.

1338. But this is not necessary where a creditor or legatee prosecutes who is entitled to a priority of payment. The executor or administrator in such cases is the legal representative of the residuary legatees, and it is his duty to protect their rights. *Ibid.*

1339. Where a testator devised his real and personal estate to two of his sons, provided they should pay certain legacies given in the will, and the legatees filed their bill against them, and obtained a decree for the sale of the real estate to pay the legacies; which, upon being sold, proved insufficient; and no decree having been asked in that suit charging the devisees personally with the payment; held, that the legatees could not file a new bill against them for that

purpose. *Cook v. Grant, Administrator*, 1 Paige, 407.

1340. The legatees should have asked and obtained all the relief to which they were entitled against the devisees in the first suit. *Ibid.*

1341. Where several suits are brought by different legatees for general legacies, and the estate is insufficient to pay them all, the Court will direct an account of the estate to be taken in one cause only, and in the mean time direct the proceedings in all the other suits to be stayed. *Ross and wife v. Cray, Executor*, 1 Paige, 416.

1342. It is a matter of discretion as to which suit the account shall be taken in. The Court will therefore direct the suit which is most beneficial for the legatees to be proceeded in, and if there is doubt on that subject, will refer it to a master to ascertain which suit is most for the interest of the legatees and other persons interested in the estate. *Ibid.*

1343. The children of a deceased legatee, although exclusively entitled to the legacy, cannot recover the same from the owner of the real estate upon which it is charged, without administering upon the estate of the legatee. *Jenkins v. Freyer*, 4 Paige, 47.

XXXII. LIMITATIONS, STATUTE OF.

1344. Twenty years are required to bar an equity of redemption. *Slee v. The President and Directors of the Manhattan Company*, 1 Paige, 48.

1345. Twenty years, by analogy to the statute of limitations, is the period allowed in Chancery for commencing proceedings to set aside conveyances of real estate on the ground of fraud. *Ward v. Van Bokkelen*, 1 Paige, 100.

1346. The statute of limitations is a good plea in bar in equity as well as at law. *Stafford v. Bryan*, 1 Paige, 239.

1347. Where a legacy to a daughter was payable on her marriage or when she became of age, and she married before arriving at full age, in a suit brought by her and her husband for the legacy after the lapse of six years, it was held, that the statute of limitations did not run against her, she coming within the exception in the statute in favour of *femes covert*. *Wood and wife v. The Executors of Riker*, 1 Paige, 616.

1348. Where the statute of limitations is a good defence to only a part of the complainant's demand, if pleaded as a bar to the whole, the plea will be bad. *Ibid.*

1349. The statute of limitations may be interposed against legacies, if not charged upon the land, as well in equity as at law. *Souzer and wife v. De Meyer and De Meyer*, 2 Paige, 574.

1350. To revive a debt barred by the statute of limitations, there must be an admission of a subsisting indebtedness, unaccompanied by any thing which shows the intention of the party to avail himself of the statute as a bar, or which is sufficient to rebut the implication of a promise to pay. *Stafford v. Bryan*, 2 Paige, 45.

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1351. Where the right to sue at law accrued before the revised statutes took effect, the time within which a suit will be barred depends upon the statute which existed previous to that time; but where the right to commence the suit accrued since that period, the time within which the suit is to be brought must be regulated by the revised statutes. *Ibid.*

1352. The same rules are applicable to suits in equity in cases where the complainant has a concurrent remedy at law. *Ibid.*

1353. Whether the time which has elapsed previous to the adoption of the revised statutes is to be taken into consideration in estimating the ten years within which a suit must be brought which is of exclusively equitable cognisance? *Quære. Ibid.*

1354. Upon a liability created by statute, the plaintiff may bring an action of debt or *assumpsit* at his election, if no form of action is prescribed by the statute creating such liability. A suit in equity founded upon such liability would not therefore be barred till the expiration of the longest time limited for bringing either of those actions at law. *Van Hook v. Whitlock*, 3 Paige, 409.

1355. Whether loose declarations of the father as to the receipt of money belonging to his daughter will revive the cause of action for the same, after a lapse of twenty-five years from the time the legal right of the husband to recover the money had accrued? *Quære. Van Epps v. Van Deusen*, 4 Paige, 64.

1356. The statute of limitations does not, in terms, apply to Chancery; still when its jurisdiction is invoked in cases of which it has not an exclusive, but a concurrent jurisdiction, equity gives to it the like effect as a Court of law. *Bertine v. Varian*, 1 Edw. 343.

1357. Ignorance of rights and fraud and concealment will prevent the operation of the statute; but a party must set these up distinctly in his pleading. An averment that the complainants had not been "in a situation to call the guardians or their representatives to account," is too indefinite. *Ibid.*

1358. The statute of limitations may be a bar in a suit by one partner against another for an account and settlement of the joint concern. *Atwater v. Fowler*, 1 Edw. 417.

XXXIII. LOAN OFFICERS.

1359. Where, by the division of the county of Washington, lands mortgaged to the old loan officers of that county fell within the limits of the new county of Warren; held, that under the act of the 12th of March, 1819, the loan officers, upon a foreclosure or sale of the mortgaged premises, were bound to publish a copy of their advertisement of sale in a newspaper in Warren county. *Bogers v. Murray*, 3 Paige, 390.

1360. A rule made by the loan officers without giving the notice required by law is invalid, and will be set aside upon the application of the owner of the mortgaged premises. *Ibid.*

XXXIV. LUNATICS AND IDIOTS.

- A. *Jurisdiction of Chancery, and its course of proceeding in regard to lunatics and idiots; commission and inquisition of lunacy; traverse of the inquisition.*
- B. *Committee or curator of the person and estate of the lunatic; his power and duty, and herein of the sale of the lunatic's estate, for his maintenance and the payment of his debts; account and allowances.*
- C. *Habitual drunkards.*

A. *Jurisdiction of Chancery, and its course of proceeding in regard to lunatics and idiots; commission and inquisition of lunacy; traverse of the inquisition.*

1361. On the execution of a commission in the nature of a writ *de lunaticis inquirendo*, it is improper for the sheriff who summoned the jury to be in the room, or to converse on the subject with the jury, while they are deliberating on their verdict. *In the matter of Arnout*, 1 Paige, 497.

1362. Where the sheriff had improperly interfered with the deliberations of the jury, their inquisition was set aside, and a new commission was issued directed to the coroner. *Ibid.*

1363. It is the privilege of a party against whom a commission of lunacy is issued, to be present at, and to have notice of its execution. *In the matter of Tracy*, 1 Paige, 580.

1364. If peculiar circumstances render it improper or unsafe to give such notice, they should be stated in the petition to the Court, so that a special provision may be inserted in the commission dispensing with notice to the party. *Ibid.*

1365. In this state it is not a matter of course to allow an inquisition to be traversed, but the same rests in the sound discretion of the Court. *Ibid.*

1366. The practice here is to award a feigned issue in all cases where a traverse would be proper, instead of allowing a formal traverse. *Ibid.*

1367. An issue should be directed, upon the application of the party, in all cases of doubt, especially under the act respecting habitual drunkards. *Ibid.*

1368. Whether any and what allowance will be made to a party out of his estate in the hands of a committee depends upon the circumstances of each particular case. *Ibid.*

1369. Courts never enforce executory contracts against infants or lunatics, except such contracts as are for necessities furnished. *Loomis and Hayden v. Spencer and Rolph*, 2 Paige, 163.

1370. But where an infant or lunatic has received the benefit of property sold to him in good faith, by a party who had no knowledge of his incapacity to contract, and where no advantage has been taken of his situation, a Court of Equity will not interfere to set aside the contract. *Ibid.*

1371. Where the creditor of a lunatic, on the sale of property to the latter in good faith, has obtained a legal security, the Court of Chancery

will not deprive him of such security without restoring to him so much as the estate of the lunatic has been actually benefited by the sale. *Ibid.*

1372. Commissioners may be required to give the lunatic due notice of the time and place of executing a commission of lunacy, although the lunatic resides out of the state. *In the matter of E. Pettit, a lunatic*, 2 Paige, 174.

1373. A commission may issue to ascertain the lunacy of a non-resident, but it cannot be executed beyond the limits of this state. *Ibid.*

1374. The statute gives the Court of Chancery the exclusive care and custody of the persons and estates of idiots, lunatics, and habitual drunkards; and all contracts made by them, and all gifts of their property and effects, after the actual finding of an inquisition declaring their incompetence, are actually void. *L'Amoureux, Committee of Stafford v. Crosby*, 2 Paige, 422.

1375. The inquisition is only *prima facie* evidence of the invalidity of an act done by the lunatic or drunkard before the issuing of the commission, but which is overreached by the finding of the jury. *Ibid.*

1376. The chancellor will not grant an application in the name of a lunatic for leave to traverse the inquisition, unless he is satisfied, upon a private examination of the lunatic, or by the report of a master, that such is the wish of the lunatic, and that he is capable of understanding the nature and object of the application. *In the matter of Christie*, 5 Paige, 242.

1377. But where the conveyance of a purchaser is overreached by the inquisition, the Court, upon probable cause shown, will permit such purchaser to traverse the finding of the jury upon his stipulating to be bound by the final decision upon such traverse. *Ibid.*

1378. When a petition or affidavit is sworn to by a person who has been found by the inquisition of a jury to be a lunatic, the officer before whom the same is sworn should state in the *jurat*, that he had examined the deponent for the purpose of ascertaining the state of his mind, and that he was apparently of sound mind, and capable of understanding the nature and contents of the petition or affidavit. *Ibid.*

B. *Committee or curator of the person and estate of the lunatic; his power and duty, and herein of the sale of the lunatic's estate, for his maintenance and the payment of his debts; account and allowances.*

1379. A committee must be appointed in this state for a non-resident lunatic to enable him to obtain the control of property here. *In the matter of E. Pettit, a lunatic*, 2 Paige, 174.

1380. It is not proper to subject the estate of the lunatic, &c., to the expense of a proceeding by bill against his committee, except by the direction of the Court; and it is a contempt of the Court to commence a suit at law without its permission. *L'Amoureux, Committee of Stafford, v. Crosby*, 2 Paige, 422.

1381. The statute having given to the Court of Chancery the exclusive jurisdiction in such cases, and charged it with the duty of providing for the payment of the debts of the idiot,

lunatic, or drunkard, out of his estate, the chancellor will see that the legal and equitable rights of the creditors are protected and enforced; but this must be done according to the usual forms of proceedings in this Court, or under its direction. *Ibid.*

1382. It is a contempt of the Court for a person to interfere with the property of a lunatic, &c., after he is informed of the institution of proceedings to declare his incompetency. *Ibid.*

1383. After the finding of an inquisition declaring the incompetency of the lunatic, &c., the proper remedy of creditors is by an application to the Court, by petition, for the payment of their debts, if the committee decline discharging them without the direction of the Court; and if their demands are disputed or doubtful, it may be referred to a master to ascertain whether they are equitably due. *Ibid.*

1384. The chancellor has no authority to order the sale of the real estate of the lunatic, unless it be necessary for the payment of the lunatic's debts, or for the maintenance of himself or of his family, or for the education of his children. *In the matter of Pettit, a lunatic*, 2 Paige, 596.

1385. And in neither of these cases can it be done if there is sufficient personal estate for that purpose. *Ibid.*

1386. If a person has either a legal or equitable claim against the estate of an idiot, lunatic, or habitual drunkard, in the hands of a committee appointed by the Court of Chancery, which such committee refuses to pay, he must apply to that Court, by petition, for payment of his demand; and he will not be permitted to obtain payment by means of a suit at law, unless such suit is brought with the sanction of the Court of Chancery. *In the matter of Heller*, 3 Paige, 199.

1387. Where a party proceeds at law against the lunatic after the appointment of a committee by this Court, he will, upon a proper application by the committee, be restrained from such proceeding. *Ibid.*

1388. If the property of a lunatic is under the control of the Court of Chancery, in the hands of a committee, it is a contempt of the Court for a plaintiff in a suit at law to interfere with the property, on a judgment and execution against the lunatic. *Ibid.*

1389. Debts contracted by a lunatic or habitual drunkard, after the appointment of a committee, and without his consent, cannot be paid out of the estate, although established by a suit at law against the lunatic or drunkard. *Ibid.*

1390. Where an idiot, who was under the care of a committee appointed by this Court, pulled down a school-house standing upon lands owned in common by him and the trustees of the school district, the Court authorized an equitable partition of the lands, so as to compensate the trustees for the share of the school-house which belonged to them. *Ibid.*

1391. The committee of a lunatic, who has voluntarily accepted the appointment, cannot be discharged without showing some valid excuse for resigning the trust; and the fact that his situation is rendered unpleasant, in consequence

of controversies existing between different members of the lunatic's family, is not sufficient for that purpose. *In the matter of Lytle*, 3 Paige, 251.

1392. Where a bill is filed by a creditor of a lunatic against his committee to obtain payment of a debt out of the estate, it is not necessary to make the lunatic a party. But in a suit where there are conflicting interests between the lunatic and his committee which must be settled in the cause, both should be made parties. *Thal v. Woodworth*, 3 Paige, 470.

1393. After the appointment of a committee of a lunatic by the Court of Chancery, it is a contempt of Court for a creditor to sue the lunatic, or to levy an execution upon his property, without permission of the chancellor or vice-chancellor having jurisdiction of the proceedings in lunacy. *In the matter of Hopper*, 5 Paige, 489.

1394. The proper course for the creditor of a lunatic who is under the care of a committee is to apply to the Court, by petition, for the payment of his debts out of the lunatic's estate; or for leave to bring a suit, or to be permitted to establish his debts on a reference to a master, if the existence of the debt is disputed by the committee. *Ibid.*

1395. Where a judgment is obtained against a lunatic, and an execution issued and levied upon his property, before the institution of proceedings in lunacy in the Court of Chancery, the Court will not set aside the judgment and execution upon a summary application of the committee, although such judgment and execution are overreached by the finding of the jury upon the commission of lunacy. *Ibid.*

C. Habitual drunkards.

1396. Where a person for any considerable part of his time is intoxicated to such a degree as to deprive him of his ordinary reasoning faculties, it is *prima facie* evidence that he is incapable of managing his affairs. *In the matter of Tracy*, 1 Paige, 580.

1397. Where the Court designates a master to take an account between a committee of an habitual drunkard and the estate, it is irregular and improper for the parties to change the master, for the discharge of this duty, without the sanction of the Court. *In the matter of Carter*, 3 Paige, 146.

1398. If the committee of an habitual drunkard neglects to file an inventory of the estate, or to render his accounts regularly under oath, as required by the one hundred and fifty-fourth rule, in the settlement of his accounts, every presumption will be taken most strongly against him. *Ibid.*

1399. The committee of an habitual drunkard, who holds a mortgage against the estate, cannot, without the sanction of the Court, enforce it by proceedings of foreclosure under statute. *Ibid.*

1400. Where the committee has been guilty of gross negligence, he will be decreed to pay the costs of the proceedings against him to obtain his removal and the settlement of his accounts. *Ibid.*

1401. The committee of an habitual drunkard

should apply to the Court for protection against any person who furnishes the drunkard with the means of intoxication. *In the matter of Heller*, 3 Paige, 200.

1402. The Court of Chancery has the custody and control of the person as well as of the estate of an habitual drunkard, and can exercise that control by means of a committee, as in the case of a lunatic. *In the matter of Lynch*, 5 Paige, 420.

1403. The committee of an habitual drunkard has the right, subject only to the superintending control of the Court, to decide as to the proper residence of the drunkard, and he is responsible for the consequences of his neglect to take proper care of the person of such drunkard; and it is the duty of the Court to aid and protect the committee in the proper exercise of this right, and to give him directions on the subject when necessary. *Ibid.*

1404. Where a third person, without the consent and against the wishes of the committee, has the custody of, or harbours the habitual drunkard, the committee should apply to the Court, *ex parte*, for an order that such person deliver the drunkard up to the committee, or cease from harbouring him; and if such order is disobeyed, the party will be punished for a contempt of the Court. *Ibid.*

XXXV. MASTER'S OFFICE AND SALE.

1405. Where, on a sale, the master had attended three days from the distance of forty miles, the Court would not direct an allowance in costs beyond the scale fixed in the forty-eighth rule; especially as no reason appeared for placing the sale under the direction of a master from so great a distance. *Roseboom v. Vedder*, 1 Hopk. 328.

1406. A purchaser at a master's sale is bound to complete the purchase where the vendor shows a *prima facie* title, against which there are no reasonable grounds of suspicion. *In the matter of Thomas Browning*, 2 Paige, 64.

1407. If it appears that any person is making a claim adverse to the title of the vendor, or that there are probable grounds to suppose such a claim will be made, the Court will direct the testimony of the witnesses to be perpetuated. *Ibid.*

1408. The biddings at a master's sale will not be opened, except in very special cases; and then it will not be done unless the purchaser is fully and liberally indemnified for all damages, costs, and expenses to which he has been subjected. *Duncan and others, Trustees, v. Dodd and others*, 2 Paige, 99.

1409. Where the master, who was directed to sell mortgaged premises under a decree, had written instructions from the complainant's solicitor not to sell the premises for a less sum than two thousand six hundred dollars, the amount of the debt and costs, but through ignorance of his duty the premises were sold for one thousand dollars less, to purchasers who were informed of the instructions at the time

of sale, and before they paid their bid, the Court ordered a resale of the property. *Requa v. Rea and wife*, 2 Paige, 339.

1410. Where the purchasers took possession of the property, and made improvements thereon, after being informed by the master that the facts would be submitted to the Court, and without waiting for the confirmation of the report of sale, it was held, that they were not entitled to indemnity for such improvements. *Ibid.*

1411. Where a person becomes a purchaser under a decree of a Court of Chancery, he submits himself to the jurisdiction of the Court in the suit in which the decree was made, as to all matters connected with the sale, or relating to him in the character of purchaser. *Ibid.*

1412. Where a purchaser, at a master's sale, purchases under the assurance given at the time, that he is to receive a perfect title; if such title cannot be given, he will not be compelled to complete the purchase. *Morris and others v. Morvill and others*, 2 Paige, 586.

1413. Neither can he be compelled to receive a good legal title, if it is liable to be litigated, in consequence of some equitable claim which may be brought against it. *Ibid.*

1414. He is not obliged to accept a mere equitable title, or a doubtful title. *Ibid.*

1415. He has a right to require, under such circumstances, a title which is good both at law and in equity. *Ibid.*

1416. It is the duty of the master who sells property under an order of the Court, to pay over the moneys received upon the rule, to the parties entitled thereto, without delay. And if he neglects to pay over the money as directed by the order of the Court, the interest which is lost by such neglect should be charged upon the master personally. *Lawrence v. Murray*, 3 Paige, 406.

1417. Where land sold under a decree of the Court was described in the master's notice as containing about seventy acres, when in fact it contained only thirteen acres, and one of the complainants who was present at the sale knew of the deficiency, but concealed that fact from the master and the bidders, and encouraged them to bid, the bill was set aside on the application of the purchaser. *Vedder v. Fonda*, 3 Paige, 94.

1418. The master who sells property should insert nothing in his description of the same, in the notice of sale, which may unduly enhance the value of the property or mislead the purchaser. *Ibid.*

1419. It is the policy of the Court of Chancery to encourage a fair competition at a master's sale; and to effect this object, it will not allow any deception whatever to be practised upon the bidders. *Ibid.*

1420. The purchaser at a master's sale cannot object to the title merely on the ground that there is a possibility that some person, other than the parties in the suit, has an interest in the premises, where there is no probability that any such interest exists. *Dunham v. Minard*, 4 Paige, 441.

1421. Where, on an order for the release of mortgaged premises, the master was directed to put up the premises at a particular sum, and resell

the same, if that amount or a larger sum was bid therefor, and at the sale the premises were struck off to a purchaser for the sum specified; and thereupon the master, acting under the directions of the complainant's solicitor, and without any previous intimation to that effect, insisted upon the immediate payment of the bid in specie, although the purchaser offered to pay the same in good current bank bills, or in good drafts on specie paying banks at Albany, or to pay the amount in specie as soon as it could be obtained from the banks where it could be found; and the master immediately put up the property again upon the terms that specie should be paid down, and no person purchasing on these terms, he reported that the terms upon which the resale was directed had not been complied with; it was held, that the conduct of the master was improper and unjustifiable, and that the purchaser was entitled to a deed of the premises, upon the payment of the amount of his bid; and the report of the master was set aside, and he was directed to execute to the purchaser a deed upon such resale. *Baring v. Moore*, 5 Paige, 48.

1422. It seems, a master is liable for the costs of setting aside his report of sale, and of the subsequent proceedings thereon, if his conduct as such master has been grossly improper and oppressive. *Ibid*.

1423. A supplementary bill, or an original bill in the nature of a supplemental bill, is but a continuation of the original suit, so far as regards the right of a master who has been solicitor or counsel in the original suit to act as master in any proceedings on the supplemental bill. *McLarin v. Charrier*, 5 Paige, 530.

1424. The approval of an appeal bond is an act requiring the exercise of judgment and discretion on the part of the approving officer; and a master who has acted as solicitor or counsel in the cause or matter in which the appeal is taken, or whose law partner has thus acted, cannot regularly approve such bond. *Ibid*.

1425. Where a master, or any other judicial officer of the Court of Chancery, has, in the character of a solicitor or counsellor, given advice, or prepared any pleadings or proceedings in a cause or matter pending in or brought before the Court, or has made or opposed motions or petitions in such cause or matter, or where his law partner has been thus employed or consulted, although not the solicitor or counsel on record; such master or judicial officer cannot afterwards act as master, or do any judicial act requiring the exercise of judgment or discretion which is, in any way, connected with such cause or matter. But the restrictions of the revised statutes do not extend to a master who has acted merely as Chancery agent of the solicitor in the cause, in the receipt and service of papers; nor do they prevent a master who is not the solicitor or counsel on record from taking an affidavit, or doing any other mere ministerial act. *Ibid*.

1426. A purchaser at a master's sale under a decree of the Court of Chancery may make a valid transfer of his bid to a third person, before the execution of the master's deed for the premises; and the Court, upon the application

of such assignee, may direct the execution of a conveyance immediately to him by the master, subject to the equitable rights or liens of other persons, as against the original purchaser, which had become vested previous to the assignment of his bid. *Proctor v. Farnam*, 5 Paige, 614.

1427. Where a memorandum not authorized by the master was read at a master's sale, describing the dimensions of the dwelling houses sold, and which turned out to be incorrect by several feet, the sale was vacated. *Laight v. Pell*, 1 Edw. 577.

XXXVI. MORTGAGE.

- A. What constitutes a mortgage, and its nature.
- B. Registry of mortgages; priority of encumbrances and lacking.
- C. Estate and interest of the mortgagor and mortgagee, and when the equitable is merged in the legal estate.
- D. Equity of redemption; who may redeem; what length of time shall be allowed for that purpose; when payment or satisfaction of a mortgage will be presumed.
- E. Foreclosure and sale.
- F. Account between mortgagor and mortgagee.

A. What constitutes a mortgage, and its nature.

1428. In 1796, in the state of Connecticut, E. agreed to sell to C. certain lots of land in this state; for which he duly executed a deed of conveyance, of which an acknowledgment by him was endorsed; C. paid part of the consideration, and gave promissory notes for the residue; but not having security at hand for the payment of those notes, the deed was left in the hands of H. as an escrow, until security should be furnished. E. died in 1800, the notes not having been paid or secured; C., being indebted to the complainant, made the complainant a deed of conveyance of these lots, informing him then or afterwards that he had no title, and that the deed had been left with H. as security. After this information the complainant made overtures by indirect means to get the deed from E. to C. out of the hands of H., and finally succeeded; E., or his representatives, caused the true state of the case to be made known to the complainant, and the amount justly due on the notes to be demanded of him, which he refused to pay, relying on his title. The complainant took possession, and sold the lands with warranty. In 1820 the heirs of E. brought ejectments for the lands, which the complainant defended. On trial H. proved the delivery of the deed, as he had before explained the fact to the complainant; and the judge being of opinion that the deed was an escrow, verdicts were found for the lessors of the plaintiff, the defendants in this suit, upon which the complainant filed this bill. This is, in substance, the ordinary contract for the sale of lands when the title remains in the vendor as security. *Leggett v. Edwards*, 1 Hopk. 530.

1429. Though not in form a mortgage, it is such in substance. *Ibid.*

1430. Time is not of the essence of this contract; compensation may be made, and that compensation is interest. *Ibid.*

1431. Though the conduct of the complainant was immoral and reprehensible, and though the delay of both parties had been great, yet those circumstances do not deprive the complainant of rights previously acquired. *Ibid.*

1432. The complainant is entitled to relief upon payment of the principal due on the notes, with interest, costs, and expenses, both at law and in equity; including not only legal costs, but all reasonable expenses of every kind which the litigation has imposed on the defendants. *Ibid.*

1433. An agreement for a mortgage is in equity a specific lien on the land. *In the matter of Howe*, 1 Paige, 125.

1434. *Bona fide* purchasers without notice, who have actually paid the purchase money, cannot be disturbed in their title to the premises purchased, where the deed intended as a mortgage is absolute on its face. *Whitlick v. Kane and others*, 1 Paige, 202.

1435. In such cases the remedy of the mortgagor is personal against the mortgagee, and his legal representatives, for the moneys received on the sale of the mortgaged premises. *Ibid.*

1436. In taking and stating an account of the amount due on such mortgage, the mortgagee will be charged with the rents and profits of the mortgaged premises from the time he took possession, and also with the amount of the purchase money received by him on the sale of the premises, together with interest thereon to the time of stating the account. *Ibid.*

1437. Where an instrument in writing was duly executed, conveying certain lands to the grantee, his executors, administrators, and assigns, for and during the term of one year, yielding and paying therefor yearly lawful interest of seven per cent. during said term of one year, and in and upon the 14th of November, 1810, with a condition to be void on the payment by the grantor of £600 to the grantee on the 14th November, 1810, containing also a covenant on the part of the grantor to pay the £600 and interest at the time above mentioned, the same was held to be a good and valid mortgage and security in equity, for the sum covenanted in the instrument to be paid by the grantor. *Elkott, Executor, v. Pell and others*, 1 Paige, 263.

1438. And such instrument would be valid and binding against all persons chargeable with notice of the same. *Ibid.*

1439. An assignment of a land contract, for the security of a debt due the assignee, upon the condition, that if the debt was paid at the time stipulated, the assignee should reassign the contract, is, in equity, a mortgage, and the assignor has a right of redemption. *Brockway v. Wells*, 1 Paige, 617.

B. Registry of mortgages; priority of encumbrances and tacking.

1440. The English doctrine of tacking mortgages does not apply in this state. *Bridgen v. Carhartt*, 1 Hopk. 234.

1441. It seems to be the spirit of our law for the registry of mortgages, that each mortgage is a security for the specific debt mentioned in it, and no more. *Ibid.*

1442. Where one creditor has the mortgage of two funds, and another creditor has a subsequent mortgage of one of those funds, the first mortgagee must pursue and exhaust his remedy against the fund not mortgaged to the other, before he can subject the fund mortgaged to the other to satisfaction. *Jersey S. B. Company v. Jersey Company*, 1 Hopk. 460.

1443. And this principle is enforced, though there may be a question concerning the validity of the first mortgage in respect to a part of one of the funds. *Ibid.*

1444. And it is also enforced, where a part of the property subject to the first mortgage is situated in another state. *Ibid.*

1445. Van D. having purchased lands of Van R., for which he had not paid, sold part of the land to W., from whom he took two mortgages of equal dates for part of the consideration, intending that one of the mortgages should be assigned to Van R. to secure the original consideration of the land, and that it should have priority. The mortgages were registered currently; but the one intended for Van R. was first assigned to him, and afterwards the other was assigned to S. S. in good faith and for full value. *Van Rensselaer v. Stafford*, 1 Hopk. 569.

1446. Van D., by assigning the first mortgage to Van R., while he retained the second, gave priority to the first, and postponed his own claim under the second. *Ibid.*

1447. S. S., the assignee of the one mortgage, took it subject to all the equity which Van R., the assignee of the other, had against the mortgagee. *Ibid.*

1448. A deed, absolute on its face, if intended only as a mortgage or security for the payment of money, whether accompanied by a written defeasance or not, must be recorded as a mortgage, in order to protect the holder against a subsequent *bona fide* mortgagee or purchaser of the premises. *White v. Moore and others*, 1 Paige, 551.

1449. If no written defeasance was executed, the holder of the mortgage may comply with the requirement of the statute at any time afterwards, by executing a defeasance according to the terms agreed upon by the parties, and then recording both instruments together as a mortgage. *Ibid.*

1450. Where an absolute deed is accompanied by a written defeasance contained in a separate instrument, showing that the conveyance was only intended as a mortgage, the deed and defeasance must both be recorded in the book of mortgages, to protect the holder of such security against the claims of subsequent *bona fide* purchasers from the mortgagor. *Grimstone v. Carter*, 3 Paige, 431.

1451. Under the recording act of January, 1794, relative to conveyances in the military tract, and the act of 1801, concerning mortgages, the *bona fide* purchaser of a military lot is protected against a claim under a prior unregistered mortgage, although such mortgage is

afterwards registered before the recording of the deed. *Hawley v. Bennett*, 5 Paige, 104.

1452. A person who suffers himself to do an unlawful act, whereby another is injured, shall make satisfaction. Therefore, where a mortgage was made to F., who took an assignment of a prior mortgage from W., but did not get it recorded, and W. was afterwards induced to acknowledge satisfaction of the mortgage which he had assigned, whereby F.'s security was overreached by an intermediate judgment; *held*, that W.'s estate should make reparation. *Ferris v. Hendrickson*, 1 Edw. 132.

1453. Where a mortgagor, for his own advantage, yet in good faith, procures satisfaction pieces from his mortgagees, and cancels the mortgages without paying the mortgage moneys, and does so upon an understanding to give new mortgages, but dies before the accomplishing of it, and his heirs give such new mortgages; *held*, they should have the same effect as the old securities, subject to intervening rights; and that the United States were not entitled to come in for the amount of duties secured upon bonds afterwards given by the deceased mortgagor rateably with the mortgagees. *United States of America v. Crookshanks*, 1 Edw. 233.

1454. An unregistered mortgage has still (since the R. S.) a preference over a docketed judgment. *Schmidt v. Hoyt*, 1 Edw. 652.

C. Estate and interest of the mortgagor and mortgagee, and when the equitable is merged in the legal estate.

1455. The mortgagor of a chattel, having the right of possession for a definite period, has an interest which may be sold by execution; the purchaser acquires a right of possession and the absolute ownership, subject to the encumbrance. *Bailey v. Burton*, 8 Wend. 339.

1456. Where a mortgagee obtains a renewal of a lease, or any other advantage, in consequence of his situation as such mortgagee, the mortgagor coming to redeem is entitled to the benefit thereof. *Slee v. Manhattan Company*, 1 Paige, 48.

1457. Where, under a statute foreclosure, the holder of the legal estate or mortgagee himself becomes the purchaser of the equity of redemption, no deed is necessary to make his title to the premises perfect. *Ibid.*

1458. Where the owner of the legal estate takes an assignment of an outstanding mortgage, there will be no merger of the mortgage, unless the owner of the legal estate so intended when he purchased the mortgage. *Russell v. Austin*, 1 Paige, 192.

1459. Where a mortgagee parts with all his interest in the mortgage to a third person, but does not assign it, and he afterwards obtains his discharge under the insolvent laws, the mortgage will not pass to his assignees under those laws. *Hosford v. Nichols and others*, 1 Paige, 220.

1460. Where either real or personal estate, upon which there is an outstanding mortgage, is turned into money, the rights of the mortgage continue unaltered, and the Court will direct the application of the money according

to the rights of the parties as they existed previous to the alteration of the estate. *Sutor v. Miller and others*, 2 Paige, 68.

1461. A mortgagee of leasehold premises, who has never been in possession, or in the receipt of the profits of the estate, is not liable to an action upon the covenants contained in the lease, as the assignee thereof. *Ibid.*

1462. A mortgagee out of possession has, both at law and equity, only a chattel interest in the mortgaged premises; and the mortgagor for every substantial purpose is the real owner. *Ibid.*

1463. If a mortgage while in the hands of the mortgagee is not a valid lien on the property, it will not be valid in the hands of the assignee of such mortgage. *Pendleton and wife v. Fay and others*, 2 Paige, 202.

1464. Before foreclosure a mortgagee cannot maintain ejectment to recover possession of the mortgaged premises, and he has no interest in such premises which can be sold on execution; and before an entry under his mortgage, he is not bound by a covenant running with the land, as an assignee of the mortgagor. *Morris and others v. Morvatt and others*, 2 Paige, 586.

1465. If a vendee is in possession of lands under a contract to purchase, a subsequent purchaser or mortgagee has constructive notice of his equitable rights, and takes the land subject to his prior equity. *Gouverneur v. Lynch*, 2 Paige, 300.

1466. If the purchase money has been paid by a vendee before a subsequent mortgage is recorded, the mortgagee will have no claim upon the land. *Ibid.*

1467. If a part of the purchase money remains unpaid at the time the mortgage is recorded, such mortgage will be an equitable lien on the land to the extent of the unpaid purchase money. *Ibid.*

1468. It is an established rule, both at law and in equity, that a mortgage is not evidence of a subsisting title or interest in the mortgagee, if he has never entered under his mortgage, and no interest has been paid or demanded thereon for more than twenty years. *Dunham v. Minard*, 4 Paige, 441.

D. Equity of redemption; who may redeem; what length of time shall be allowed for that purpose; when payment or satisfaction of a mortgage will be presumed.

1469. S., being indebted to the Manhattan Company upon a note to the amount of \$2000, and also being in embarrassed circumstances, upon the application of the directors of the company, in order to secure the amount due to the company, assigned to them a bond and mortgage for \$4000, which he held upon a house and lot in Poughkeepsie against F. and H. The assignment was made with the express understanding that the surplus, after satisfying the debt of the company, should belong to S. The assignment stated that S., for the sum of \$2000, assigned the bond and mortgage to the Manhattan Company, with power to collect the sum of \$2000 for their own use; and contained a covenant on the part of S., that \$2000 was due on the mortgage, and that the

mortgaged premises should sell for that sum and the interest and costs. In 1817, the Manhattan Company foreclosed the mortgage, and caused the mortgaged premises to be bid in for \$700. Previous to the sale, S. was told by the agent of the company, that if the company purchased in the property it should remain as it then was as to him, S. merely foreclosing F. and H. S. always insisted upon his right to redeem; and in 1825, made a direct application for that purpose, and offered to pay all that was justly due to the company. The company refused to permit him to redeem. *It was held*, that the assignment from S. to the Manhattan Company was a mortgage, and even if it had been in form of an absolute assignment of the whole interest of S. in the bond and mortgage against F. and H., that in equity it would have been a mere security for the payment of the debt due the Manhattan Company; that the Manhattan Company had a perfect right to foreclose the mortgage under the statute, for the purpose of barring the equity of redemption which existed in F. and H.; that the assignment by S. to the Manhattan Company was a mortgage of the power of sale as well as a mortgage of the debt; that if a stranger had purchased the mortgaged premises upon the sale thereof, the right of S. to redeem the same would have been gone, but not his right to redeem the second mortgage created by the assignment, which right would then attach itself to the purchase money instead of the land; that as the Manhattan Company were the purchasers of the mortgaged premises, the right of S. to redeem the said premises remained undisturbed, the legal estate of said premises continuing undivested in the Manhattan Company; that the assignment of the bond and mortgage to the Manhattan Company being itself a subsisting mortgage, and S.'s equity of redemption not being divested by the statute foreclosure, the question of waiver on account of lapse of time did not arise. *See v. Manhattan Company*, 1 Paige, 48.

1470. The first purchaser from the mortgagor has the prior equity, although the consideration was not actually paid until after other portions of the land had been purchased and paid for. *Gouverneur v. Lynch*, 9 Paige, 300.

1471. The amount which a judgment creditor is bound to pay, to redeem mortgaged premises after a statute foreclosure, is the sum actually due upon the mortgage, and not the sum-bid by the purchaser at the sale under the statute. *Benedict v. Gillman*, 4 Paige, 58.

1472. Upon the redemption of mortgaged premises by a judgment creditor after a statute foreclosure, he is not bound to pay the costs of the foreclosure. *Ibid.*

1473. Where the purchaser, under a statute foreclosure, makes valuable and permanent improvements upon the premises under the belief that he has a good title, and without notice of the existence of a judgment which is a lien upon the equity of redemption, the judgment creditor applying to redeem must, in addition to the amount due upon the mortgage, pay the enhanced value of the premises arising from such improvements. *Ibid.*

1474. As a general rule, a party who is permitted to redeem mortgaged premises, whether he is plaintiff or defendant in the suit, must pay the costs of the suit, in addition to the amount due on the mortgage. *Ibid.*

1475. Where a mortgagee, having received an equitable satisfaction of his mortgage, afterwards attempts to set it up as a subsisting lien upon the mortgaged premises, satisfaction of the mortgage may be decreed, so that it may be cancelled on the record of mortgages. *Kellogg v. Wood*, 4 Paige, 578.

1476. A deed, although absolute in its terms, may be proved by parol to have been intended by the parties thereto to operate only as a mortgage; and a judgment creditor of the mortgagor will be permitted to redeem the premises in the hands of the heirs or personal representatives of the mortgagee, upon the payment of the amount justly due. *Van Buren v. Gimstead*, 5 Paige, 9.

1477. Where the party entitled to redeem offers to pay to the defendants the whole amount equitably due before he files his bill to redeem, he will not be charged with the defendant's costs. *Ibid.*

1478. Upon a bill to redeem, where the complainant is in possession of the premises, which are an ample security for the amount admitted by him to be due, and the defendant insists that he is the absolute owner of the premises, and that the complainant is not entitled to redeem, the Court will not order the amount admitted to be due to be paid into Court, nor appoint a receiver of the rents and profits of the premises pending the litigation, if the inadequacy of the complainant is fully denied. *Jenkins v. Hinman*, 5 Paige, 308.

E. Foreclosure and sale.

1478*. A decree of sale on foreclosure in a mortgage is not to be made till the master's report on the account shall be confirmed. *Patton v. Hall*, 9 Cow. 747.

1478†. A master may, after a hearing before him on reference is closed, and before he has settled the draft of his report, receive further evidence, if he be satisfied that it was discovered after the first hearing. *Ibid.*

1479. A., being seised of a house and lot of land, devised the same to B., his wife, who after his death became duly seised, &c., and mortgaged the same. Subsequent to the mortgage, several judgments were recovered against B., and on the 21st day of August, 1823, B. died, having devised the same premises to C., her daughter, subject to the encumbrances. Executions were issued on all the judgments against B., by virtue of which the premises in question were sold on the 25th day of November, 1823, to S., the petitioner, for \$2100, and a certificate delivered by the sheriff pursuant to the act of April 12th, 1823. *In the matter of Scruggins*, 1 Hopk. 88.

1480. On the 10th of May, 1823, a bill was filed to foreclose the mortgage above mentioned, upon which bill a decree of sale was entered on the 22d of November, and the premises sold in pursuance thereof on the 4th of December, 1823, to the petitioner S. for \$7940. The mortgage and judgment creditors were fully paid, and a balance remained in the hands of the assistant register. The petitioner had paid on the two sales \$2000 more than the property was worth. The Court directed the balance remaining with the assistant register to be paid to S., the petitioner. *Ibid.*

1481. By the purchase under the execution, S., the purchaser, acquired all the title of B.

subject to the mortgage, and that title so acquired was a perfect right in equity, subject to be defeated, or transferred by a redemption according to the statute. *Ibid.*

1482. The sale under the decree of this Court extinguished the right acquired under the sheriff's sale, the mortgage being a prior encumbrance. Compensation may be made, however, to the purchaser at the sheriff's sale. *Ibid.*

1483. The representative of the mortgagor could have redeemed the land only by discharging the encumbrances, and the land having been converted into money under the decree of the Court, she cannot be entitled in equity to any thing more than so much of the value of the land as may remain after satisfying the encumbrances. *Ibid.*

1484. The complainant, holding two mortgages against the defendant upon distinct parcels of land, brought this bill for foreclosure and sale. On one sale, there was a surplus, and on the other a deficiency; *held*, that the surplus of one could not be applied to supply the deficiency of the other. *Bridgen v. Carhartt*, 1 Hopk. 234.

1485. The object of a suit for foreclosure is to obtain satisfaction from the lands, and it is inconsistent with the nature of such a mortgage security to allow a set-off. *Troup v. Haight*, 1 Hopk. 239.

1486. And where such counter claims exist and are liquidated, the course of proceeding in equity requires that they should be presented by way or cross bill. *Ibid.*

1487. The accounts of all encumbrances on mortgaged premises must be reported by the masters before a sale will be ordered, and this though the amount due to one defendant is litigated by another defendant; and though there is no question as to the amount due to the complainant. There may be exceptions to this course in special cases. *Renwick v. Maccomb*, 1 Hopk. 277.

1488. The expense of insurance against fire is not a charge upon mortgaged premises, unless by express agreement of the mortgagor or the owner of the estate. *Faure v. Winans*, 1 Hopk. 233.

1489. But it seems, that taxes are a regular charge; and if paid by the mortgagee, may be included in the master's report of the amount due. *Ibid.*

1490. Mortgaged premises are not sold on credit without the consent of both parties. *Sedgwick v. Fish*, 1 Hopk. 594.

1491. But on the complainant's application, the Court will order a sale on credit, to the extent of principal and interest. *Ibid.*

1492. In mortgage and partition sales in Chancery, if the premises are not sold at the risk of the purchaser, he will not be compelled to complete the purchase, in case the premises should be encumbered, or no title should pass by the sale, or there should be difficulty in obtaining possession. *M'Gown v. Wilkins*, 1 Paige, 120.

1493. H. was seised in his own right of an undivided fourth part of a tract of land, and was also seised in right of his wife of one undi-

vided fourth part thereof. D. and T. also, each owned one undivided fourth part. The share of T. was subject to a mortgage. A voluntary partition was made of the premises between the parties: by which two lots thereof were released by T. and D. to H. and wife, and the residue was released by H. and wife to D. and T. as tenants in common, they paying to H. and wife \$675 for the difference in value. Afterwards the mortgagee, without regarding the partition, and without making H. and wife parties to the suit, foreclosed his mortgage against T. in Chancery, and sold one undivided fourth of the whole premises, leaving a balance due on the mortgage after the sale. Previous to the foreclosure and subsequent to the partition, several judgments were recovered in the Supreme Court against T. T., after the recovery of these judgments, assigned all his property to trustees for the payment of his debts. Subsequent to this assignment, the premises, released as aforesaid by H. and wife to D. and T., were sold by virtue of a decree in Chancery, obtained in a partition suit brought by one of the heirs of D. One-half of the proceeds of this partition sale had been paid to the representatives of D.; one-fourth to the mortgagee of T., and the remaining fourth was in the hands of the master. Under these circumstances, this remaining one-fourth was decreed to be applied in satisfaction of the balance due on the mortgage against T., for the purpose of discharging the two lots released to H. and wife from the lien of that mortgage. *In the matter of Howe*, 1 Paige, 126.

1494. Had the mortgagee made H. and wife parties to the bill for foreclosure of the mortgage against T., the Court would have decreed a sale only of the share assigned to T. upon the voluntary partition. The equitable rights of H. and wife were not altered or affected by the general assignment of T. for the benefit of his creditors, or by the judgments recovered against him subsequent to the voluntary partition. *Ibid.*

1495. On a bill of foreclosure by a subsequent mortgagee, he will be entitled to redeem the prior mortgage, and then to sell the whole estate for the money due on both mortgages. *The Western Insurance Company of the Village of Buffalo v. The Eagle Fire Insurance Company*, 1 Paige, 284.

1496. If the prior mortgage should not be due, the junior mortgagee will be entitled to a decree for a sale of the mortgaged premises subject to such prior mortgage. *Ibid.*

1497. After a decree for the foreclosure and sale of mortgaged premises, the Court will control and regulate the proceedings and manner of sale, so that no injustice shall be done to either party. *Suffern v. Johnson and Peterson*, 1 Paige, 450.

1498. Where mortgaged premises are an inadequate security for the debt, and the mortgagor is irresponsible, the Court, although the entire mortgage debt is not due, will order the whole of the premises to be sold, or so much as is necessary to pay the whole debt and costs, unless the defendant pays to the complainant the sum which will become due before the sale,

or gives ample security for the payment of the residue when it becomes due. *Ibid.*

1499. Mortgaged premises should be sold either together or in parcels, as will be best calculated to produce the highest sum. *Ibid.*

1500. Where a defendant in a bill of foreclosure, who was not personally liable for the mortgage debt, filed a cross bill, and set up a defence which was not ultimately sustained, and thus in the mean time kept possession of, and received the rents and profits of the mortgaged premises, and which premises, upon a sale thereof, were found insufficient to pay the amount due, he was decreed to pay the extra costs occasioned by his defence. *The Bank of Plattsburgh and others v. Platt and others*, 1 Paige, 464.

1501. Where the rights of the several defendants are truly stated in a bill of foreclosure, it is not necessary for them to appear and answer to protect their rights. *The Merchants' Ins. Co. v. Marvin and others*, 1 Paige, 557.

1502. Where lands belonging to several persons are covered by a mortgage given by the person from whom they derive their titles, the several parcels must be sold to satisfy the mortgage in the inverse order of their alienation. *Gouverneur v. Lynch*, 2 Paige, 300.

1503. Where only a part of the mortgage debt is due, a decree for a sale will not be ordered until a reference has been made to a master, and he has reported as to the situation of the mortgaged premises. *The Ontario Bank v. Strong and others*, 2 Paige, 301.

1504. If the master upon such reference reports that a sale of the whole premises is necessary, he should give the reasons upon which his opinion is founded. *Ibid.*

1505. If he decides that the property may be sold in parcels, he should state in his report the relative situation and value of the several parcels, and what part of the premises ought to be first sold, and all other facts necessary to enable the Court to make such order of sale as will be most beneficial to the parties. *Ibid.*

1506. Where there were two separate mortgages on the same property, belonging to different mortgagees, and the holder of the first mortgage filed a bill of foreclosure against the second mortgagee and the owners of the mortgaged premises, and the same solicitor filed another bill in behalf of the second mortgagee, against the first mortgagee and the owners of the premises, to foreclose the second mortgage; *held*, that only one bill of foreclosure was necessary; and that the owners of the equity of redemption were to be charged with the costs of one suit only. *Wendell v. Wendell*, 3 Paige, 800.

1507. Where land is conveyed with warranty, and a mortgage is given to the grantor to secure the unpaid purchase money, and the premises are afterwards sold under the mortgage, *it seems*, that the covenants of warranty contained in the original conveyances are not merged, but that they pass to the purchaser of the lands under the mortgage sale. *Trvon v. Needham*, 3 Paige, 546.

1508. Upon a statute foreclosure, if there are judgments which are liens upon the equity of

redemption, the purchaser retains the whole legal and equitable interest in the mortgaged premises as against the mortgagor and all persons claiming under him, subject to the equitable right of the judgment creditors to redeem. *Benedict v. Gillman*, 4 Paige, 58.

1509. A mortgage being a specific lien upon the mortgaged premises, if such premises are sold under a prior judgment, the lien of the mortgage attaches upon the surplus moneys in the hands of the sheriff, who has no right to pay such moneys to the mortgagor; and if the purchaser is permitted to retain the surplus in satisfaction of an antecedent debt due from the mortgagor, he takes it subject to the specific lien of the mortgagee, although he has had neither actual nor constructive notice of the mortgage. *Barrell v. Gale*, 4 Paige, 503.

1510. Where the complainant had a mortgage upon the land of G, for \$1500, which land was previously encumbered by two judgments and another mortgage, which was prior to the judgments, and J. G., with full knowledge of the several encumbrances, purchased the land under an execution, issued upon the junior judgment and bid therefor \$2000 more than the amount of such judgment, but much less than the real value of the land, and instead of paying the surplus money to the sheriff, retained it in satisfaction of other claims against the mortgagor, who was the defendant in the execution, and took from him a discharge to the sheriff for such surplus, and thereupon received the sheriff's deed for the land; *held*, that J. G. purchased the land subject to the lien of the prior mortgage and judgment, and that the complainant, as the subsequent mortgagee, was entitled to the surplus money arising from the sheriff's sale, or so much thereof as was necessary to pay the amount due on his mortgage; *held* also, that the surplus money which had not been paid to the sheriff by the purchaser was an equitable lien upon the land in his hands to the extent of the complainant's mortgage. *Ibid.*

1511. Where D., the owner of premises which were subject to the encumbrance of a mortgage given by a previous owner, gave two mortgages to the complainant, and afterwards a judgment was recovered against D. in favour of V. H., and the premises were then sold under a statute foreclosure of the prior mortgage, and V. H. afterwards took a conveyance from the purchaser, and then conveyed the premises to S. with warranty; *held*, that the purchase of the premises by V. H. under the statute foreclosure, and the subsequent conveyance with warranty, operated as a release and extinguishment of his right to redeem the premises by virtue of his judgment; and that S. took the whole legal and equitable title to the land, subject only to the right of the complainant to redeem by virtue of his mortgages, if the amount due thereon was not paid. *Vroom v. Dittmas*, 4 Paige, 526.

1512. The effect of a statute foreclosure is to transfer to the purchaser the right of the mortgagee, to the extent of his claim or interest in the mortgaged premises, for the security of his debt, and also to transfer to the purchaser so much of the equity of redemption as is not vested

a subsequent mortgagee nor bound by the lien of subsequent judgments. *Ibid.*

1513. A subsequent mortgagee who seeks to redeem from the purchaser under a statute foreclosure of a prior mortgage is not bound to pay the costs of such foreclosure, which foreclosure as to his rights is wholly inoperative. *Ibid.*

1514. Where the purchaser of mortgaged premises assumes the payment of the mortgage debt, and gives his own bond as a collateral security therefor, upon which bond a judgment is obtained, the mortgagee cannot file a bill of foreclosure until he has exhausted his remedy against the property of the defendant in the judgment, by the return of an execution unsatisfied. *Pattison v. Powers*, 4 Paige, 549.

1515. The provision of the revised statutes prohibiting the filing of a bill of foreclosure where proceedings at law have been instituted for the recovery of the debt secured by the mortgage, is not limited to a suit at law against the mortgagor only, or upon the securities originally given as collateral to the mortgage. *Ibid.*

1516. A bill of foreclosure should contain a distinct averment, in the terms of the statute, that no proceedings have been had at law for the recovery of the debt secured by the mortgage, or any part thereof; or if such proceedings have been instituted, the bill should state what such proceedings were, and against whom instituted; and it should also show that the proceedings at law have been discontinued, or that the remedy at law has been exhausted. *Ibid.*

1517. Where A., who is the owner of land subject to a mortgage, conveys the same to B. with covenants of warranty, and B. afterwards conveys to C. with similar covenants, both covenants run with the land; and if C. afterwards conveys the land to A., the original owner, the covenants in the deed from B. will not become merged at law, so far as respects the lien or encumbrance of the mortgage. But if in the intermediate time, B. makes a valid agreement with A. that he will pay off and discharge the mortgage, the covenants in the deed from B. will not be merged in equity, but they will pass to a subsequent grantee of A., so as to give such grantee an equitable claim against B. upon the covenants for an indemnity against the mortgage. *Kellogg v. Wood*, 4 Paige, 578.

1518. The wife, joining with her husband in a mortgage for the security of his debt, is after his death entitled to the rent and profits of her dower, or other interests in the premises, until foreclosure; and where the debt is payable by instalments, and the amount which has become due can be satisfied by a sale of one parcel only of the premises, the income of her share of the residue cannot be taken to satisfy that part of the debt which is not yet due. *Bank of Ogdenburgh v. Arnold*, 5 Paige, 38.

1519. Where, in a suit for the foreclosure of a mortgage, the whole amount is not due, if the master reports that the premises can be sold in parcels without injury to the interest of the parties, only so much of the premises can be sold as will be sufficient to satisfy the amount then due, with costs; although the residue will

be insufficient to satisfy the mortgage money which is yet to become due. *Ibid.*

1520. If the whole amount secured by the mortgage has become due, and the mortgaged premises are not of sufficient value to pay the debt and costs, the Court, upon the filing of the bill, may, upon due notice to the defendant, appoint a receiver of the rents and profits of the premises, or otherwise secure such rents and profits for the satisfaction of the debt and costs. *Ibid.*

1521. But where the mortgagee has neglected to take a specific pledge of the rents and profits of the mortgaged premises for the security of his debt before it became due, he has no equitable right to the rents and profits in the mean time; and in case of the death of the mortgagor, his judgment creditors are entitled to a preference in payment out of such rents and profits. *Ibid.*

1522. A purchaser under the statute foreclosure may file a bill to foreclose the equity of redemption of a judgment creditor or subsequent mortgagee; and he is not bound to make the mortgagor, or any other person whose equity of redemption is already barred, a party to the suit. *Benedict v. Gillman*, 4 Paige, 58.

1523. In a suit to foreclose the equity of redemption of a judgment creditor after a statute foreclosure, the Court may order a sale of the premises, or may decree a strict foreclosure against the creditor, if he neglects to redeem. *Ibid.*

1524. In mortgage cases, defendants whose claims are upon the equity of redemption merely, and who have no interest in the mortgaged premises in opposition to the complainant's claim, are not permitted to litigate their claims to the surplus as between themselves until it is ascertained that there will be a surplus, unless their liens are upon different parcels of the mortgaged premises, or their rights are of such a peculiar nature as to require them to be passed upon by the Court previous to a decree of sale. *Union Ins. Co. v. Van Rensselaer*, 4 Paige, 85.

1525. Where a statutory foreclosure of a mortgage took place previous to the passage of the act authorizing the making of an affidavit to perpetuate the proof of the regularity of the proceedings, and where the attorney who made such foreclosure was dead, the entry of the attorney, in his register, of a sale pursuant to the notice, and a recital of the facts in the deed, were held sufficient evidence, *prima facie*, to establish the facts of such sale. *Hawley v. Bennett*, 5 Paige, 104.

1526. Where mortgaged premises are sold under a decree of foreclosure, the purchaser is entitled to the assistance of the Court in obtaining possession as against the parties to the suit, or those who have come into possession under them subsequent to the filing of the notice of the commencement of the suit. *Frederickhuysen v. Colden*, 4 Paige, 204.

1527. But the Court has no jurisdiction by a summary proceeding to determine the rights of third persons claiming title to the premises, who have recovered the possession by legal and adverse proceedings against a party to the suit,

under a claim of right which accrued previous to the filing of the bill of foreclosure. *Ibid.*

1598. Where mortgaged premises were sold under a decree of the Court of Chancery, and the purchaser, being unable to raise the money immediately, and being informed by M. that the Utica and Schenectady Railroad Company intended to take the premises for a depot, and that the damages would be appraised without reference to the increase of the value of the land by the location of such railroad, assigned his bid to M., who was the solicitor for the complainant in the foreclosure suit, and assumed the payment of such bid, and such original purchaser afterwards sold and assigned his bid, a second time, to other persons for a considerable advance; *held*, that M., the first assignee of the bid, was entitled to a conveyance of the premises from the master. *Prestor v. Furnam*, 5 Paige, 614.

1599. Where P. contracted with M. for the purchase of land, and afterwards mortgaged it to the state before he had paid for the same, or obtained a conveyance from M., and the mortgage was afterwards foreclosed, and the premises bid in by the comptroller in the name of and as the agent of M., and P. afterwards, upon the representation of M. that he had settled with the state, or was holden for the payment of the mortgage, took from him a warranty deed of the premises, and gave back a bond and mortgage for the purchase money, including the amount of the mortgage to the state, the whole of which was paid by P., and M. afterwards denied the authority of the comptroller to bid in the premises for him as his agent, and refused to pay such bid, whereupon the attorney-general filed an information against P. and his grantees to foreclose the original mortgage to the state, and they filed a cross bill against M. and the attorney-general, to compel the former to pay off the mortgage, so as to relieve the premises therefrom; *held*, that M. was bound to pay off and discharge the mortgage to the state, and to indemnify P. and his grantees against the same. *Attorney-general v. Purmort*, 5 Paige, 620.

1530. Notwithstanding the revised statutes, the Court can order the whole of mortgaged premises to be sold, where a master reports it would be beneficial to the infant children of a deceased mortgagor. *Brevort v. Jackson*, 1 Edw. 447.

1531. If a mortgagor is driven to file a bill, it must be one to redeem. He cannot file a bill merely to set aside a sale and have the property resold, even though the mortgagee may have inequitably made use of his power to sell, and unfairly bought in the property. *Goldsmith v. Osborne*, 1 Edw. 560.

F. Account between mortgagor and mortgagee.

1532. Where the mortgagee takes possession of the mortgaged premises before foreclosure, and occupies them himself, he must account for the rents and profits, at the rate of rent which the premises by ordinary care would have produced, exclusive of taxes and repairs. *Van Buren v. Olmstead*, 5 Paige, 9.

1533. Although a mortgagee is tenant to the mortgagor of the premises mortgaged, yet the

right to set off rents against the principal and interest of the mortgage debt does not necessarily attach as an inherent quality of the contract, so as to prevent the assignment of the mortgage, except subject to the right on a bill to redeem. *Wolcott v. Sullivan*, 1 Edw. 399.

1534. But while a mortgagee holds the mortgage, and is also tenant, so long the mortgagor has a right to have the rents applied to the keeping down of the interest. *Ibid.*

1535. If a mortgagee in possession is allowed to retain it after assigning his mortgage with notice, the mortgagor cannot charge the subsequently accruing rents against the assignee. His remedy is by eviction or compelling an occupation rent. *Ibid.*

XXXVII. NE EXEAT REIPUBLICA.

1536. The writ of *ne exeat* is not here a prerogative writ. *Gilbert v. Colt*, 1 Hopk. 496.

1537. In a proper case, this writ is of right, and not discretionary. *Ibid.*

1538. Citizens of other states and foreigners are liable to it while they are in this state. *Ibid.*

1539. The Court determines the amount in which the defendant shall be held to bail; and the sheriff must take a bond in the amount directed as the penal sum. *Ibid.*

1540. Where a defendant in a bill for an account and payment of demands founded on contract has been discharged under the non-imprisonment act, a writ of *ne exeat* against him will be discharged. *Ashworth and others v. Wrigley*, 1 Paige, 301.

1541. The writ will not be retained on a simple affidavit that a *certiorari* has been allowed for the purpose of reversing the discharge obtained under the insolvent act. *Ibid.*

1542. This Court may hold the insolvent to bail in cases of fraud. *Ibid.*

1543. But whether it would retain a *ne exeat* on affidavit of mere irregularity in obtaining the discharge? *Quere. Ibid.*

1544. If the party against whom a final decree is made intends to remove beyond the jurisdiction of the Court before the decree can be enforced by execution, a *ne exeat* will be granted. *Dunham v. Jackson*, 1 Paige, 639.

1545. A *ne exeat* is in the nature of equitable bail, and may be applied for in any stage of the suit. *Ibid.*

1546. A writ of *ne exeat* is now resorted to merely for the purpose of obtaining equitable bail. *Mitchell v. Bunch*, 3 Paige, 606.

1547. Whenever the defendant intends leaving the state, the complainant, upon producing evidence of such intention, and of his equitable claims against him, has a right to this equitable bail. *Ibid.*

1548. It is a matter of course to discharge a *ne exeat*, upon the party's giving security to answer the complainant's bill, where a discovery is necessary, and to abide such order and decree as may be made in the cause, and to render himself answerable to the process of the Court which may be issued to enforce its performance. *Ibid.*

1549. As a general rule, a *ne exeat* is issued only for an equitable demand. *Ibid.*

1550. But in case of a bill filed for an account it may be granted, although the defendant might have been arrested at law, this being a case where the Courts of Chancery and law have a concurrent jurisdiction. *Ibid.*

1551. A *ne exeat* may be granted in a suit between foreigners, and in respect to demands arising abroad. *Ibid.*

1552. But where a judgment debtor has been sued upon the judgment, in the Circuit Court of the United States sitting within the state, and held to bail in such suit, and a bill has also been filed against him in the Court of Chancery to obtain the payment of such judgment, and a *ne exeat* issued thereon against the defendant, the *ne exeat* will be discharged, unless the complainant elects to release the defendant from his arrest and bail in the Circuit Court of the United States. *Ibid.*

1553. The complainant is not entitled to a writ of *ne exeat* on a bill for the specific performance of a contract previous to the time at which the contract is to be performed, and before any right of action has accrued thereon, either at law or in equity, against the defendant. *De Rerifnoli v. Corsetti*, 4 Paige, 264.

1554. A bill of *quia timet*, upon a contract for personal services to be performed at a future time, cannot be filed for the purpose of obtaining equitable bail, although there is danger that the defendant may leave the state before the time for the performance of the contract arrives. *Ibid.*

1555. The writ of *ne exeat* is in the nature of equitable bail; and to entitle a complainant to such bail, there must be a present debt or duty, or some existing right to relief against the defendant or his property, either at law or in equity. *Ibid.*

1556. The act to abolish imprisonment for debt has not deprived the Court of Chancery of the power to issue a writ of *ne exeat* in cases of equitable cognisance, where such writ would have been allowed previous to the passage of that act. But a *ne exeat* will not be granted upon a mere legal demand, upon which the complainant would not have been entitled to equitable bail in this Court before the passing of that act, although the defendant is about to remove from the state. *Brown v. Haff*, 5 Paige, 235.

1557. But to entitle the complainant to a writ of *ne exeat*, upon a bill for a specific performance of a contract, against the vendee, he must show a debt actually due; and must therefore show affirmatively that he is able to make a good title to the premises agreed to be sold. *Ibid.*

XXXVIII. NUISANCE.

1558. Any person is authorized to abate a public nuisance; but where the question of nuisance is doubtful, the Court may interfere to prevent a waste of property by persons having no interest in the question, and leave the parties to settle the question of right by indictment. *Hart v. Mayor, &c. of Albany*, 3 Paige, 213.

1559. The Albany basin is a public highway; and a single canal boat becomes a public nuisance, if it is permanently located in any particular part of the basin, or for a great and unreasonable length of time, to the exclusion of all other boats, the owners of which might find it necessary or even convenient to pass that way, or to locate in the same place temporarily. *Ibid.*

1560. No person has a right to appropriate any part of a public street to his own exclusive use permanently, although such occupation may be convenient for the transaction of the particular business in which he is engaged. *Ibid.*

1561. Public policy requires that the body or the individuals clothed with the power of preventing nuisances in populous towns and crowded harbours should not be disturbed in the exercise of that power, unless they clearly transcend their authority. *Ibid.*

1562. *Prima facie*, the person who appropriates any part of a public street or harbour to his own use exclusively, without the consent of the Legislature or the municipal authorities of the place, is guilty of a nuisance. *Ibid.*

1563. A floating store-house, permanently moored in the Albany basin, secured in its place by means of spiles or posts driven into the earth in the bottom of the basin, is *prima facie* a nuisance, and the Court will leave the owner thereof to his legal remedy against those who remove it as such. *Ibid.*

XXXIX. PARENT AND CHILD.

See GUARDIAN AND WARD, xxi. 751, 2, 3. INFANT, xxv. 1066.

XL. PARTITION.

1564. A suit for partition does not embrace the object of adjusting dormant claims, adverse titles, and real or pretended encumbrances held by other persons; none of which can be affected by the decree. *Serring v. Mercereau*, 1 Hopk. 501.

1565. The interests of third persons do not prevent a partition, nor are they affected by it. *Ibid.*

1566. The fifteenth section of the statute, (36 *Seas. ch. 100.*) directing the Court to ascertain the rights of the parties, applies only to the rights of the parties before the Court. *Ibid.*

1567. The object of that section was, to require such examination of the title, in cases of partition at law, as was previously required by the practice in Chancery. *Ibid.*

1568. Judgment creditors are not necessary or proper parties in partition. *Ibid.*

1569. No fee for counsel beyond the amount allowed by the statute can be decreed to be allowed. *Ibid.*

1570. The right of an encumbrancer cannot be affected by a sale of lands in partition, neither can he be made a party to the suit. *Harwood and others v. Kirby*, 1 Paige, 469.

1571. If the lands are divided, the lien of the encumbrance after the division will be confined to the share allotted to the party against whom the encumbrance is held. *Ibid.*

1572. If the lands are sold, the purchaser will take the premises subject to the lien of the encumbrance upon the undivided share. *Ibid.*

1573. The revised statutes have altered the law on this subject, and have authorized the Court to decree a sale, which will give the purchaser a perfect title, discharged from all liens and encumbrances. *Ibid.*

1574. If a mortgage is given on an undivided share of the estate pending a suit for partition, the lien of the mortgagee will be divested by a sale of the premises under the decree, and the purchaser will take the estate discharged from the encumbrance. *Sears and wife v. Hyer and others*, 1 Paige, 483.

1575. Where partition suits were pending at the time the revised statutes went into operation, the subsequent proceedings therein must conform to such statutes: *Larkin v. Mann and others*, 2 Paige, 27.

1576. Partition suits in this Court may be commenced either by bill or petition, and the course of practice prescribed by the revised statutes in relation to proceedings in the common law Courts must be adopted here as far as practicable, except in cases where a different course of practice is authorized or prescribed by law. *Ibid.*

1577. If the suit is commenced in this Court by bill, the complainant must take out and serve a *subpoena*, as in ordinary suits. *Ibid.*

1578. No proceedings can be had against an infant after service of the *subpoena* until a guardian has been appointed, and has filed the requisite security. *Ibid.*

1579. Where the right of the complainant is not admitted by the answer, he is bound to make such proof of his title as would entitle him to a recovery in ejectment. *Ibid.*

1580. If the bill is taken as confessed, the proof of the complainant's title may be made before the master on a reference. But if an issue of fact is joined in the cause, the complainant may make the necessary proof, and produce the abstract of the conveyances before the master. *Ibid.*

1581. The Court may in its discretion award a feigned issue to try the question of title, as in ordinary cases in this Court. *Ibid.*

1582. In Chancery it is not necessary that the shares assigned to the several parties should be exactly equal; as the parties who receive more than their share of the estate may be required to make a pecuniary compensation to those who receive less. *Ibid.*

1583. A party who has merely a future contingent interest in an undivided share of real estate cannot sustain a suit for partition of the property. *G. H. and E. Striker v. Mutt and others*, 2 Paige, 387.

1584. A mere reversioner, without the concurrence of any of the owners of the present interest in the premises, has no right to file a bill for partition. *Ibid.*

1585. But a reversioner is a necessary party

where a bill is filed by a person who is owner of an undivided share of the reversion, as well as of an undivided share of the present interest in the property. *Ibid.*

1586. The reversioner is also a necessary party where the suit is brought by the owner of an undivided share of the premises for life, or of any other particular estate in the same, and some of the other parties own the residue in fee. *Ibid.*

1587. By the revised statutes, the Court of Chancery has concurrent jurisdiction with Courts of law in suits for the partition of legal estates. *Jenkins v. Van Schaack*, 3 Paige, 242.

1588. It is not necessary to aver in a bill for partition, that the complainant is in possession of the premises, as that fact is presumed from the allegation that the parties are seized in common. *Ibid.*

1589. If there has been an ouster of the complainant, or the premises in question are held adversely, that defence should be set up by plea or answer. *Ibid.*

1590. The purchaser of premises sold under a decree for partition takes the same subject to the right of dower of the wife of one of the tenants in common, unless the wife was a party to the suit; but where an actual partition is made, the wife's dower will attach upon the portion of the premises allotted to her husband. *Wilkinson v. Parish*, 3 Paige, 663.

1591. If one tenant in common, who is in possession, supposing himself legally entitled to the whole premises, erects valuable buildings thereon, he will be entitled to an equitable partition of the premises, so as to give him the benefit of his improvements. *Thorn v. Needham*, 3 Paige, 546.

1592. Where six children, one of whom was an idiot, inherited a lot of land as tenants in common, and for the purpose of making partition it was agreed, that A., one of the children, should purchase the shares of two others, and have the east half of the lot for his portion thereof; and that E., another of the children, should purchase the share of one of the others, and should also take the share of the idiot in consideration of supporting such idiot for life, and that he should have the west half of the lot for his portion thereof, and conveyances were executed by all the children except the idiot, conveying the premises accordingly; and A. afterwards sold the east half of the lot to T.; held, that as E. obtained no title to the idiot's share of the lot, there was no consideration for his agreement to support the idiot; but that T. was entitled to an equitable partition of the premises, in which the share of the idiot should be assigned to be out of the west half of the lot conveyed to E. by the other heirs. *Tal v. Wordworth*, 3 Paige, 470.

1593. Where a lessee of land becomes a purchaser of an undivided moiety of the rent and reversion, the lease and rents as to that portion of the premises is merged and extinguished, and he is not such a tenant in common, of the rent and reversion, with the owner of the other half thereof, as to entitle the latter to a partition of the land during the continuance of the lease. *Landing v. Pine*, 4 Paige, 639.

1594. If the owner of an undivided moiety of a lot of land is a lessee of the other half thereof, and the lease has become forfeited by the non-performance of a condition subsequent, the landlord must enter for the forfeiture, or otherwise recover the possession of his undivided half of the premises, before he can sustain a bill for partition. *Ibid.*

1595. Where notice has been given to creditors, having general liens upon the undivided interest of one of the parties in a partition suit, to come in and establish their claims before the master, the lien of such creditors upon the estate will be divested by the sale; a purchaser at the sale under the decree cannot, therefore, object that the master has decided wrong as to the existence of such a lien. *Dunham v. Miskard*, 4 Paige, 441.

1596. If the master improperly rejects the claim of a creditor coming in under the notice in a partition suit, as to his lien upon the premises, the claimant must except to the master's report, if he wishes to preserve his lien upon the purchase money, for which the premises are to be sold under the decree. *Ibid.*

1597. In a partition cause, where the original parties to the suit admit their several titles to the property by their pleadings, if one of them dies, and the suit is revived against his heirs at law by default, the Court may declare the rights, title, and interests of the several parties, without a reference as to the title, and without requiring the complainant to exhibit proof of the same, or an abstract of the conveyances by which the title is held. *Wilde v. Jenkins*, 4 Paige, 481.

1598. A reference to a master to examine and report as to general liens or encumbrances on the undivided interests or shares of the several parties in a partition suit, is necessary before a decree for a sale of the premises can be made, and can in no case be dispensed with. *Ibid.*

1599. Where a partition suit abates by the death of one of the tenants in common after the appointment of commissioners to make the partition, the suit must be renewed, and the rights of the new parties in the premises ascertained, before the commissioners can proceed with the partition, or make a report that a sale is necessary. *Reynolds v. Reynolds*, 5 Paige, 161.

1600. An order for sale cannot be made upon the report of commissioners that a sale is necessary, after a master has reported that the premises are so situated that an actual partition can be made with prejudice to interest of the parties. But if the situation of the property or the rights of the parties therein have materially changed since the report of the master, there should be a special application to the Court for a new reference to ascertain whether a partition can still be made. *Ibid.*

1601. Where a partition suit abates, and new parties are brought before the Court upon the revival of the suit, a new reference will be necessary to ascertain their rights before a sale can be decreed. *Ibid.*

1602. Where lands leased for a term of years are owned by several persons, as tenants in common both of the rents and of the reversion, a bill for partition may be sustained; but a sale of the lands, under the decree in partition, must

be made subject to the rights of the lessee, who, by the sale, will become the tenant to the purchaser of the rents and reversion. *Woodworth v. Campbell*, 5 Paige, 518.

1603. A decree of partition or sale of the real estate will not be granted amongst heirs, while the personal property appears to be insufficient to pay the debts of the ancestor. *Mathews v. Mathews*, 1 Edw. 568.

1604. A tenant in common of part is not debarred from bringing a bill of partition individually, merely because he is a trustee as to another part. *Cheesman v. Thorne*, 1 Edw. 629.

1605. There can be a partition or sale notwithstanding other persons may come in and be entitled. *Ibid.*

XLI. PARTNERSHIP

1606. A surviving partner has the legal right to the partnership effects. *Cust and wife v. Abel, Executor*, 1 Paige, 393.

1607. But in equity he is considered merely as a trustee to pay the partnership debts, and to dispose of the partnership property for the benefit of himself and the estate of the deceased partner. *Ibid.*

1608. He cannot derive any exclusive profit from the use of the partnership funds. *Ibid.*

1609. As a general rule, each one of the members of a copartnership has an equal right to the possession of the partnership effects, and to collect and apply them in satisfaction of the debts of the firm. *Law v. Ford*, 2 Paige, 310.

1610. Where either partner has a right to dissolve the partnership, and the articles of copartnership do not provide for the settlement of the concern, upon a bill filed for that purpose by one of the partners, the appointment of a receiver is a matter of course. *Ibid.*

1611. In such case the Court will direct the receiver to apply the partnership funds to the payment of all the debts of the firm rateably, without giving any preference to the favourite creditors of either partner. *Ibid.*

1612. The creditors of a partnership have an equitable right to payment out of the partnership effects in preference to the creditors of the individual partners. *Doveau v. Fowler*, 2 Paige, 400.

1613. Where, on the dissolution of a copartnership existing between D. and F., D. agreed with F. that F. should take all the stock and effects, and pay all the debts due by the firm, and afterwards F. became insolvent, and threatened to dispose of all the partnership property, and appropriate the same to his own individual use, leaving the debts unpaid; upon a bill filed for that purpose, an injunction was granted restraining F. from disposing of the partnership property in a different manner from that stipulated in his agreement with D. *Ibid.*

1614. Where the administrator of a deceased partner assigned all his interest in the partnership effects to the survivor, under an agreement that the latter should discharge all the debts of the firm, it was held, that this assignment and

agreement did not destroy the lien or equity which existed in favour of each partner, on the dissolution, to have the partnership property applied to the payment of the partnership debts. *Ibid.*

1615. After the dissolution of a copartnership, one of two surviving partners cannot, without the consent of the other, assign the partnership effects to trustees for the benefit of preferred creditors. *Egberts v. Wood*, 3 Paige, 518.

1616. Partnership creditors are entitled to a priority of payment out of the partnership property; and the separate creditors of the individual partners to a priority of payment out of their separate property. *Ibid.*

1617. Upon the death of one of the partners, a joint creditor of a partnership has no claim for the payment of his debt out of the separate estate of the deceased partner until all the separate creditors of such partner have been paid their demands out of his estate. *Wilder v. Keeler*, 3 Paige, 167.

1618. So the creditors of the individual partners have no claim upon the partnership property until all the partnership creditors are satisfied. *Ibid.*

1619. If the surviving partners are insolvent, the joint creditors can in Chancery claim satisfaction out of the separate estate of the deceased partner, after payment of the debts due to his separate creditors. *Ibid.*

1620. Creditors of a partnership can claim their entire debt out of the partnership fund, although they have a security from third persons who sustain the character of sureties for the partnership. *Ibid.*

1621. The sureties in such case have an equity that the creditor should, for their indemnity, prove his demand, and collect it, if possible, against the estate of the principal debtors. *Ibid.*

1622. Where some of the creditors of a partnership have obtained satisfaction of part of their debts out of the joint estate, they will not be permitted to come in upon the equitable assets belonging to such estate rateably with the other creditors who have received nothing, until the last mentioned creditors have received sufficient out of the estate to put them all upon an equality. *Ibid.*

1623. Where one of several partners is not only jointly liable for a joint debt, but is also separately liable as endorser for the firm, his separate estate as to such debt is to be considered as legal assets, and must be applied in payment thereof, in preference to the joint debts due the other creditors; but the joint estate being primarily liable, that must be first applied towards the payment of such debt. *Ibid.*

1624. It seems, that one of the partners, during the existence of a copartnership, may, without the consent of his copartners, make a valid assignment, in the name of the firm, of all or any of the partnership effects, directly to a creditor of the firm, in payment of his debt. *Egberts v. Wood*, 3 Paige, 517.

1625. Whether one partner can, without the consent of his copartners, assign the partnership effects to a trustee for the payment of the

partnership debts, and can in such assignment give a preference to one set of creditors over another? *Quære. Ibid.*

1626. Where one of several partners dies, the legal title to the debts and choses in action belonging to the copartnership vests in the surviving partners as joint tenants; and they alone are chargeable at law with the payment of the partnership debts. *Ibid.*

1627. And such surviving partners, without the assent of the personal representatives of the deceased partner, can appropriate the partnership property to the payment of the partnership debts, and may give such preferences in the payment of debts as they may think proper. *Ibid.*

1628. The representatives of the deceased partner have the right to insist that the partnership effects shall be applied to the payment of the partnership debts. *Ibid.*

1629. The property of a copartnership, upon the insolvency of the firm, is considered in equity as a trust fund for the payment of the partnership creditors rateably. *Ibid.*

1630. But either of the partners before the dissolution of the copartnership, or all the partners afterwards, may apply the partnership funds to the payment of one creditor in preference to another. *Ibid.*

1631. Where the articles of copartnership require one of the copartners to make an annual statement of the copartnership accounts upon the books of the firm, and he makes such statement accordingly, the other copartner will be deemed to have acquiesced in the correctness of the statement, if he does not object to it within a reasonable time thereafter. *Hearill v. Corning*, 3 Paige, 566.

1632. In taking an account between partners, entries on the partnership books, to which both parties had access at the time the entries were made, are to be considered as *prima facie* correct; but subject to the right of either partner to show mistake or errors in the account. *Ibid.*

1633. Whether an assignment by an insolvent partnership, which gives a preference to the creditors of the individual partners over the partnership creditors, is valid? *Quære. Wake-man v. Grover*, 4 Paige, 23.

1634. Where A. B., being the owner of several farms, in 1827, entered into articles of agreement with three of his sons and his son-in-law, wherein it was agreed, that the three sons and son-in-law should work and carry on the farms owned by A. B., for the term of five years, in such manner as might be thought by A. B. most discreet and prudent, and should put on the same, all such improvements of husbandry as they owned, and A. B. agreed to put on to the said farms, for the use thereof, all such teams and implements of husbandry as he owned; and it was further agreed that other teams and implements of husbandry which might be necessary should be purchased from the products of the farms, and that each of the parties should have his proper living and expenses out of such products; and A. B. also agreed that at the expiration of the said term of five years, his said three sons and his son-in-

law should have the one-half of his personal property and one-half of the products of the farms; and A. B. further agreed, that in case the three sons and son-in-law faithfully performed the said agreement on their part, that he would convey to them by deed in fee simple one-half of all such farms; and at the time of making the agreement A. B. owned considerable personal property; and his son-in-law was then in ill health, and remained in such ill health, and unable to work, until his death, which took place a few weeks thereafter; it was held, that the articles of agreement did not constitute the parties thereto copartners, so as to entitle the representative of the son-in-law to a share of the property; although, by the act of God, it became impossible for the decedent to perform his part of the agreement. *Chase v. Barrett*, 4 Paige, 148.

1635. A person who contracts for a share of the profits of a particular trade or business, as profits, is a partner as to third persons, and is liable for the debts of the partnership. *Ibid.*

1636. Whether a partnership exists as to creditors, between a merchant and a mere servant or agent of his, who contracts with the merchant for a share of the actual profits as a reward for his services, and who is not held out to the world as a partner? *Quere. Ibid.*

1637. To constitute a partnership, as between the parties thereto, there must be a joint ownership of the partnership funds and an agreement, either express or implied, to participate in the profits or loss of the business. *Ibid.*

1638. Where a former customer of a partnership, having no notice of its dissolution, deals with one of the partners on the credit of the firm, all the partners will be liable to such customer on the contract. *Brisban v. Boyd*, 4 Paige, 17.

1639. But if the customer was informed of the dissolution immediately after a sale to one of the former partners on the credit of the firm, and before the goods were delivered; a Court of equity would not permit the vendor to recover the price of the goods against the former partners of the vendee. *Ibid.*

1640. After the dissolution of a partnership, one partner cannot bind the other by the acknowledgment of a debt which is neither legally or equitably due, or by giving a note for the same, although at the time of such acknowledgment, or of the giving of the note, the supposed creditor had no knowledge of the dissolution. *Ibid.*

1641. Where a retiring partner, upon a distribution of the partnership effects, agrees to bear a portion of the loss upon a note taken by the other partners towards their distributive share of the effects, if it cannot be collected of the drawer, he stands in the situation of a surety for the drawer, *pro tanto*, and will be discharged from his liability if the holders of the note take a new security from the principal debtor, and extend the time of payment, without the assent of such retiring partner. *Wilde v. Jenkins*, 4 Paige, 481.

1642. Where copartnership accounts have been stated and settled between the parties up to a particular period, and such settlement has

been acquiesced in for several years without objection, the evidence of error or mistake must be strong and conclusive to authorize the opening of the account. *Ibid.*

1643. The practice of opening accounts which have been adjusted by the parties themselves, who could best understand them, is not to be encouraged; and it should never be done upon an allegation of error, supported by doubtful or even probable testimony only, where no fraud had been practised by one party upon the other. *Ibid.*

1644. The implied authority arising from the ordinary contract of copartnership does not authorize one of the partners, without the assent of his copartners, to make a general assignment of the copartnership effects to a trustee for the benefit of creditors, and giving preference to one class of creditors over another. *Havens v. Hussey*, 5 Paige, 30.

1645. Where a party in a joint speculation pays for goods, and sells them *bona fide*, he cannot be charged with a loss arising from the failure of the purchaser; but is entitled to be reimbursed one-half of the money advanced for the original purchase; and this will be so, even although he may have declared the debt secured, and afterwards accepted of a compromise without the consent or knowledge of the other party, provided there was no deceit or misleading. *Cunningham v. Littlefield*, 1 Edw. 104.

1646. In such a case the parties are not in the relative situation of principal and agent, but of partners. *Ibid.*

1647. One partner cannot bind another in the settlement, adjustment, and compounding of a debt due to them jointly, without the knowledge or express assent of the other; and when such a power is exercised in good faith, and in relation to a matter within the scope of the partnership, he cannot be responsible to the other for error of judgment, or any thing short of a dereliction of duty. *Ibid.*

1648. In the absence of fraud, the next of kin cannot file a bill for account against surviving partners, one of whom is administrator to the deceased partner. *Hyer v. Burdett*, 1 Edw. 325.

1649. In general, the cases in which silence and delay have been considered as furnishing presumptive evidence of abandonment, or release of claim, are those wherein executors, administrators, or trustees are called upon to pay after having distributed the funds. A partnership in stock is not within this rule. *Atwater v. Fowler*, 1 Edw. 417.

1650. If a partner, in a single partnership transaction, receives from the other partner a statement of accounts between them, and is silent for thirteen years afterwards, it amounts to an acquiescence. *Ibid.*

1651. Unless there is a valid severance of stock in a joint stock operation, there can be no trust in relation to the shares in the hands of one partner. *Ibid.*

1652. A private debt, without the express assent of the creditor, may, by the understanding of parties, become payable out of partnership funds. Thus: a bookseller was privately indebted to A. for money had and received; the

former laid out the money in books, and brought them as stock into a partnership formed with C. The concern became insolvent; and B. (during C.'s absence, but acting for him under a power) made an assignment for the benefit of their creditors, and put down A. as a creditor of the concern. The Court, considering there was proof of C.'s understanding, before the insolvency, that the debts which B. owed for books brought into the concern were to be paid out of the copartnership funds, *held*, that A. was to be considered as a creditor of the firm, notwithstanding he had given no consent to be so considered, and was entitled to dividends under the assignment with the rest of the partnership creditors. *Coll v. Wilder*, 1 Edw. 484.

XLII. PAYMENT.

1653. Where the right to a debt due from a third person is in litigation, it cannot with safety be paid to either party after notice; but the debtor will be permitted, pending the litigation, to pay it into Court to the credit of the cause. *Mills and Minton v. Pittman*, 1 Paige, 490.

1654. Where the complainant was sued for false imprisonment for an act done by him in the discharge of his duty as a police officer, in the city of New York, and afterwards recovered a judgment for costs against the plaintiff in that suit, which costs were subsequently paid to the complainant, by the corporation of the city, as a gratuity; *held*, that such payment was no bar to a suit, by a creditor's bill in this Court, to recover the costs out of the property of the plaintiff in the original suit. *Bleakley v. White*, 4 Paige, 654.

1655. Where the receipt and payment of money is to take place at the same time and between the same parties, and the payment is to be so received, one sum should be allowed to compensate the other, without an actual receipt and payment. *Morton v. Ludlows*, 5 Paige, 519.

XLIII. PATENTS.

1656. If the specification annexed to a patent is sufficiently explicit to enable a skilful mechanist, without any other aid, to construct the patented invention, the patent will not be void; although some of the minor details of the machine should not be set forth at large. *Burrall v. Jewett*, 9 Paige, 134.

1657. But the patent is void if the machine will not answer the purpose for which it was intended, without some addition, adjustment, or alteration which had not been discovered or invented at the time the patent was issued. *Ibid.*

1658. Where a patent is granted for an improvement in machinery, a drawing of the improvement as well as a specification is required. *Ibid.*

1659. The drawing may be referred to for

the purpose of aiding a specification which otherwise would be imperfect. *Ibid.*

1660. It may also be referred to as evidence to show that the machine claimed under the patent is not the one for which the patent issued. *Ibid.*

XLIV. PLEADINGS.

A. *Of the parties.*

B. *Bill.*

C. *Demurrer.*

D. *Plea.*

E. *Answer and disclaimer.*

F. *Replication and issue.*

A. *Of the parties.*

1661. A purchaser under contract who enters into actual possession of lands, in pursuance of the terms of the agreement, makes improvements, &c., should be made a party to a bill in equity filed to avoid the title of his vendor, so that the Court may make such order in the premises as will be just and equitable in reference to the rights of all concerned. If he is not made such party, and a decree is obtained avoiding the title of his vendor on a bill filed by a creditor of the grantor of the vendor, and such creditor becomes a purchaser of the legal estate of his debtor, at a sheriff's sale, under an execution on the judgment in his favour, and brings ejectment for the recovery of the land, he is not entitled to recover. *Park v. Jackson*, 11 Wend. 442.

1662. Where it is sought to charge lands with a legacy, it seems, that the legatee is a necessary party. *Fish v. Howland and others*, 1 Paige, 20.

1663. Although one legatee may file a bill in favour of himself and all others who might choose to come in under the decree, yet the bill must state the fact that it is filed on behalf of the complainant and all others, &c. *Ibid.*

1664. Where a trustee prosecutes a claim for the benefit of the *caveat que trust*, the latter must be made a party. *Ibid.*

1665. The officers of a corporation may be made parties to a bill of discovery, to enable the complainants to obtain a knowledge of facts which could not be arrived at by the answer of the corporation put in without oath. *Fermilyes v. The Fulton Bank and others*, 1 Paige, 37.

1666. One of two devisees cannot file a bill for an account against one of two executors, where the executors by the will have the charge of the real estate, without making the other devisee and executor parties. *Fabre and wife v. Colden*, 1 Paige, 166.

1667. As a general rule, a mere witness cannot be made a party defendant. *The President, Directors, and Company of the Fulton Bank v. Sharon Canal Company*, 1 Paige, 219.

1668. But suits against corporations are exceptions to this rule; as they do not answer upon oath, the only means of obtaining a discovery from them is to make their officers and agents parties, and to compel such officers and agents to answer the bill. *Ibid.*

1669. The former as well as the present officers of a corporation can be made parties to a suit against such corporation, and compelled to make discovery of facts within their knowledge. *Ibid.*

1670. Where one of the executors renounces the execution of the will, the other executors may file a bill in their own name, and if it is necessary to bring the executor who refused to accept the trust before the Court, he may be made a party defendant. *Thompson, Executor, Jr. v. Graham and others*, 1 Paige, 394.

1671. An assignee of an undivided moiety of leasehold premises can maintain an action in his own name upon a covenant of warranty contained in the original lease. *Van Horne v. Crain*, 1 Paige, 455.

1672. Whether he could maintain an action upon a covenant to convey without joining with the assignee of the other moiety? *Quære. Ibid.*

1673. But if the assignee of one moiety should unconsciously refuse to join with his co-tenant in any act which would be for the common benefit of their estate, Chancery will compel him to join, or to permit the co-tenant to do it for his own benefit, if it can be done without injury to the estate. *Ibid.*

1674. The rule that all persons materially interested in the subject-matter of the litigation should be made parties to the suit, may be dispensed with when it becomes extremely difficult or inconvenient. *Hallett and Davis v. Hallett and others*, 2 Paige, 15.

1675. But it cannot be dispensed with where the rights of persons not before the Court are so inseparably connected with the claims of the parties litigant, that no decree can be made without impairing the rights of the former. *Ibid.*

1676. Where there are many persons having claims on a fund, and the shares of a part cannot be determined until the rights of all the others are settled and ascertained, as in the case of residuary legatees or creditors of an insolvent estate, all must be made parties, or they must have an opportunity of coming in and substantiating their claims, before any distribution of the fund can be made. *Ibid.*

1677. In such cases, if the fund is in Court or under the exclusive control of the parties actually before the Court, it will be sufficient for any of the parties having a separate claim upon the fund, to file a bill in behalf of themselves and all others who may elect to come in under the decree. *Ibid.*

1678. It seems that one residuary legatee may file a bill in behalf of himself and all others standing in the same situation, and that it is not necessary to make them all actual parties to the suit. *Ibid.*

1679. A person is a necessary party to a suit when no decree in relation to the subject-matter of litigation can be made until he is properly before the Court as a party; or where the defendants in the suit have such an interest in having such person before the Court as would enable them to make the objection, if he were not a party. *Batley v. Ingles and others*, 2 Paige, 278.

1680. A defendant may in some cases be a proper party to a suit, although he is not a ne-

cessary party; as in the case of a fraudulent assignment of a trust fund, where the *cestui que* trust may, at his election, either proceed against the trustee alone or may join the fraudulent assignee in the same bill. *Ibid.*

1691. Where a debtor failed, and conveyed all his property to assignees in trust to pay certain specified debts, and to divide the surplus, or so much thereof as should be necessary, among such of his other creditors as should come in under the assignment and release him from their debts, and to reassign the residue to the debtor, and a number of the creditors came in under the assignment and complied with the condition; it was held, that the debtor could not file a bill against his assignees for an account of the trust property, without making the creditors who came in under the assignment, and those whose debts were specially provided for, and which remained unpaid, parties to the suit. *Mitchell v. Leno and Taylor*, 2 Paige, 280.

1682. Where there is an absolute assignment of a chose in action, and the assignor claims no interest therein, he is not a necessary party to a bill filed to recover the amount due. *Ward v. Van Bokkelen and others*, 2 Paige, 289.

1683. The assignee of a chose in action is now considered the real party to the suit as well at law as in equity; and the defendant may plead and give in evidence any matter of defence which exists in his favour against the assignee. *Ibid.*

1684. Where the vendor is dead, all his heirs at law should be parties to a bill to set aside the sale on the ground of fraud upon the part of the vendee. *Livingston v. The Peru Iron Company and others*, 2 Paige, 290.

1685. If the vendor makes a subsequent conveyance while the fraudulent vendee is in actual possession, claiming the land under his prior purchase, the subsequent conveyance is inoperative; and a suit to set aside the first sale must be brought in the name of the vendor, or his legal representatives if he is dead. *Ibid.*

1686. No persons are parties as defendants in a bill in Chancery, except those against whom process is prayed, or who are specifically named and described as defendants in the bill. *Verplanck and others v. The Mercantile Insurance Company of New York and J. Barker*, 2 Paige, 438.

1687. Where there was no prayer of process against a corporation by its corporate name, but only against the officers thereof, and the corporation was not described in the bill as being a party thereto, held, that the corporation was not before the Court as a party to the suit. *Ibid.*

1688. Infants cannot be made parties to a bill for the sake of discovery merely, as they do not answer on their oaths. *Leggett v. Selton*, 3 Paige, 84.

1689. The answer of an infant by his guardian cannot be excepted to for insufficiency. *Ibid.*

1690. Where the subject-matter of a suit is in relation to a bond or contract in which there are joint obligors, all the obligors ought to be made parties. *Campbell v. Western*, 3 Paige, 124.

1691. Upon a bill filed, previous to the adoption of the revised statutes, by certain stockhold-

ers of an incorporated company, against the individual directors, for fraud and mismanagement in the execution of their trust, by which the property of the corporation was dissipated and lost; *held*, that the corporation was a necessary party, either as complainant or defendant. *Robinson v. Smith*, 3 Paige, 222.

1692. Where there has been a waste or misapplication of the corporate funds by the officers or agents of the institution, a suit to compel them to account for the loss should be in the name of the corporation, unless it appears that the directors of the corporation refuse to prosecute such suit, or the present directors of the company are the parties who have made themselves answerable for the loss. *Ibid*.

1693. Where the husband files a bill in relation to his own rights, if his wife is a necessary party, by reason of a judgment or decree in favour of the husband and wife, which is a lien upon the property of the defendant, and in a case where all the encumbrancers must be before the Court, the wife may be joined with her husband as a complainant. *Clarkson v. De Peyster*, 3 Paige, 336.

1694. Where the complainant claims in opposition to a deed of trust, and seeks to set it aside on the ground of fraud, he may proceed against the fraudulent trustee alone, without making the *cestui que* trusts parties. It is otherwise where the complainant is endeavouring to enforce a claim adverse to the interests of the *cestui que* trusts, but which is founded upon the supposed validity of the trust deed. *Rogers v. Rogers*, 3 Paige, 379.

1695. Where several creditors or legatees are entitled to a rateable proportion of a common fund, which is insufficient for the payment of all their debts or legacies, all the creditors or legatees should be made parties to a bill filed for the distribution of the fund; or the bill should be filed by a part of such creditors or legatees, in behalf of themselves and all others standing in a like situation in reference to the fund. *Egberts v. Wood*, 3 Paige, 517.

1696. Where the owner of a negotiable note, who might have sued in his own name, caused a suit at law to be instituted in the name of a third person, for the purpose of depriving the defendant of his testimony, upon a bill filed against such nominal plaintiff for a discovery, and for relief against the suit at law, he was not allowed to avail himself of the objection that the real owner of the note was not made a defendant. *Brookroy v. Copp*, 3 Paige, 539.

1697. Where a bill is filed by a creditor to carry into effect an assignment of the debtor's property, the other creditors provided for in the assignment should be made parties, or the bill should be filed in behalf of the complainant and all others who may choose to come in under the decree. *Wakeman v. Gowen*, 4 Paige, 23.

1698. But where a judgment creditor is acting in hostility to the assignment, it is not necessary for him to make the creditors whose claims are provided for in the assignment parties. *Ibid*.

1699. In a suit to set aside an assignment as fraudulent, it is sufficient to make the fraudulent assignors and assignees parties. *Ibid*.

1700. Assignees in trust for creditors may file a bill in their own names, relative to the trust estate, without making the creditors provided for in the assignment parties. *Ibid*.

1701. Upon the hearing of a cause, if it appears that all the proper parties are not before the Court, the complainant may be permitted to file a supplemental bill to bring in the necessary parties. *Jenkins v. Freyer*, 4 Paige, 47.

1702. A subscriber to a joint stock corporation, who complains of an inequitable distribution of the stock, and who is seeking to reach the stock which has been improperly assigned or apportioned to others, should file this bill in behalf of himself, and of all other subscribers standing in the same situation. *Walker v. Devereux*, 4 Paige, 229.

1703. After the distribution of the stock, the commissioners of apportionment are not the trustees of, and do not represent the interests of other persons to whom stock has been distributed. *It seems*, the stockholders themselves, so far as they are known, should be parties to a suit which is to affect their rights previous to the organization of the company by the election of directors. *Ibid*.

1704. Where a mortgagee in possession makes an absolute sale and conveyance of the mortgaged premises, the purchaser must be made a party to a bill filed against the mortgagee for the redemption of the premises. *Dias v. Muk*, 4 Paige, 259.

1705. To a bill filed by a judgment creditor to obtain satisfaction of his debt after the return of an execution unsatisfied, all the defendants or persons against whom the judgment was rendered should be made parties. *Child v. Bruce*, 4 Paige, 309.

1706. A grantee of a lot adjoining a public square, who has a special covenant from the original owner of the square, that it shall be kept open for the benefit of his lot, may file a bill in equity to restrain the grantor from violating the covenant, and may join with the corporation in such suit. *Trustees of Watertown v. Cowen*, 4 Paige, 510.

1707. The objection of a misjoinder of parties, complainants, should be taken either by demurrer or in the answer of the defendant. *Ibid*.

1708. The coming of age of an infant party does not abate the suit; nor does it render a supplemental bill necessary, unless his interest in the subject of the suit is changed by that event. *Campbell v. Bowne*, 5 Paige, 34.

1709. Where a *feme sole*, who should have been made a defendant, marries after the commencement of the suit against the other defendants, she cannot be brought before the Court with her husband by an amendment of the original bill; but a supplemental bill will be necessary. *Ibid*.

1710. But if a *feme sole* marries after suit brought against her, the suit does not abate; and it is only necessary to make a suggestion of the marriage, and to obtain an order that the husband and wife be named as parties in the subsequent proceedings. *Ibid*.

1711. Where new parties are brought before the Court, either by amendment or otherwise,

who should have been made parties to the original bill, such new parties may avail themselves of any valid defence, which they had under the statute of limitations, or otherwise, at the time they were actually made parties to the suit. *Ibid.*

1712. In a creditor's bill to reach the property of a judgment debtor which has been transferred fraudulently, or without consideration, two or more persons holding different portions of such property by distinct conveyances may be joined as defendants. *Boyd v. Hoyt*, 5 Paige, 65.

1713. Where the object of a suit is single, different persons having or claiming separate interests in distinct or independent questions, all connected with and arising out of the single object of the suit, may be joined as defendants, so that the whole object of the bill may be obtained in one suit. *Ibid.*

1714. A claim against two or more persons, to whom the property of a judgment debtor has been improperly transferred, cannot be joined in the same bill with a claim against one of the defendants for compensation for waste committed on the real estate of the judgment debtor, after it had been purchased by the complainant on execution, but before the time for redemption had expired. *Ibid.*

1715. Where the rights of the state are involved in the decision upon a legitimate claim to relief against a person who has an interest in common with the state, the attorney-general may be joined as a party defendant in a bill against such person. *Varick v. Smith*, 5 Paige, 137.

1716. Where one of several judgment debtors is insolvent, and wholly destitute of property, it is not necessary to make him a party to a creditor's bill to obtain satisfaction of the judgment out of the equitable interests or choses in action of the other defendants; but the fact that he is thus destitute of property must be distinctly averred in the bill, or the defendants may demur for want of parties. *Van Cleaf v. Sickles*, 5 Paige, 505.

1717. All the judgment debtors may be made parties to a creditor's bill, if any of them or all of them collectively have property exceeding \$100, which could not be reached by the execution at law; and one of the defendants, who is entirely destitute of property, will not be entitled to costs, unless the complainants have unnecessarily compelled him to appear and answer, instead of taking the bill as confessed against him. *Ibid.*

1718. Where one of the defendants in the judgment was not served with process in the suit at law, it is proper to make him a party to a creditor's bill against the other judgment debtors, for the purpose of enabling the other defendants to claim contribution against him for the satisfaction of the complainant's debt, if they should be compelled to pay the same. *Ibid.*

1719. The real party in interest must be a complainant in the Court of Chancery, and the assignee of a chose in action is not authorized to file a bill for the recovery of the same, in the name of the assignor who has parted with all his interest in the subject-matter of the suit. *Field v. Maghee*, 5 Paige, 539.

1720. The directors of a corporation are liable to the stockholders and creditors of the corporation for a fraudulent breach of trust. And in a suit instituted against them, on account of such frauds, it is not necessary to make all the directors parties. *Cunningham v. Pell*, 5 Paige, 607.

1721. A proceeding against trustees for a fraudulent breach of trust is an exception to the rule that in a suit against trustees all of the trustees must be made parties. *Ibid.*

1722. In a suit brought by a creditor or a stockholder of a corporation against the directors thereof, for a fraudulent breach of trust, the corporation itself, if in existence, is a necessary party. In such a suit all the directors or stockholders of the corporation should also be made parties, or the bill should be filed by the complainant as well for himself as for all others standing in the same situation. *Ibid.*

1723. A new defendant cannot be added to a suit upon a partition. It must be by a supplemental bill. *Carow, Executor, v. Mowatt*, 1 Edw. 9.

1724. Where a mortgagee has assigned his whole interest, and the mortgagor files a bill for an account and to redeem, the general rule is, that the mortgagee is not a necessary party. Still if there are circumstances rendering it proper, the practice is otherwise. *Wolcott v. Sullivan*, 1 Edw. 399.

1725. Where a party assigns his property, in trust, for the benefit of creditors, and new trustees are afterwards substituted in the place of the old ones, who assign their trust, (with the knowledge of the original assignor;) held, that such assignor cannot file a bill for an account against the first trustee, without, at least, joining the last trustees in the suit. It would be dismissed, not being amendable. *Mitchell v. Lenox*, 1 Edw. 428.

1726. The wife of a husband tenant in common is not a necessary party to a suit for partition. *Matthews v. Matthews*, 1 Edw. 565.

B. Bill.

1727. In a Court of Chancery every material allegation should be put in issue by the pleadings. *Woodcock v. Bennett*, 1 Cow. 711.

1728. No interrogatories can be filed which do not arise from or relate to some fact thus in issue. *Ibid.*

1729. A decree directing contribution by one surety to the representatives of another is within the scope and equity of a bill filed by administrators, alleging payment of a debt by their intestate as surety for the defendant and a third person, although by the answer and proofs it appears that the intestate and the defendant were co-sureties for such third person, the bill praying discovery as well as relief. *Livingston v. Van Rensselaer*, 6 Wend. 63.

1730. In case of a suit for foreclosure, if there are liquidated counter claims, they may be presented by way of cross bill, but not by way of set-off. *Troup v. Haight*, 1 Hopk. 239.

1731. A cross bill is in the nature of a defence. *Erwin v. Erwin*, 1 Hopk. 48. S. P. *Gallatien v. Cunningham*, 8 Cow. 361.

1732. It cannot introduce new and distinct

matters not embraced in the original suit; and if it does so, no decree can be founded upon those matters. *Ibid.*

1733. In such a case the original bill was dismissed, with costs in favour of the original defendants upon both that and the cross suit. *Ibid.*

1734. A bill must state clearly the persons who are made defendants, either by praying process against them, or by a distinct allegation designating the persons impleaded as defendants. *Elmendorf v. Delancey*, 1 Hopk. 555.

1735. A bill of review will not be sustained on the ground that the chancellor who made the decree was interested in the stock of the complainants, a corporation, if the decree was by consent, or merely formal, so that the chancellor did not personally exercise his judgment in it. Nor will it be sustained for newly discovered matter of error in the proceedings, which with ordinary diligence the party might have discovered before. Nor unless the complainant shows himself aggrieved by the decree. *Lansing v. Albany Ins. Co.* 1 Hopk. 102.

1736. Application to vary such allowances are made by motion or petition. *Ibid.*

1737. If it appears upon the face of the supplemental bill that all the matters alleged therein arose previous to the commencement of the suit, and might have been inserted in the original bill by way of amendment, the defendant may demur. But if this irregularity does not appear upon the face of the supplemental bill, the facts may be brought before the Court by plea. *Stafford and others v. Howlett and West*, 1 Paige, 300.

1738. Where three kinds of relief are prayed for in the bill, and the complainant is entitled to one of them, the defendant cannot demur. *The Western Ins. Co. of, &c. v. The Eagle Fire Ins. Co.* 1 Paige, 304.

1739. A bill of discovery will be sustained to aid the prosecution or defence of a civil suit in a foreign tribunal. *Mitchell and Nash v. Smith*, 1 Paige, 287.

1740. An original bill cannot be sustained either by the parties or privies to a former suit for an injunction to restrain proceedings under a decree in such suit. *Dyckman and M'Chain v. Kernochan and others*, 2 Paige, 26.

1741. A bill of interpleader, strictly so called, is, where the complainant claims no relief against either of the defendants, but only asks for leave to pay the money or deliver the property to the one to whom it of right belongs, and that he may thereafter be protected from the claims of both. *Bedell v. Hoffman and others*, 2 Paige, 199.

1742. But a bill in the nature of a bill of interpleader may be filed to redeem and to be let into possession of mortgaged premises. *Ibid.*

1743. Bills of interpleader should not be filed except in cases where the complainant can in no other way be protected from an unjust litigation in which he has no interest. *Ibid.*

1744. Where an original bill was properly filed by a creditor to reach the property of the defendant after the return of an execution unsatisfied, held, that a supplemental bill was proper to reach subsequently acquired property to

satisfy the same debt. *Eager and others v. Price and others*, 2 Paige, 333.

1745. The Court will not permit a party to file two original bills and carry on two suits at the same time against the defendant to satisfy the same debt. *Ibid.*

1746. The object of a bill of interpleader is to protect a complainant standing in the situation of an innocent stakeholder, and where a recovery against him by one claimant of the fund might not protect him against a recovery by another claimant. *Badeau v. Rogers and Second*, 2 Paige, 209.

1747. It is not necessary to file a bill of interpleader where the holder of the fund is already a party to a suit in Chancery, brought by one claimant against the other to settle the right to the fund in his hands. *Ibid.*

1748. In such a case the holder of the fund should apply by petition in that suit for leave to pay the fund into Court, to abide the event of the litigation between the other parties. *Ibid.*

1749. If a defendant permits a bill of interpleader to be taken as confessed against him, it is an admission that as to him the bill was properly filed, and that he has made an improper claim upon the fund. *Ibid.*

1750. A bill may be framed with a double aspect where it is doubtful what relief the complainant is entitled to on the facts of his case. *Colton and others v. Ross and others*, 2 Paige, 396.

1751. In such case the relief prayed for may be in the alternative, but it must be consistent with the case made by the bill. *Ibid.*

1752. Where the case made by the bill entitles the complainant to one of two kinds of relief; but not to both, the prayer should be in the disjunctive. *Ibid.*

1753. So, if it be doubtful whether the facts of the case entitle him to the specific relief prayed for, or to relief in some other form, his prayer concluding for general relief should be in the disjunctive. *Ibid.*

1754. In such case, although the complainant should not be entitled to the relief specifically prayed for, he may, under the general prayer, obtain any other specific relief consistent with the case made by the bill. *Ibid.*

1755. But where the complainant prays for a particular relief, and for other relief in addition thereto, he can have no relief inconsistent with such particular relief, although it should be founded upon the bill. *Ibid.*

1756. Where the surviving complainant is insolvent, the defendant who had demands against the deceased and surviving complainants jointly, will be permitted to file a cross bill in the nature of an original bill against the surviving complainant and the personal representatives of the deceased complainant, and the proceedings in the original suit will be stayed until the cross suit is in readiness for a hearing. *Brown and others v. Story*, 2 Paige, 594.

1757. To sustain a bill of discovery filed in aid of a defence at law, the complainant must show in his bill that the discovery prayed for is material to his defence at law; and also that his defence at law cannot be established by the testimony of witnesses, or without the aid of

the discovery which he seeks. *Leggett v. Postley*, 2 Paige, 599.

1758. A discovery will not be allowed merely to guard against anticipated perjury in a suit at law. *Ibid.*

1759. A party who acquires an entirely new right or interest in the subject-matter of the suit, by purchase pending the litigation, must bring such right or interest before the Court by a supplemental bill, or by an original bill in the nature of a supplemental bill. *Wilder v. Keeler*, 3 Paige, 164.

1760. A purchaser of the rights of one of the parties to a suit pending the litigation will not, without the consent of the other parties to the suit, be permitted to come in and take a part in the proceedings in the cause, unless he makes himself a party by filing a supplemental bill. *Ibid.*

1761. If a supplemental bill is filed without any sufficient grounds, the defendant must make the objection by plea, answer, or demurrer. *Lawrence v. Bolton*, 3 Paige, 294.

1762. A supplemental bill ought to be filed as soon as the new matter sought to be inserted therein is discovered; and if the party proceeds to a decree after the discovery of the facts upon which the new claim is founded, he will not be permitted afterwards to file a supplemental bill in the nature of a bill of review founded on such facts. *Pendleton v. Fay*, 3 Paige, 204.

1763. A party cannot file a bill of review, if he has no interest in the question intended to be presented by it, and if he cannot be benefited by the reversal or modification of the former decree. *Webb v. Pell*, 3 Paige, 368.

1764. A bill of review for error apparent must be for an error in law, arising out of the facts admitted by the pleadings, or recited in the decree itself as settled, declared, or allowed by the Court; it cannot be sustained upon the ground that the Court has decided wrong upon a question of fact. *Ibid.*

1765. Where, after a creditor's bill had been filed upon the return of an execution at law unsatisfied, the complainant obtained a second judgment, and issued an execution thereon; but the defendant having no property which could be reached by the sheriff, the complainant filed a supplemental bill without waiting for the return of the execution; *held*, that the supplemental bill could not be sustained. *M'Elwain v. Willis*, 3 Paige, 505.

1766. If the defendant has answered the original bill, and demurred to the supplemental bill only, it is erroneous to dismiss the original bill with costs, upon the mere allowance of the demurrer to the supplemental bill. *Ibid.*

1767. Where the complainant wishes to obtain a discovery of the facts, to anticipate and rebut the defence which may be set up by the defendant, he should, in the charging part of the bill, state the anticipated defence as a pretence of the defendant, and then charge the real facts to lay a foundation for the discovery which is sought. *Stafford v. Brown*, 4 Paige, 88.

1768. If a complainant wishes to obtain a preliminary injunction to stay the proceedings of the defendants during the pendency of the

suit, he should insert a formal prayer for such process in his bill. *Walker v. Devereux*, 4 Paige, 229.

1769. After the complainant has filed a replication, and obtained a decree for a reference to a master to take and state an account, he cannot file a supplemental bill for the purpose of setting up new matters which were known to him previous to the filing of the replication and obtaining the order of reference. *Dias v. Merle*, 4 Paige, 259.

1770. Where no occurrence has taken place to change the rights of the parties subsequent to the commencement of the suit, the complainant cannot, after the cause is at issue, file a supplemental bill for the mere purpose of putting in issue new matters which might have been introduced into the original bill by way of amendment, although the new facts were not known to the complainant until after the cause was at issue on the original bill. The proper course for the complainant, where the proofs have not yet been taken, is to apply for leave to withdraw his replication and to amend. *Ibid.*

1771. A supplemental bill, in the nature of a bill of discovery in aid of the original suit, may be filed after the cause is at issue, where new facts were not known to the complainant at the time of filing his replication. *Ibid.*

1772. In a sworn bill, it is equally perjury for the complainant knowingly to make a false charge or averment in the charging part, as to make a false statement in the stating part of the bill. *Smith v. Clarke*, 4 Paige, 368.

1773. The complainant in a bill of interpleader must offer to bring the fund in dispute into Court, and he must show that he is ignorant of the rights of the different claimants, or at least that there is some doubt which of them is entitled to the fund, so that he cannot safely pay it to either. *Mohawk and Hudson Railroad Company v. Chute*, 4 Paige, 386.

1774. A bill of interpleader cannot be sustained where, from the bill itself, it appears that one of the defendants is clearly entitled to the debt or duty claimed, to the exclusion of the other. *Ibid.*

1775. Where a complainant is entitled to equitable relief against the owner of property, if the legal title to the property is in dispute between two or more persons, so that he cannot ascertain to which of them it actually belongs, he may file a bill for relief against the several claimants in the nature of a bill of interpleader. *Ibid.*

1776. A bill with a double aspect may be filed where the complainant is in doubt whether he is legally entitled to one kind of relief or another, upon the facts of the case as stated in the bill; in which case his prayer should be framed in the alternative, so that if the Court decides against him as to one kind of relief prayed for, he may still obtain the proper relief under the other branch of his alternate prayer. *Lloyd v. Brewster*, 4 Paige, 537.

1777. So also, where the complainant is entitled to relief of some kind against the defendants upon the facts stated in his bill, if the nature or kind of relief to which he is entitled depends upon the existence of a fact of which

he is ignorant, he may allege his ignorance of such fact, and may form his prayer for relief in the alternative, so as to obtain the appropriate relief according to the fact as it shall appear at the hearing of the cause. *Ibid.*

1778. A bill which sets up only one sufficient ground for equitable relief is not rendered multifarious by the insertion therein of a separate and distinct claim, upon which the complainant is not entitled to ask for either discovery or relief. *Varick v. Smith*, 5 Paige, 137.

1779. The complainant may join in the same bill two good causes of complaint arising out of the same transaction, where all the defendants are interested in the same claim of right, and where the relief asked for as to each is of the same nature. *Ibid.*

1780. A bill of discovery in aid of the complainant's defence in a suit at law is not a suit in Chancery concerning property, within the meaning of the provision of the revised statutes requiring the Court of Chancery to dismiss suits concerning property where the matter in dispute does not exceed one hundred dollars. *Schrappell v. Redfield*, 5 Paige, 245.

1781. If the bill contains no prayer for relief, it will be considered as a bill for discovery merely, although, in the prayer for process of *subpoena*, the word decree is erroneously added to the words usually inserted in a bill of discovery. *Ibid.*

1782. Where a complainant files a bill to set aside a conveyance made by him, on the ground of fraud in obtaining it, if the suit abates by the death of the complainant, and the wife of the defendant is one of the heirs at law, the other heirs may file a bill of revivor against the wife and her husband, without alleging therein that she refused to join with the other heirs in a bill of revivor against the husband. *Randolph v. Dickerson*, 5 Paige, 517.

1783. In determining whether an allegation or statement in a bill is relevant or pertinent, the bill must not only be regarded as a pleading to bring before the Court and put in issue the material allegations and charges upon which the complainant's right to relief rests, but also as an examination of the defendant, for the purpose of obtaining evidence to establish the complainant's case, or to counterprove or destroy the defence which the defendant may attempt to set up. *Hawley v. Wolvorton*, 5 Paige, 522.

1784. The complainant in his bill may state any matter of evidence, or any collateral facts, the admission of which, by the defendant, in his answer, may be material in establishing the allegations of the bill, as a pleading, or to ascertain the nature, extent, and kind of relief to which the complainant is entitled; or which may legally influence the Court in determining the question of costs. *Ibid.*

1785. A bill which does not pray that the cause may be heard at the same time with another cause, and one decree be had in both, is not, in form, a cross bill. But it would seem, if they are calculated to present one and the same point, although for different objects, they may stand together, and be prosecuted at the same time. *Wright v. Taylor*, 1 Edw. 236.

C. Demurrer.

1786. The bill charged that several defendants combined and confederated among themselves, and with the debtor of the complainant, against whom they had obtained a decree for their debt, to defraud the complainants by taking a conveyance and transfer to each, in separate parcels, of all the debtor's real and personal property, without consideration, and with intent to avoid execution upon the decree; and that they accordingly received such conveyances and transfer of all the debtor's property, which they held for him, or for their own use. To this bill, one of the defendants answered, denying the combination between himself and the other several alienees and transferees of the debtor's property; and demurred to the residue of the bill, because it was for several distinct matters and causes, in many of which the defendant thus answering and demurring was not interested or concerned; held, that the defendants were properly joined, and that the demurrer should be overruled. *Fellows v. Fellows*, 4 Cow. 682.

1787. The general rule is, that where a bill is filed concerning things of distinct natures against several persons, it is demurrable; but unconnected parties may join in a suit, when there is one connected interest among them all, centering in the point in issue in the cause. *Ibid.*

1788. Where to a bill in Chancery, filed by a purchaser of land, alleging a previous conveyance of part of the same premises, executed by his grantor, to have been obtained by fraud, and that the grantees, under such fraudulent deed, had entered into possession, and held and occupied the premises, praying a discovery, on account and general relief, the defendant demurred, relying upon his possession under his deed, as rendering void the conveyance to the complainant; it was held, that the possession under the deed, admitted by the demurrer to have been fraudulently obtained, could not be considered adverse so as to avoid the deed to the complainant, and the demurrer was overruled, and the defendant decreed to answer. *Livingston v. Peru Iron Company*, 9 Wend. 511.

1789. In a suit for a specific performance of a contract in relation to land, if the bill states that an agreement was made on demurrer to the bill, the contract will be presumed to have been reduced to writing, and signed by the parties or their agents, unless the contrary appears. *Cozine v. Graham and Bleeker*, 2 Paige, 177.

1790. If the agreement, however, appears in the bill to have been a parol agreement, and no facts are alleged to take the case out of the statute, the defendant may demur to the bill. *Ibid.*

1791. If the defendant has a defence which will excuse him from a discovery as to the whole or any material parts of the bill, he must make such defence by plea or demurrer. *Cuyler v. Bogert*, 3 Paige, 186.

1792. A defendant can demur, for want of proper parties, only in those cases where it is apparent from the bill itself that there are other

persons who ought to have been made parties; but if that fact does not distinctly appear upon the face of the bill, the objection of a want of parties must be made in a plain and explicit manner by plea or answer, showing who are the necessary parties. *Robinson v. Smith*, 3 Paige, 222.

1793. The objection, by defendants who are officers of a corporation, that a discovery of the matters stated in the bill may subject the corporation to a forfeiture of its charter, is not sufficient to support a general demurrer, to the relief as well as to the discovery sought by the bill. *Ibid.*

1794. A demurrer on terms will be allowed upon payment of the costs of the demurrer on the record; but liberty will be given to the complainants to amend. *Ibid.*

1795. Where the bill charged, that by a post-nuptial agreement between the defendants, a husband and his wife, the property of the wife was conveyed to trustees, and it was agreed that a certain specified part of the property should be vested in stocks, or put out at interest, as a provision for the complainant, for whom the wife considered herself under a moral obligation to provide; and that the interest on the dividends on the stock should be paid to the wife, free from the control of her husband, for the use and benefit of the complainant, according to the discretion of the wife during her life; and that upon the death of the wife, the principal should become the property of the complainant, if she survived her; and the bill further charged that the husband refused to permit his wife to receive the dividends on the stock, and to pay them over, according to her discretion, to the complainant; a general demurrer to the bill for want of equity, put in by the husband for himself and his wife jointly, was overruled. *Becker v. Bingham*, 3 Paige, 246.

1796. A demurrer for want of equity cannot be sustained, unless the Court is satisfied that no discovery or proof properly called for by, or founded upon, the allegations in the bill, can make the subject-matter of the suit a proper case for equitable cognizance. *Ibid.*

1797. The objection to the jurisdiction of the Court, that the complainant has an adequate remedy at law, should be made by plea or demurrer, or should be distinctly stated in the answer of the defendant. *Winsall v. Hall*, 3 Paige, 313.

1798. It is a good ground of demurrer to the whole bill, that a person who has no interest in the controversy, and has no equity as against the defendant, is improperly joined as a party complainant. *Clarkson v. Depeyster*, 2 Paige, 336.

1799. Where a general demurrer to the whole bill is overruled for want of equity, the defendant may demur on terms, upon the ground that the suit is brought by a *feme covert* in her own name, when she should have prosecuted by her next friend. *Garlick v. Strong*, 3 Paige, 440.

1800. A party availing himself of the right to demur on terms must pay the costs of the demurrer on the record. *Ibid.*

1801. An omission of the averments required in a creditor's bill by the 189th rule is a good

ground of demurrer. *McEwsin v. Willis*, 3 Paige, 505.

1802. Where a defendant cannot answer as to particular facts charged in the bill without criminating himself, or subjecting himself to a penalty or forfeiture, he may demur to the discovery, and answer as to the relief. *Livingston v. Harris*, 3 Paige, 538.

1803. Where the complainant files a supplemental bill for the purpose of bringing forward new matters which might have been introduced into the original bill by way of amendment, the defendant should make his objection thereto by demurrer, or by plea, or in his answer to the supplemental bill. And it is too late to make such objection, for the first time, at the hearing. *Fulton Bank v. New York and Sharon Canal Company*, 4 Paige, 127.

1804. An objection to the jurisdiction of the Court, on the ground that the complainant has a perfect remedy at law, should be made by a demurrer, or in the answer of the defendant. If the objection is made in the answer, the complainant proceeds at the peril of costs, if the objection is sustained at the hearing. *Ibid.*

1805. In a suit concerning property, if it appears upon the face of the complainant's bill that the matter in dispute, exclusive of costs, does not exceed \$100, the defendant may either demur, or move to dismiss the bill with costs. *Smits v. Williams*, 4 Paige, 364.

1806. A speaking demurrer is one which introduces some new fact or averment which is necessary to support the demurrer, and which does not appear distinctly upon the face of the bill. *Brooks v. Gibbons*, 4 Paige, 374.

1807. The defendant is not bound to look beyond the copy of the bill served on his solicitor; and if that does not contain the requisite affidavit or verification to give the Court jurisdiction of the case, he may demur to the bill on that ground. *Loring v. Pine*, 4 Paige, 639.

1808. If a joint claim against two defendants is improperly joined in the same bill with a separate claim against one of the defendants, both or either may demur to the bill for multifariousness. *Boyd v. Hoyt*, 5 Paige, 65.

1809. A demurrer to a bill for multifariousness, like a demurrer for a misjoinder at law, goes to the whole bill; and if the demurrer is allowed, the bill will be dismissed as to the party who demurs. *Ibid.*

1810. Where the bill contains a general prayer for relief as well as for a discovery, the defendant may demur if it appears upon the face of the bill that the value of the matter in controversy does not exceed one hundred dollars. *Schrappel v. Redfield*, 5 Paige, 245.

1811. Where a bill is filed against the representatives of a deceased partner to obtain satisfaction of a copartnership debt out of the estate of the decedent, the joining of the surviving partner, who is insolvent, with them as a defendant, does not render the bill multifarious, or authorize such representative to demur. *Bulle v. Gemung*, 5 Paige, 254.

1812. Where supplementary matter is improperly inserted in a bill of revivor and supplement, it does not authorize the defendant to de-

mur to the whole bill. He should demur to the supplemental matter only. *Randolph v. Dickerson*, 5 Paige, 517.

D. Plea.

1813. If a purchaser rest his claim in a Court of equity on the fact of being a *bona fide* purchaser, he must deny notice fully, positively, and precisely, even though it be not charged on the other side. *Gallatin v. Cunningham*, 8 Cow. 361.

1814. He must also deny all knowledge of facts charged from which notice may be inferred. *Ibid.*

1815. If he do not thus put the notice in issue, proof is inadmissible. *Ibid.*

1816. If he rely upon want of notice in another form, which he purchased, he must still aver the fact by plea or otherwise. *Ibid.*

1817. A defendant cannot plead and answer, or plead and demur, as to the same matter. *Souzer and wife v. De Meyer and De Meyer*, 2 Paige, 574.

1818. If he answers as to those matters which by his plea he has declined to answer, he overrules the plea. *Ibid.*

1819. So if a plea and demurrer are to the same part of the bill, the demurrer is overruled. *Ibid.*

1820. If the defendant is willing to give the discovery sought by the bill, and has a defence which might be pleaded in bar, he will have the full benefit of such defence if he sets it up, and insists upon it in his answer. *Ibid.*

1821. Where the complainant sets up equitable circumstances in his bill, in anticipation of a plea and to defeat the same, the defendant must support his plea by an answer to those equitable circumstances, in addition to the general denial thereof in the plea. *Ibid.*

1822. If the answer admits or does not fully deny such equitable circumstances, they may be used on the argument to falsify the plea. *Ibid.*

1823. And if they are denied by the plea and the answer, the complainant may take issue on the plea, and prove the same. *Ibid.*

1824. If the plea is falsified by the proofs, the complainant will be permitted to examine the defendant on interrogatories, if a discovery is necessary. *Ibid.*

1825. If a plea is bad in form only, but good in substance as to the whole or any part of the relief sought by the bill, and was not put in in bad faith, it will be permitted to stand as a part of the defendant's answer, or the defendant will be permitted to insist upon the same matters in his answer. *Ibid.*

1826. A plea will be overruled if it does not set forth any new matter, although the objection raised by it would have been valid if it had been urged by way of demurrer to the bill. *Coxine v. Graham and Blecker*, 2 Paige, 178.

1827. Where the complainant has omitted to bring before the Court persons who are necessary parties, but the objection does not appear on the face of the bill, the proper mode of taking advantage of it is by plea or answer. *Mitchell v. Lenox and Taylor*, 2 Paige, 280.

1828. But if the objection appears on the face of the bill, the defendants may demur. *Ibid.*

1829. The mere pendency of a suit in a foreign Court, or in a Court of the United States, cannot be pleaded in abatement or in bar to a suit for the same cause in a state Court. *Mitchell v. Bunch*, 2 Paige, 606.

1830. As to matters which are not alleged to be the defendant's own acts, or to be within his personal knowledge, it is sufficient, if the defendant, in his negative averments, deny the facts charged, upon his belief only; but he must so frame his averments that the complainant can put the facts in issue by a replication. *Bolton v. Gardner*, 3 Paige, 273.

1831. It is sufficient if the defendant, in his answer in support of such plea, denies the equitable circumstances stated in the bill, according to his knowledge, information, and belief. *Ibid.*

1832. If the negative averments in a plea by an executor relate to transactions in the lifetime of the testator, or to acts done by others, it is not necessary they should be sworn to positively; it is sufficient if they are made upon the defendant's belief only. *Heartt v. Corning*, 3 Paige, 566.

1833. Where fraud or other circumstances are charged in the bill, to avoid a release, the defendant pleading the release must, by proper negative averments in his plea, deny the allegations of fraud, &c., and must support his plea by a full answer and discovery as to every equitable circumstance charged in the bill, in avoidance of such release. *Ibid.*

1834. A plea of a discharge under the insolvent act must distinctly state every fact which was necessary to give the discharging officer jurisdiction in the first instance. *Sallers v. Tobias*, 3 Paige, 338.

1835. The usual mode of defence to a bill of review, founded upon alleged errors apparent from the decree, is to plead the former decree in bar of the suit, and to object by demurrer to the opening of the enrolment; alleging, as a ground of demurrer, that there is no error in the decree. *Webb v. Pell*, 3 Paige, 368.

1836. It seems, that it is not necessary to plead the former decree, if such decree is fully and fairly stated in the bill of review. *Ibid.*

1837. Where only one cause of action is stated in the bill, the defendant must ascertain what time of limitation is applicable to the case, and frame his plan accordingly. *Fan Hook v. Whitlock*, 3 Paige, 410.

1838. The Court may permit a defendant to plead double under special circumstances; as where he could not make his defence by answer without setting out a long account, which would be unnecessary, if the defence sought to be made by plea was valid. *Ibid.*

1839. A plea which sets up no valid defence to any part of the matter it professes to cover will be overruled absolutely, and will not be permitted to stand for an answer. *Orcutt v. Orms*, 3 Paige, 459.

1840. The Court may permit a plea to stand for an answer, if it contains matter which, if put in the form of an answer, would have constituted a valid defence to some material part of the matter to which it is pleaded in bar. *Ibid.*

1841. By allowing a plea to stand for an an-

swer, the Court decides that it contains matter of defence; but that it is not a full defence to all which it professes to cover, or that it is informally pleaded, or that the defence cannot properly be made by way of plea, or that the plea is not properly supported by an answer. *Ibid.*

1842. If a plea to the whole bill, unaccompanied by an answer, is allowed to stand for an answer without reserving to the complainant the right to except, it is to be deemed a full answer, though not necessarily a perfect defence. *Ibid.*

1843. A plea to a bill in Chancery must be verified by oath, although the complainant has expressly waived an answer from the defendant on oath. *Heartt v. Corning*, 3 Paige, 566.

1844. If a plea is not verified by the oath of the defendant, the complainant may apply for an order to set it aside, or to have it taken off the files of the Court; but he cannot make the objection upon the argument of the plea. *Ibid.*

1845. A plea is a special answer; and the defendant may therefore put in a plea to the bill, under the usual order for further time to answer. *Ibid.*

1846. Where the complainant waives the necessity of an answer under oath, if the defendant puts in a plea to the bill, he will not be required to support it by an answer. *Ibid.*

1847. Where a defence consists of a variety of distinct facts and circumstances, there can be no saving by a plea. *Loud v. Sergeant*, 1 Edw. 164.

1848. Where a complainant files a bill in this Court upon a judgment recovered on a bond in a Court whose ordinary jurisdiction is limited to \$100, but which has jurisdiction upon some species of bonds to a greater amount, the defendant, in setting up a plea that the matter of such judgment was *coram non judice* for the want of jurisdiction, must show affirmatively on the face of the plea, that it was not a bond of the latter description; otherwise it will be presumed that the Court had jurisdiction. *Storms v. Storms*, 1 Edw. 596.

1849. Where a plea, which constituted a full defence to a particular part of the bill, was disallowed on the ground of a technical defect or informality in the manner of pleading, the Court permitted it to stand for an answer, and prohibited the complainant from calling for a further answer, by exceptions, as to that part of the bill. *Leecraft v. Dempsey*, 4 Paige, 124.

1850. A plea is not rendered double by the mere insertion therein of several averments that are necessary to exclude conclusions arising from allegations, which are made in the bill, to anticipate and defeat the bar which might be set up in the plea. *Bogardus v. Trinity Church*, 4 Paige, 178.

1851. Where the complainant states a variety of matters in his bill, which, if admitted to be true, would be evidence to counterprove the allegations of the plea, it is necessary to negative such matters by general averments in the plea, and to support the plea by an answer as to such matters. *Ibid.*

1852. Upon the argument of a plea, every fact stated in the bill, and not denied by the

averments in the plea and by the answer in support of the plea, must be taken as true. *Ibid.*

1853. Where issue is taken upon a plea, if the truth of the matters pleaded are established, the suit will be barred, as far as the plea extends. *Ibid.*

1854. A defendant is bound to support his plea by an answer as to circumstances stated in the bill, which, if admitted to be true, would be evidence to counterprove the plea. *Ibid.*

1855. Where the matter in dispute does not exceed \$100, if that fact does not appear upon the face of the bill, it may be pleaded in bar of the suit. *Smets v. Williams*, 4 Paige, 364.

1856. Payment by a stranger, between whom and the defendant there is no privity, cannot be pleaded by the latter in bar of a suit for his own debt. *Bleakly v. White*, 4 Paige, 654.

1857. Where the complainant waives an answer on oath, no discovery or answer is necessary in support of a plea which covers the whole relief sought for by the bill. *Fisk v. Miller*, 5 Paige, 26.

1858. So to a bill against a guardian, filed for an account and satisfaction for the estate of his ward which came to his hands, and to set aside a release obtained from the complainant on the ground of fraud, the defendant cannot plead the release in bar of the account, and at the same time insist by his answer that he has fully accounted with the complainant for the property and effects which came to his hands as guardian. *Ibid.*

1859. Upon a replication to a plea, nothing is in issue except what is distinctly averred in the plea; and if that is established at the hearing, the plea is a bar to so much of the bill as it professes to cover. *Ibid.*

1860. Where the bill charges that a release of the complainant's demand was obtained by fraud and without consideration, it is not sufficient for the defendant merely to plead the release in bar of the suit, although it recites a good consideration for the giving thereof; but the plea should also contain an averment of the truth of such recital, so that the fact may be put in issue by the replication. *Ibid.*

E. Answer and disclaimer.

1861. If a plea of the statute of limitations to a bill for an account and discovery, with an accompanying answer, is overruled, and the defendant ordered to put in a full and perfect answer, he will not be allowed to repeat in his second answer the same matter contained in the plea which had been overruled, though he add matter in his second answer sufficient to sustain the defence upon the statute; but he must put in a full and perfect answer. *Murray v. Coster*, 4 Cow. 617.

1862. A general denial of fraud in an answer to a bill of discovery is not enough, where, in addition to a general charge of a fraudulent concealment of property, there is a specific charge that such property is held by others in secret trust or by colourable title for the benefit of the defendant; the specific charge must be responded to, or the answer will be held insufficient. *Pettit v. Candler*, 2 Wend. 618.

1863. Where, in a suit against twelve defend-

ants, an answer was put in and filed, purporting to be the *joint* and *several* answers of *all*, though one of the defendants had not signed or sworn to it; and after replication filed, proofs taken, the cause set down for hearing, a motion for re-examination of a witness, a denial of the same, and appeal from such denial, and a motion for leave to file a *supplemental answer*, the defendant who had not joined in the *original answer*, filed, without leave of the Court, a *separate answer*, setting forth substantially the same defences offered in the supplemental answer; *it was held*, that the *separate answer* was filed irregularly, and must be taken off the files of the Court. *Fulton Bank v. Beach*, 6 Wend. 36.

1864. Regularly an answer should be signed and sworn to, but the signature and oath may be waived by the complainant; and filing a replication is evidence of such waiver. *Ibid.*

1865. In a bill of discovery against a corporation, the corporation ought to be permitted to put in a separate answer, in order to make offers and admissions, and to deny facts which the officers may suppose do exist. *Vermilyea v. The Fulton Bank*, 1 Paige, 37.

1866. Where a defendant is examined by the complainant, in relation to the amount due the complainant on account of certain property sold by the defendant on commission, it is not sufficient for the defendant to refer to his books of account produced before the master; but he must give the best answer he can from recollection and information, aided by a recurrence to the books and papers immediately within his control and possession, aided by such explanations, responsive to the questions put, as are necessary to prevent improper conclusions being drawn from his answers. *Pack v. Hamlin and others*, 1 Paige, 247.

1867. Where matters charged in the bill, as the acts of the defendant himself, are of such a nature that he can be presumed to recollect them if they ever took place, a positive answer is, in general, required. *Hall v. Wood*, 1 Paige, 404.

1868. But where the facts are such that it is probable he cannot recollect them so as to answer more positively, a denial of the facts according to his knowledge, recollection, and belief, will be sufficient. *Ibid.*

1869. A defendant cannot be compelled to answer a charge in the complainant's bill, which, if true, would subject him to an indictment or a criminal prosecution. *Leggett v. Postley*, 2 Paige, 599.

1870. The wife is not bound to answer a bill of discovery as to matters in which she has no personal interest. *City Bank v. Bangs*, 3 Paige, 36.

1871. The answer of a defendant, responsive to the bill, is evidence against the complainant, but not against a co-defendant. *Webb v. Pell*, 3 Paige, 368.

1872. If the defendant answer as to any matters covered by his plea, he overrules the plea. *Bolton v. Gardner*, 3 Paige, 373.

1873. Where the defendant in his answer denies all knowledge of a fact charged in the bill, but admits his belief as to the fact charged, it is not necessary for him to deny any informa-

tion on the subject. *Davis and Brooks v. Mapes and others*, 2 Paige, 106.

1874. The complainant is entitled to an answer to every fact charged in the bill, the admission or proof of which is material to the relief sought, or is necessary to substantiate his proceedings and make them regular. *Ibid.*

1875. The defendant must answer as to all facts within his knowledge, or which he can ascertain from an inspection of books and papers in his possession or under his control. *Ibid.*

1876. If the further answer which is called for by the complainant's exceptions can be of no possible use to him, the first answer is sufficient, and the exceptions cannot be sustained. *Ibid.*

1877. As a general rule, if the charge in the bill embraces several particulars, the answer should be in the disjunctive, denying each particular, or admitting some and denying others, according to the fact. *Ibid.*

1878. The titles of further answers must correspond with the order under which they are put in. *The Bennington Iron Company and others v. Campbell and others*, 2 Paige, 160.

1879. It is improper to incorporate in an answer to an amended bill the whole matter of the former answer. *Ibid.*

1880. If the objection that the contract was not in writing does not appear upon the face of the bill, the defendant must either plead *that* fact in bar or insist upon it by way of defence in his answer. *Coxine v. Graham and Flecker*, 2 Paige, 177.

1881. An answer should regularly be signed and sworn to, but the signature and oath may be waived by the complainant, and the filing of a replication is evidence of such waiver. *The Fulton Bank v. Beach et al.* 2 Paige, 307.

1882. Although a *jurat* to an answer is not in the precise form prescribed by the rules, yet if the answer is retained by the complainant five months without objection, the informality cannot be urged by him as a ground for refusing a motion to dissolve an injunction; especially where the *jurat* would be deemed sufficient upon an indictment against the defendant for perjury. *Graham v. Stagg*, 2 Paige, 321.

1883. Where a plea to the bill has been overruled on the merits, the same matter cannot be set up in the answer, as a bar to the suit, without the special permission of the Court. *Thomson v. Townsend*, 2 Paige, 413.

1884. To a bill filed for relief against a usurious mortgage, charging the usurious acts as having been done by the defendant in person, he cannot answer that he has no knowledge, information, recollection, or belief, other than that derived from the facts stated in the complainant's bill, and therefore he neither denies or admits the same; but the defendant, although the facts are not charged to have accrued within seven years, must at least admit or deny the facts according to the best of his knowledge and belief. *Sloan v. Little*, 3 Paige, 103.

1885. Wherever the facts are charged in a bill as being the acts of the defendant, or within his own personal knowledge, he is bound to admit or deny the facts charged, either positively or according to his belief, whether they occurred

within seven years or at a greater distance of time. *Ibid.*

1886. And if the defendant never heard of or knew the facts charged, except as they are stated in the complainant's bill, he is not bound to admit or deny them, or to express any belief one way or the other. *Ibid.*

1887. Where a defendant is answering as to his own acts, or as to other matters either known to him or charged in the bill to be within his personal knowledge, he must answer the substance of each charge distinctly and particularly. *Utica Insurance Company v. Lynch*, 3 Paige, 210.

1888. If he has any information on the subject other than such as is derived from the bill, he must answer as to such information, and as to his belief or disbelief of the facts charged. *Ibid.*

1889. A defendant is not bound to answer any allegations in the complainant's bill which are not material to be answered. *Ibid.*

1890. Where the defendant has no knowledge or information as to any of the facts stated in the bill, he may deny, generally, all knowledge or information of the same, without answering as to each charge separately, and may put the allegations of the complainant in issue by the general traverse at the conclusion of his answer. *Ibid.*

1891. Where the defendant has neither knowledge nor information of the matters charged, except what is derived from the bill itself, he is not bound to express any belief one way or the other. *Ibid.*

1892. No particular form of words is necessary in an answer; it is sufficient, if it be not evasive, and if the substance is preserved. *Ibid.*

1893. As a general rule, if the defendant submits to answer the complainant's bill, he must answer fully. *Cuyler v. Bogert*, 3 Paige, 186.

1894. A purchaser for a valuable consideration, without notice, may, by an answer, object to a discovery which would destroy his title, provided he sets up this defence, and fully denies all the circumstances stated in the bill, which go to charge him with actual or constructive notice of the complainant's equity. *Ibid.*

1895. Where the defendant, by his answer, objects to the discovery of particular matters alleged in the bill, he cannot answer as to such matters in part without overruling his own objections. *Ibid.*

1896. It is not a sufficient answer to the matters charged in the bill, for the defendant to aver that he has no knowledge or information of the same, except what is derived from certain depositions taken previous to the filing of the bill; which depositions are not annexed to the answer, nor the substance thereof stated therein. *Ibid.*

1897. A defendant, in his answer, may object to the discovery of any matters charged in the bill which will subject him to a criminal prosecution, or to a forfeiture or penalty. *Livingston v. Harris*, 3 Paige, 538.

1898. The complainant may call for an answer on oath, not only to the main charges in

the bill, upon which his claim to relief is founded, but also as to matters of evidence and collateral facts stated in the bill, which are material in establishing the main charges, or in ascertaining the nature or kind of relief to which he is entitled. *Mechanic's Bank v. Levy*, 3 Paige, 606.

1899. Where a fact is stated in the bill by way of recital merely, without any interrogatory calling for an answer as to that fact, the defendant is not bound either to admit or deny the same. *Ibid.*

1900. If the defendant admits the main fact charged in the bill, it is unnecessary for him to answer as to other matters which are merely stated as evidence of that fact. *Ibid.*

1901. The defendant is not bound to answer an interrogatory, unless the same is founded upon some allegation or charge in the bill. It is sufficient, however, if the interrogatory is founded upon a statement in the bill which is inserted therein merely as evidence in support of the main charges. *Ibid.*

1902. Where a replication is filed, no statement in the answer not responsive to the bill can avail the defendant, unless it is established by proof. *Wakeman v. Grover*, 4 Paige, 23.

1903. A defendant may plead, answer, and demur to the same bill; but these several defences must each refer to, and in terms be put in as a defence to a separate and distinct part of the bill. *Leecraft v. Dempsey*, 4 Paige, 124.

1904. If an answer commences as an answer to the whole bill, it overrules a plea or demurrer to any particular part of the bill, although such part is not in fact answered. *Ibid.*

1905. If the matter of an answer is relevant, or can have any influence in the decision of the suit, either as to the subject-matter of the controversy, the particular relief to be given, or as to the costs, it is not impertinent. *Van Rensselaer v. Brice*, 4 Paige, 174.

1906. The defendant is bound to answer the charging part as well as the stating part of the bill; and his answer to the charging part, if responsive thereto, is evidence in his own favour, if an answer on oath has not been waived by the complainant. *Smith v. Smith*, 4 Paige, 368.

1907. Where an answer on oath is waived, the answer is not evidence in favour of the defendant for any purpose; but as a pleading, the complainant may avail himself of admissions and allegations contained therein, which establish the case made by his bill. *Bartlett v. Gade*, 4 Paige, 504.

1908. Where the defendant, who was insolvent, had recovered a judgment against the complainant in an action of slander, and the latter filed his bill to offset another judgment against the defendant, which had been assigned to the complainant by F., during the pendency of the slander suit; and the defendant, by his answer, after denying that the assignment was made absolutely and in good faith, and averring that it was made without consideration, and was merely colourable, proceeded to charge the complainant with having uttered the slanderous words for which the defendant's judgment was recovered, at the instigation of F., and to aid

him in a design of destroying the defendant's character under a promise of indemnity from F., and that F.'s judgment was assigned to the complainant in pursuance of such promise of indemnity; *held*, that these charges in the answer were not material to the defence, and were scandalous and impertinent. *Somers v. Turey*, 5 Paige, 54.

1909. A defendant cannot be allowed to introduce irrelevant matters into his answer, for the purpose of discrediting the witnesses, who, as he supposes, may be called by the complainant to sustain the suit. *Norton v. Wood*, 5 Paige, 260.

1910. In a bill or answer which is to be sworn to, if the fact which the party wishes to introduce as an averment is only derived from the information of another person who knows the fact, it is allowable, in pleading in this Court, to state the information, and to add an averment of the belief of the party that the information thus communicated to him is true. *Ibid*.

1911. In a suit for relief against a judgment at law, neither the judge's notes nor the case made and settled therefrom are legal or proper evidence to conclude the parties as to the facts which occurred, or were proved upon the trial of the cause, and they ought not to be referred to and made a part of the answer. The facts which occurred on the trial at law should be directly stated in the answer, leaving the truth of the allegations to be established by proof in the usual manner. *Ibid*.

1912. A repetition of the same allegations in different parts of the bill, or answer, renders one or the other of such allegations impertinent. *Ibid*.

1913. Where pertinent matter is so mixed up with that which is impertinent and irrelevant that they cannot be separated, the whole may be rejected as impertinent. *Ibid*.

1914. Material and necessary matter must be explicitly met in answer; but exceptions founded upon verbal criticism, slight defect, and omission of immaterial matter will be invariably disallowed and treated as vexatious. *Baggot v. Henry*, 1 Edw. 7.

1915. Difference in the mode of answering, between the bill filed for the discovery of property alleged to have been fraudulently assigned, and for the purpose of setting aside the trust deed, and a bill for an account and distribution: and see note (a) at the end of the case. *Cunningham v. Freeborn*, 1 Edw. 28.

1916. Upon exceptions taken to an answer to a bill of the first description for insufficiency, the question for the Court is, whether the defendant has sufficiently answered as to the consideration upon which the assignment was made, and as to the debts which it was intended to secure, and the particulars of the property assigned. *Ibid*.

1917. It is enough if (in such a case) the assignee sets forth the assignment, and shows the debtor can have no right to property in his hands until the trusts of the assignment are satisfied; without giving a more particular statement of the property than is shown by the assignment itself, if it be fair upon its face. *Ibid*.

1918. In a suit in equity, founded upon the original consideration of a sale, or upon the security given for purchase money, a defendant may set up in his answer a fraud or deceit in the sale, or a breach of warranty, and show a total or partial failure of consideration. It presents circuitry of action. *Lewis v. Wilson*, 1 Edw. 305.

1919. Therefore, where a draft was given upon the sale of certain merchandise, and by remissness it was not endorsed, and a bill was filed to compel payment or an endorsement, a defendant has a right to set up in answer the same matters of defence which he would have been entitled to make at law. Exceptions for impertinence overruled. *Ibid*.

1920. Where suspicious circumstances, gross fraud, and collusion are charged in a bill, the defendant will be held to a strict rule in answering. Not only his motives, but his designs, "unuttered thoughts" must be exposed. *Mechanic's Bank v. Lery*, 1 Edw. 316.

1921. A short sentence is not impertinent, although it contains no fact or material matter, and may only be inserted in answer from abundant caution. *Desplaces v. Gorla*, 1 Edw. 350.

1922. The practice of taking exceptions for impertinence to trivial matter is not to be encouraged. *Ibid*.

1923. A statement in an answer introduced to show the temper with which a bill is filed, and the oppressive course pursued by a complainant, is not impertinent; it may have an effect upon the costs. *Ibid*.

1924. Whatever is called for by the bill, or will be material to the defence with reference to the order or decree which may be made, is proper to be retained in an answer. *Ibid*.

1925. The principle, that a defendant who denies some substantial leading fact, which, if admitted, would entitle the plaintiff to relief, and who cannot be compelled to answer further until the truth of the fact is disposed of, applies only to a case of partnership accounts. And even then a general denial of the partnership will not avail, if the bill charges that it would appear by a discovery from the defendant; therefore, although a partnership in certain goods was denied, the defendant ought to have set forth at large certain letters, the bills of lading and invoice, as the means of better ascertaining whether the goods were partnership property. *Ibid*.

1926. If a bill against executors call specifically and particularly for accounts, in all their various details, a very voluminous schedule, containing a copy from the books of account, specifying each item of debit and credit, will not be impertinent. *It seems*, it would have been impertinent, if the bill had not thus called for it. *Scudder v. Bogert*, 1 Edw. 372.

1927. Copies of receipts taken by the defendants for moneys paid and charged in account, and making an immense schedule to an answer, are impertinent. *Ibid*.

1928. If, in answer to a divorce bill, a defendant (not the husband) insert matter tending to criminate the wife, or in palliation of the husband, it will be deemed impertinent. *Monroy v. Monroy*, 1 Edw. 382.

929. Although, as a general rule, a party must answer fully, yet he may accompany an admission or denial with explanations by way of avoidance; and if the complainant require further information, he must get it through the interrogatories or charging part of the bill. If he has omitted these, he cannot except. His course is to amend. *Whitney v. Belden*, 1 Edw. 386.

1930. Where a complainant files a judgment creditor bill, and charges the defendant "has" property, it is not sufficient for the latter to deny in general terms that he has any; he must answer whether he had property at the time the bill was filed. *Tyotter v. Bunce*, 1 Edw. 573.

F. Replication and issue.

1931. Where one of two defendants denies in his answer all knowledge of the facts alleged in the complainant's bill, the complainant, in order to give such defendant an opportunity to litigate his rights, must file a replication to his answer. *Elliot, Executor, v. Pell and others*, 1 Paige, 263.

1932. Where the complainant replies to a plea, he admits its sufficiency; and if the truth of the plea is established, the bill will be dismissed. *Dows and others v. M' Michael*, 2 Paige, 345.

1933. If the defendants, or either of them, deny the allegations in a bill of interpleader, or set up distinct facts in bar of the suit, the complainant must reply to the answer, and close the proofs in the usual manner, before he can bring his cause to a hearing. *The President, Directors, and Company of the City Bank v. Bangs and others*, 2 Paige, 570.

1934. But where the defendants admit the facts stated in the bill, and on which the right to file the bill of interpleader rests, and set up no new facts as against the complainant, or in bar of his suit, it seems to be sufficient for him to file a replication, and to set the cause down for a decree to interplead, without waiting until the proofs are taken as between the defendants. *Ibid.*

1935. A special replication to a plea filed without leave ordered to be stricken off. *Storms v. Storms*, 1 Edw. 358.

1936. The use of special replications has been discontinued, and if a complainant wants to avoid the effect of matter pleaded in bar, he must apply to amend the charging part of his bill. This charging part, containing the alleged pretences of a defendant and the complainant's denial of them, amounts virtually to a special replication. *Ibid.*

XLV. POWER.

See EXECUTORS AND ADMINISTRATORS, CHANCERY, xviii. 664. PRINCIPAL AND AGENT.

XLVI. PRACTICE.

- A. *Filing bill; exceptions to bill and process.*
- B. *Appearance.*
- C. *Removal of cause into the Circuit Court of the United States.*

D. *Motions, petitions, affidavits, notices, and orders.*

E. *Amending and dismissing the bill.*

F. *Taking the bill pro confesso.*

G. *Putting the plaintiff to his election.*

H. *Amending the answer; filing answer or a supplemental answer.*

I. *Exceptions to the answer.*

K. *Taking testimony; productions of books and papers; feigned issue, and other intermediate proceedings.*

L. *Hearing and rehearing.*

M. *Reference to a master; report and exceptions.*

N. *Decree.*

O. *Attachment.*

P. *Appeal from a vice-chancellor.*

R. *Bill of revivor.*

S. *Suing in forma pauperis.*

A. Filing bill; exceptions to bill and process.

1937. After appearance to an injunction bill, a copy is to be served on the defendant without delay; and if not done, the defendant may move to dissolve the injunction. *Ferguson v. Robinson*, 1 Hopk. 8.

1938. The neglect of the solicitor is the neglect of his client. *Ibid.*

1939. A writ of assistance is, in ordinary cases, the first and only process for giving possession of land, under an adjudication of this Court. *Valentine v. Teller*, 1 Hopk. 422.

1940. Notice of every application to the Court must be given to the opposite party, in case he has appeared, where the motion relates to any matter pending in Court, or where a final order is sought, orders for time and those of a like nature alone excepted; otherwise the applicant or petitioner will only be entitled to an order nisi. *Isnard v. Cazeaux*, 1 Paige, 39.

1941. And copies of every petition, affidavit, &c., upon which the motion is founded, must be served, together with the notice of the motion. *Ibid.*

1942. If an original bill is wholly defective, and there is no ground for proceeding upon it, it cannot be sustained by filing a supplemental bill, founded upon matters which have subsequently taken place. *Candler v. Pettit and others*, 1 Paige, 168.

1943. A suit cannot be brought in the name of a *feme covert* without her consent; and when brought with her consent, the *prochein ami* may be changed on her application, the person substituted giving security for the costs already incurred. *Fulton and others v. Roosevelt*, 1 Paige, 178.

1944. The *subpoena* for a better answer may be taken out immediately on filing the master's report, and may be served on the solicitor. *Richards v. Barlow and others*, 1 Paige, 323.

1945. The *subpoena* for costs must be served on the defendant in person, and the amount of costs, as ascertained on taxation, must be inserted therein. *Ibid.*

1946. It is not necessary to obtain leave to file a bill of review, where it is brought to correct errors apparent on the face of the record. *Webb and others v. Pell and others*, 1 Paige, 564.

1947. *Aliter*, where it is brought upon the discovery of new matter. *Ibid.*

1948. Where a *subpoena* was taken out upon a bill of review, and a *bona fide* attempt made to serve it within five years from the entry of the original decree; it was held to be a sufficient commencement of the suit, although the *subpoena* was not in fact served within the time allowed by law for appealing from the decree. *Ibid.*

1949. On filing a bill of review, a deposit must be made with the register of the same amount which is required on an appeal. *Ibid.*

1950. Where the solicitor for the complainant acted under a mistake as to the practice, he was allowed, after the commencement of the suit, to make the deposit *nunc pro tunc*. *Ibid.*

1951. In no case is the complainant in the original suit compelled to stay proceedings therein upon the filing of a cross bill, except by a special order of the Court. *White v. Buloid and others*, 2 Paige, 164.

1952. If the complainant in the cross bill wishes to stay proceedings in the original suit, the cross bill should be filed on oath, and a certificate of counsel should be obtained, stating that he believes a stay of proceedings in the original suit to be necessary for the attainment of justice in the cause, and that the cross bill is not intended for delay. *Ibid.*

1953. Notice of the application for an order to stay the proceedings in the original cause should be given to the adverse party. *Ibid.*

1954. It is not a matter of course to stay the proceedings in the original suit in any case, unless the defendant in the cross bill is in contempt for not answering. *Ibid.*

1955. If the cross bill is not filed before or at the time of answering in the original suit, the delay must be accounted for, or the proceedings will not be stayed. *Ibid.*

1956. It is not too late to file a cross bill after the proofs in the original suit are closed, if the complainant in the cross bill is willing to go to a hearing on bill and answer as to the cross suit. *Ibid.*

1957. If a defendant is absent from home, and no person can be found at his place of abode, a *subpoena* may be served at his store or place of business, by delivering the same to his clerk or servant. *Smith v. Parke*, 2 Paige, 298.

1958. In ordinary cases the defendant is not entitled to notice of the application for leave to file a supplemental bill. Notice of the motion is necessary only where the complainant asks for a preliminary injunction, or some other special relief, upon the matter of the supplemental bill, previous to the time for the appearance of the defendant. *Lawrence v. Bolton*, 3 Paige, 294.

1959. If a party to the original bill does not voluntarily appear to a supplemental bill or bill of revivor, the complainant must proceed by *subpoena* to obtain his appearance to the same. *Ibid.*

1960. Where the complainant, instead of taking out a *subpoena* on a supplemental bill, entered an order that the defendants answer the same within forty days, and the defendants thereupon applied for and obtained an order for

further time to answer; it was held, that they had waived the irregularity. *Ibid.*

1961. Upon a mere amendment of the complainant's bill, no new *subpoena* is necessary, except to bring in new defendants who are made parties by the amendment. *Ibid.*

1962. If the complainant in a mortgage case unnecessarily sets out the rights of the several defendants at length, his bill may be excepted to for impertinence; and if not excepted to, the extra costs occasioned by the insertion of such unnecessary statements in the bill will be disallowed on taxation. *Union Ins. Co. v. Van Rensselaer*, 4 Paige, 85.

1963. And where the complainant in such cases so misstates the rights of a defendant as to render it necessary for him to put in an answer to protect his rights, the complainant may be personally charged with the extra costs occasioned thereby. *Ibid.*

1964. A supplemental bill cannot be filed without a previous order of the Court giving permission; but such order may be granted on an *ex parte* application. *Eager and others v. Price and others*, 2 Paige, 333.

1965. Where an injunction is asked for on a supplemental bill, a copy of the bill is usually served on the party, if he has appeared in the cause, together with a notice of the application; and if the Court makes an order for the injunction, leave to file the bill is necessarily implied in such order. *Ibid.*

1966. On an *ex parte* application to file a supplemental bill, the Court only examines the question so far as to see that the privilege is not abused for the purposes of delay and vexation to the defendant. *Ibid.*

1967. A creditor's bill cannot be filed until after the return day of the execution issued upon the complainant's judgment, although the execution should be actually returned before that time. *Cusidy v. Meacham*, 3 Paige, 311.

1968. The complainant must state in his bill the issuing of the execution, the time it was returnable, and the actual return of the sheriff thereon. *Ibid.*

1969. The service of a *subpoena* upon a defendant in another state or country is irregular, and no proceedings can be founded thereon, unless the defendant voluntarily appears, or stipulates in writing to accept such service as regular. *Dunn v. Dunn*, 4 Paige, 495.

1970. Where an injunction is granted *ex parte* upon the filing of the bill, it is irregular for the complainant to serve the injunction upon the defendant, without serving him with a *subpoena* to appear and answer. But such irregularity is waived by the defendant's voluntarily appearing and answering the bill. *Parker v. Williams*, 4 Paige, 439.

1971. An injunction should, upon its face, contain sufficient to apprise the party upon whom it is served what he is restrained from doing, without the necessity of his resorting to the complainant's bill to ascertain what the injunction means. *Sullivan v. Judah*, 4 Paige, 444.

1972. Papers used upon an application for a writ of assistance and for other relief, where a decree had directed a reconveyance of an estate

and possession to be given, and which were refused. *Devauzene v. Devauzene*, 1 Edw. 272.

1973. Writs of *subpoena* and injunction can be served during the days of holding the election for charter officers. *Wheeler v. Bartlett*, 1 Edw. 323.

1974. Where a copy of a *subpoena* to appear and answer is, as to the return day and month, served in blank, it is not a good service, and proceedings under it will be set aside. *Arden v. Walden*, 1 Edw. 631.

1975. Copies of pleadings served on the adverse party should be perfect copies of the original pleadings on file, including the signature of counsel, the *jurat*, &c. *Littlejohn v. Munn*, 3 Paige, 280.

1976. A party has a right to presume that the pleading served on him is a correct copy of the one filed; and where the copy of an answer served contains neither the signature of solicitor or counsel, or if it has no *jurat* annexed, the complainant may apply to take the answer off the files for irregularity. *Ibid.*

1977. But where the answer actually filed was correct, the defendant was allowed to serve a perfect copy thereof, upon payment of the costs occasioned by the irregularity. *Ibid.*

1978. Where pleadings, depositions, reports, or decrees do not contain more than a single page, they do not come within the 95th rule, requiring them to be paged. *The People v. Elmer*, 3 Paige, 85.

1979. In a doubtful case the Court may direct notice of the application to be given to the defendants who have appeared. *Ibid.*

1980. In the Court of Chancery, the registers and clerks are not authorized to issue any process in blank, to be filled up by the solicitor; except process to appear and answer to bills, and process to compel the attendance of witnesses. *Merrill v. Townsend*, 5 Paige, 80.

1981. Process should be tested on the day on which it is sealed by the register or clerk in Chancery; and if not served before the return day, an *alias* should be procured on the filing of the same, with the sheriff's return; or new process may be obtained, upon the affidavit of the solicitor that the former process has not been used or executed. *Ibid.*

1982. The solicitor has no authority to alter the test of an execution in the Court of Chancery. *Ibid.*

1983. It is irregular to make any process returnable on Sunday. And when the complainant made his *subpoena* returnable on that day, and afterwards took out an attachment thereon against the defendant for not appearing, the Court set aside the attachment as irregular. *Gould v. Spencer*, 5 Paige, 541.

B. Appearance.

1984. If the complainant proceeds to compel an answer, he need not take an order for the defendant to appear, under the 115th general rule. *Brownson v. Reynolds*, 1 Hopk. 416.

1985. Where a bill is filed against husband and wife, the husband is bound to enter a joint appearance, and put in a joint answer for both. *Leavitt v. Cruger and wife*, 1 Paige, 421.

1986. But if the wife refuses to join in an

answer or a plea, the husband will be permitted to put in either separately. *Ibid.*

1987. The service of a *subpoena* upon the wife is only necessary where the proceeding is against her in respect to her separate estate. *Ibid.*

1988. An order for the appearance of a non-resident infant defendant must be obtained and published, or served, in the same manner as in the case of adult defendants. *The Ontario Bank v. Strong and others*, 2 Paige, 301.

1989. And if the infant does not appear by guardian within twenty days after the expiration of the time limited in the order, the complainant may apply to the Court to appoint a guardian *ad litem*, to appear and answer for such infant. *Ibid.*

1990. Where the Court of Chancery has jurisdiction of the subject-matter of the suit, if a defendant who is beyond the limits of the state consents to waive the irregularity of the service of the *subpoena* by a voluntary appearance, or by an agreement in writing to accept the service of the *subpoena* upon him as regular, he cannot afterwards object to the regularity of proceedings against him founded upon such service. *Dunn v. Dunn*, 4 Paige, 425.

1991. A party who appears in person, and who is not an officer of the Court, has no right to costs. *Verplank v. Mercantile Insurance Company*, 1 Edw. 46.

1992. A non-resident defendant is entitled to the whole of the time which is fixed upon by the statute wherein to appear, notwithstanding a copy of the order for his appearance be personally served upon him, pursuant to the 124th sec. 2 R. S. 186. The service only saves advertising. *Cornell v. Watson*, 1 Edw. 82.

C. Removal of a cause into the Circuit Court of the United States.

1993. A suit in a state Court will not be removed into the Circuit Court of the United States, unless the latter Court has jurisdiction of the subject-matter of the suit, and has the power of doing substantial justice between the parties. *Rogers v. Rogers*, 1 Paige, 183.

1994. Where N. R. commenced suits at law in the Superior Court of the city of New York against H. R., and H. R. filed a bill in Chancery to obtain an injunction restraining the proceedings at law; it was held, that the suit in Chancery could not be removed into the Circuit Court of the United States, inasmuch as such removal would leave H. R. without remedy; the Circuit Court of the United States having no power to restrain the proceedings at law. *Ibid.*

D. Motions, petitions, affidavits, notices, and orders.

1995. Petitions must be sworn to. *Anonymous*, 1 Hopk. 101.

1996. On a motion to dissolve an injunction upon answer, exceptions filed are no objection to the motion, unless they affect the answer in points relating to the grounds of the injunction. *Doe v. Roe*, 1 Hopk. 276.

1997. Although a petition to sell infants' real estate sets forth their inability to procure

security, and a master's certificate is to the same effect, yet the Court cannot dispense with sureties. *In the matter of Thorne*, 1 Edw. 507.

1998. Notice of motion, under the 53d general rule, may be four days, one exclusive and the other inclusive. *Irvings v. Humphreys*, 1 Hopk. 364.

1999. Issue directed in a testamentary cause under special circumstances, to try the sanity of the testator. *Vanderheyden v. Reid*, 1 Hopk. 408.

2000. Where an order had been obtained, on an *ex parte* application, that the complainant be admitted to prosecute in *forma pauperis*, the same was vacated with costs. *Isard v. Czeasz*, 1 Paige, 39.

2001. A motion to dismiss a bill for want of prosecution can only be made where there are other defendants against whom the cause is not in readiness for a hearing, in consequence of the neglect of the complainant to expedite the proceedings against them. *Whitney v. The Mayor, &c. of New York*, 1 Paige, 548.

2002. Where both parties have the right to bring the cause to a hearing, a motion to dismiss the bill for want of prosecution is irregular. *Ibid.*

2003. Where only a part of the money secured by a mortgage is due, and the bill is taken as confessed, the reference to ascertain whether the premises can be sold in parcels is a common order. *Everitt v. Huffman and others*, 1 Paige, 648.

2004. An order to examine a complainant as to any payment received by him, where the defendant is either absent, concealed, or a non-resident, is a common order; but an order for leave to examine a complainant in his own favour can only be obtained on a special application. *Southwick v. Van Bussum and others*, 1 Paige, 668.

2005. After both the original and cross suits are at issue, or in a situation to be heard, the complainant in the cross suit may have an order that they be heard together. *White v. Buloid and others*, 2 Paige, 164.

2006. But the delay of the complainant in the cross suit will not be permitted to delay the hearing of the original cause. *Ibid.*

2007. Where an order to stay the proceedings in a cause pending in this Court is proper, the party must apply to the Court upon petition. *Dyckman and M'Chain v. Kernochan and others*, 2 Paige, 26.

2008. An affidavit to set aside proceedings for irregularity should be made either by the party or his solicitor. The affidavit of the counsel is not sufficient, unless an excuse is shown for dispensing with the affidavit of the party or the solicitor. *The People v. Spalding*, 2 Paige, 326.

2009. An affidavit may be sworn to before any proper officer, although he is counsel for one of the parties, or is a partner of the solicitor in the cause. *Ibid.*

2010. The rule prohibiting the solicitor or attorney of the party from taking the affidavit is confined to the solicitor or attorney on record. *Ibid.*

2011. The provision of the revised statutes

prohibiting a master from acting as such in a cause in which he is counsel, does not extend to the mere taking of an affidavit. *Ibid.*

2012. After a general order for further time to answer, the defendant cannot put in a demurrer, except on special leave by the Court; and if he put in such demurrer without leave, it will be ordered to be taken off the files for irregularity. *Burrall v. Rainclaus*, 2 Paige, 331.

2013. The 125th rule does not authorize the vice-chancellor or master to grant a chamber order, giving the defendant further time to demur. To obtain such an order, the application must be made to the Court, and the order must be entered with the register or clerk. *Ibid.*

2014. If the complainant *prima facie* would be chargeable with costs if the suit was decided against him at the hearing, the Court will not, on a motion to dismiss the bill, examine the whole merits of the cause merely to ascertain whether there are any equitable circumstances which might excuse him from the payment of costs. *Hammerley v. Barker*, 2 Paige, 372.

2015. The rule requiring an affidavit of regularity on bills taken as confessed applies to mortgage cases only. The affidavit is proper, however, in other cases of bills taken as confessed under the revised statutes, to enable the Court to ascertain whether the defendants have been personally served with process, or whether they are proceeded against as absentees; and a short affidavit for this purpose, not exceeding two or three folios, may be allowed on taxation, if it has been actually made and used. *Rogers v. Rogers*, 2 Paige, 460.

2016. A defendant may give notice of an application to dissolve an injunction immediately upon the service of his answer, without waiting the ten days allowed to the complainant to except; but if exceptions are duly served within the time prescribed by the rule, it will be an answer to the application. *Satterlee v. Barge*, 3 Paige, 142.

2017. But a party is not at liberty to give notice of an application to dissolve the injunction for a time which is within the ten days allowed, by the 38th rule, for excepting to the answer. *Ibid.*

2018. A special order entered under the direction of the Court, although in violation of one of its standing rules, cannot be disregarded by the parties, or the officers of the Court, so long as it remains in force. *Osgood v. Joslin*, 3 Paige, 195.

2019. A party is not compelled to disregard an order of course, which has been irregularly entered by the adverse party, and which the latter refuses to waive; but he may apply to the Court to discharge the same, and in the mean time may suspend proceedings which are inconsistent with such order. *Ibid.*

2020. Where the defendant neglects to appear and oppose a motion for an order directing him to deliver certain articles to the master, he cannot afterwards resist a motion for an attachment against him for his non-compliance with the order, by showing that such order ought not to have been made. *Higbee v. Edgerton*, 2 Paige, 253.

2021. His proper course, where the order is

improper, or has been obtained through inadvertence or mistake, is to apply to open the motion, or to vacate the order. *Ibid.*

2022. Where a default has been entered contrary to a verbal agreement entered into between the solicitors for the respective parties, the Court cannot take such agreement into consideration in deciding upon the regularity of the default, if the objection is insisted upon, that the agreement was not in writing, or in conformity to the 121st rule. *Wager v. Stickie*, 3 Paige, 407.

2023. The Court will, however, take into consideration the fact that the solicitor relied upon such verbal agreement, when that fact is set up merely as an excuse, to enable the party to have the default set aside upon the merits, and upon the usual terms. *Ibid.*

2024. Upon a motion made to dissolve an injunction upon bill and answer, every allegation positively sworn to in the bill, and not substantially denied in the answer upon the defendant's own knowledge, must be taken as true. *Grimstone v. Carter*, 3 Paige, 421.

2025. If an order overruling a demurrer is not appealed from within the time limited for appealing from an interlocutory order, that order must stand, and the defendant must pay the costs of the argument of the demurrer, although he succeeds in an appeal from the final decree involving the same question which was raised by the demurrer. *Teal v. Woodworth*, 3 Paige, 470.

2026. Where the defendant has obtained an order to dissolve an injunction by the default of the adverse party, after due notice of the application, the Court will not vacate such order merely to enable the complainant to interpose a technical objection which does not go to the merits of the application. *Champlin v. Mayor, &c. of New York*, 3 Paige, 573.

2027. Neither party can have any benefit from a decision of the Court, until the order upon such decision is drawn up and perfected; and where it is material to either party, the caption or date should be made to correspond with the time of the actual entry of the order. *Whitney v. Beljen*, 4 Paige, 140.

2028. Where the party who is entitled to draw up the order enters it as of the time the decision of the Court was pronounced, he cannot afterwards object that it was not actually entered at that time. *Ibid.*

2029. If the party entitled to draw up the order on a decision of the Court neglects to do so for twenty-four hours after the decision is pronounced, any other party interested in the entry of the order may apply to the register or assistant register, at the place where the decision was made, to draw up and enter the order in conformity with the decision of the Court. *Ibid.*

2030. Where an order is special in its provisions, the party entitled to draw up the same should submit a copy thereof to the adverse party, that he may propose amendments thereto, before it is submitted to the register to be settled and entered. *Ibid.*

2031. Where a sum of money is paid into Court while the suit is pending before the chan-

cellor, and the cause is subsequently referred to a vice-chancellor to hear and decide the same, the party in whose favour the decision is made must, for the purpose of obtaining the fund, obtain an order from the chancellor, that the regular or assistant register pay over the fund, in conformity with the decree of the vice-chancellor. *City Bank v. Bangs*, 4 Paige, 285.

2032. Where a party seeks to set aside the proceedings of his adversary for an irregularity which is merely technical, he must make his application for that purpose the first opportunity. *Hart v. Small*, 4 Paige, 288.

2033. If a solicitor, after notice of a irregularity, takes any steps in the cause, or lies by and suffers his adversary to proceed therein, under a belief that his proceedings are regular, the Court will not interfere to correct the irregularity, if it is merely technical. *Ibid.*

2034. If the complainant makes oath that a discovery from the defendant is necessary, he is entitled to an order that the defendant answer the bill, or be attached; and the Court will not, in any stage of the suit, inquire whether a discovery is necessary. But if the complainant abuses the power to compel an answer from the defendant under the 24th rule, the Court will take it into consideration in deciding the question as to the general costs of the cause. *Stafford v. Brown*, 4 Paige, 360.

2035. The order that the defendant answer in forty days, or that he be attached, should be served on his solicitor, when he has appeared by a solicitor; and it is not necessary that it should be served on the defendant personally. *Ibid.*

2036. An application to set aside proceedings for a mere technical irregularity must be made the first opportunity. *Parker v. Williams*, 4 Paige, 439.

2037. Where exceptions to the answer for insufficiency are put in within the time prescribed by the 38th rule, a motion to dissolve the injunction upon bill and answer cannot be made until the expiration of the time for procuring the master's report on the exceptions. *Ibid.*

2038. An order or decree by consent cannot be modified or varied in an essential part, without the assent of both parties to the same. *Leitch v. Cumpston*, 4 Paige, 476.

2039. Although an order or decree has been entered by consent, the Court, upon the application of either party, may give such further directions as shall become necessary for the purpose of carrying the order or decree into effect; according to the spirit of intent. *Ibid.*

2040. Where an order was made by the Court, directing a party to deposit a paper in his possession with the master forthwith, held, that the order must be complied with immediately, or within a reasonable time after notice of the order; and that the party was not entitled to twenty-four hours after service of the order to comply therewith. *The People v. Brower*, 4 Paige, 405.

2041. Where the complainant waives an answer on oath, and relies upon the affidavits of third persons annexed to his bill, to sustain an injunction in opposition to the defendant's answer on oath denying the equity of the bill;

the defendant, upon an application to dissolve the injunction, may also read the affidavits of third persons in support of his answer. *Haight v. Case*, 4 Paige, 525.

2042. If an answer on oath has not been waived as to one of the defendants, the complainants, upon an application to dissolve the injunction, cannot be permitted to read the affidavits annexed to the bill for the purpose of contradicting the positive answer of that defendant on oath. *Ibid.*

2043. Where an infant defendant, upon coming of age, neglects to appear by a solicitor in the place of his guardian, the complainant must apply for an order that he appoint a solicitor; as in cases of the death or removal of the solicitor of a party. *Campbell v. Bowne*, 5 Paige, 34.

2044. Where a party is relieved against an order or decree regularly obtained against him by the adverse party, upon certain terms or conditions specified by the chancellor in his decision, it is the duty of the party applying for such relief to draw up and enter the order granting the same without any unreasonable delay; and if he neglects to do so, the adverse party, upon filing an affidavit showing such neglect, and that the terms upon which the Court directed such relief to be granted have not been complied with, may proceed to carry into effect the original order or decree, without entering an order upon the application to be relieved against it. *Hoffman v. Tredwell*, 5 Paige, 82.

2045. A chamber order, under the 125th rule, allowing further time to file exceptions to an answer, does not extend the time within which exceptions must be filed to prevent an application to dissolve an injunction. *Wakeman v. Gillespy*, 5 Paige, 112.

2046. An extension of the time required by the 38th rule, within which exceptions must be filed to prevent an application for the dissolution of an injunction, can only be obtained upon a special application to the Court, and on due notice to the adverse party. *Ibid.*

2047. Where a bill is filed against a solicitor or other officer of the Court, if he neglects to enter his appearance, he will not be entitled to service of notices and other papers in the cause upon him or his agent. But after he has appeared in the suit, he will be entitled to notice of the hearing, and of the subsequent proceedings, although he permits the bill to be taken as confessed against him. *Wells v. Cruger*, 5 Paige, 164.

2048. It is not a matter of course in the Court of Chancery to set aside an order taking the bill as confessed merely upon an affidavit of merits, even before a decree in the cause, and where a final decree has been entered; if the defendant applies to set aside his default and open the decree, he must, upon the motion, produce the answer he proposes to put in, so that the Court may be satisfied as to the sufficiency thereof, and be apprized of the nature of the defence. *Ibid.*

2049. Where a party obtains an order for relief from a regular proceeding against him in the suit, upon certain terms to be performed by him as a condition of such relief, he must seek the aid of a solicitor of the adverse party, and perform,

or offer to comply with such terms, or he will lose the benefit of the order. *Ibid.*

2050. An *ex parte* order made under the immediate direction of the Court, although irregularly obtained, cannot be treated by the adverse party as a nullity; and a common order, entered contrary to such special order, and treating it as a nullity, is itself irregular. But if the Court afterwards sets aside the special order, leaving the common order in full force, the common order will be made regular, by relation as of the time when it was entered. *Sudwell v. Palmer*, 5 Paige, 166.

2051. Upon a motion to dissolve an injunction, if the complainant relies upon affidavits annexed to the bill, under the thirty-seventh rule of the Court of Chancery, to contradict the answer, the defendant has a right to read affidavits, or other evidence, in support of his answer. *Brown v. Hoff*, 5 Paige, 235.

2052. It is competent for the Court, upon the mere examination of an affidavit or other paper read before it, on a motion, to order scandalous or impertinent matter contained in such affidavit or paper to be expunged without a reference to a master, and to charge the proper party with the costs. *Powell v. Kane*, 5 Paige, 265.

2053. A party who makes an affidavit to oppose a motion is only authorized to state the facts, and it is scandalous and impertinent to draw inferences or state arguments in the affidavit reflecting upon the character or impeaching the motives of the adverse party or his solicitor. *Ibid.*

2054. The adverse party is entitled to notice of taxation of costs, for the same length of time before the day appointed for taxation as is required for the service of a master's summons by the 100th rule of the Court; and a taxation of the costs without such notice is irregular, and may be set aside. *Hoffman v. Skinner*, 5 Paige, 526.

2055. Where the solicitors reside in the same city or town, two days' notice of the taxation of costs must be given. *Ibid.*

2056. Whether the complainant can file a supplemental bill, or an original bill in the name of a supplemental suit, by a new solicitor, without an order to change the former solicitor on record? *Querc. M'Laren v. Charrier*, 5 Paige, 530.

2057. Testimony taken in the cause cannot be read upon a motion to dissolve an injunction. *Bush v. Vandenberg*, 1 Edw. 27.

2058. If there is a fair and reasonable question for the Court to decide, namely, whether a contract may not be specifically executed, an injunction granted will be retained till the hearing. *Ibid.*

2059. The Court can exercise a sound discretion in relation to the amount of security required from general guardians under the 148th rule; and therefore may, in cases where the property of infants is very extensive, allow the security to be given in a fair sum only. But in such cases, the order permitting the same must contain sufficient provisions, as to the periods and mode of accounting, &c., as will protect the estate and the income of the property. In *the matter of Hedges*, 1 Edw. 57.

2060. In a suit for a nullity of marriage on account of another wife living, the affidavit of regularity of the proceedings is the only affidavit necessary; the explanation as to cohabitation, connivance, or time, mentioned in the 165th rule, does not apply. *Borradaile v. Borradaile*, 1 Edw. 40.

2061. A chamber order of a vice-chancellor, allowing further time to answer under the 125th rule, need not be entered in the clerk's office. The service of a copy of such chamber order is sufficient. *Byrne v. Romaine*, 1 Edw. 318.

E. Amending and dismissing the bill.

2062. Where an answer admits a valid and subsisting agreement, though variant from that set forth in the bill, the complainant will be allowed to amend his bill as to the terms of the contract, so as to conform it to the admission of the answer upon such terms as to costs as the chancellor may direct. *Wood v. Young*, 5 Wend. 620.

2063. The filing of a replication, after notice given of a motion to dismiss the bill for want thereof, is good cause against the motion; but it will only be allowed on payment of costs. *Grinould v. Inman*, 1 Hopk. 86.

2064. Negotiations between the parties are not sufficient to excuse a default in the regular proceedings of the Court, without the express agreement. *Ibid.*

2065. Amendments to a bill, when allowed, are always considered as forming part of the original bill. They refer to the time of filing the bill, and the defendant cannot be required to answer any thing which has arisen since that time. *Hurd and Sewall v. Everett*, 1 Paige, 124.

2066. Facts which existed before the filing of the original bill should be inserted therein by way of amendment. *Candler v. Pettit*, 1 Paige, 142.

2067. But if the original bill was sufficient for one kind of relief, and facts afterwards occur which entitle the complainant to other or more extensive relief, he may have such relief by setting out the new matter in a supplemental bill. *Ibid.*

2068. An original bill cannot be amended by incorporating therein any thing which arose subsequent to the commencement of the suit. This should be stated in a supplemental bill. *Reford and others v. Howlett and West*, 1 Paige, 200.

2069. All matters which arose previous to the filing of the original bill, although discovered afterwards, should be introduced into the same by way of amendment, if the cause is in a stage in which an amendment is allowable. *Ibid.*

2070. If the cause has progressed so far that an amendment cannot be made, or if material facts have occurred subsequent to the commencement of the suit, the Court will give the complainant leave to file a supplemental bill. *Ibid.*

2071. And where such leave is given, the Court will permit other matters to be introduced into the supplemental bill which might have

been incorporated in the original bill by way of amendment. *Ibid.*

2072. If the complainant wishes to compel the defendant to state the new matter set up by way of defence with more particularity, he should amend his bill and state the matter by way of pretences, and call upon the defendant to answer as to the particulars. *Spencer v. Van Duzen and Jones*, 1 Paige, 555.

2073. Under the general rule of the Court allowing the complainant to amend upon an insufficient answer, he cannot amend by leaving out the name of the defendant, and thus discontinue the suit against him without costs. *Chase v. Dunham and others*, 1 Paige, 572.

2074. A bill cannot be amended by inserting therein facts known to the complainant at the time of filing the bill, unless some excuse is given for the omission. *Whitmarsh v. Campbell and others*, 2 Paige, 67.

2075. When amendments are made to a bill, if the complainant files or serves an entire new bill, incorporating therein as well the original matter as the amendments, he must distinctly designate the amendments in the new bill. *The Bennington Iron Company and others v. Campbell and others*, 2 Paige, 159.

2076. If the amendments are not noted upon the new bill, the defendant's solicitor may refuse to receive the copy of the bill which includes such amendments. *Ibid.*

2077. The defendant's solicitor should either decline receiving the amended bill where the amendments are not noted upon it, or he should ascertain what the amendments are, and answer the amendments only. *Ibid.*

2078. But if this course is not pursued by the defendant, the complainant can only avail himself of the objection by excepting to the answer for impertinence. *Ibid.*

2079. The provision of the revised statutes authorizing the representatives of a deceased complainant to amend, relates only to such amendments as the deceased party might have made if living; and does not authorize the insertion of any matters, by way of amendment, which have arisen since the filing of the original bill. *Douglass v. Sherman*, 2 Paige, 358.

2080. If, by the complainant's own act or procurement, the object of the suit is defeated, he cannot be permitted to discontinue without costs. *Hammersley and Dyett v. Barker and Chapman*, 2 Paige, 372.

2081. The provision in the revised statutes which exempts the party dismissing his own bill from costs in certain cases, only extends to those cases where *prima facie* he would not be chargeable with costs on a decree dismissing the bill at the hearing, as in the case of suits by executors in right of their testators. *Ibid.*

2082. Where a party is entitled to amend his bill as of course under the rules of the Court, he may enter an order of course to amend, and it is not necessary to set out the amendments in the order. *Hunt v. Holland*, 3 Paige, 78.

2083. If a bill which has been sworn to is amended under the 190th rule, and, as a new engrossment of the bill and amendments, is filed, the defendant is entitled to a copy of the bill

as originally filed, as well as of the amended bill, unless the amendments are particularly designated in the copy of the letter which is served. *Ibid.*

2084. Upon the allowance of a demurrer upon the ground of a mere formal defect in the bill, the complainant will be permitted to amend his bill upon terms if it appears that his counsel acted under a mistake. *McEwain v. Willis*, 3 Paige, 505.

2085. Where there is a mere formal defect in a bill, if the defendant does not make the objection by demurrer, or insist thereon in his answer, he will be precluded from raising the objection at the hearing. *Ibid.*

2086. Where the complainant obtains an order for leave to amend his bill upon payment of the costs of the defendant's answer, and the costs of opposing the application, he is not compelled to pay the costs of the answer if he elects to proceed without making the proposed amendment; but he must in that case pay the costs of opposing the application to amend. *Van Ness v. Cantine*, 4 Paige, 55.

2087. Where a bill is dismissed at the hearing for want of proper parties, it should be without prejudice to the right or claim of the complainants in any future litigation. *Van Epps v. Van Dusen*, 4 Paige, 65.

2088. Where the defendant, either by plea, demurrer, or answer, distinctly takes the objection of the want of proper parties, the complainant should at once amend his bill by bringing in the necessary parties before any further proceedings are had in the cause. *Ibid.*

2089. And if he neglects to do this, it will be in the discretion of the Court at the hearing either to permit the cause to stand over upon payment of costs, to enable the complainant to bring the proper parties before the Court, or to dismiss the bill with costs. *Ibid.*

2090. If the defendant does not take the objection of the want of proper parties until the hearing, the complainant will be allowed a reasonable time to bring the proper parties before the Court, either by an amendment of the original bill or by a supplemental bill; unless it should appear that the necessary parties were omitted in the bill by the fraudulent or wilful omission, or the bad faith of the complainant. *Ibid.*

2091. Where a cause is at issue as to one of the defendants, by the filing of a replication to his answer, and the complainant has neglected to proceed against the other parties, so that such defendant cannot proceed to examine witnesses and close the proofs, he may move to dismiss the complainant's bill for want of prosecution. *Vermilyea v. Odell*, 4 Paige, 131.

2092. Where the complainant files a replication to the answer after he is apprized of the necessity of an amendment of his bill, he precludes himself from making such amendment. *Ibid.*

2093. In a case where a special application to the Court for leave to make the amendment is necessary, the complainant should obtain an order to extend the time for filing the replication until after the decision of the Court upon the application to amend. *Ibid.*

2094. After the defendant has put in his answer on oath to a bill in the usual form, the complainant cannot amend his bill, and include in such amendments a waiver for the answer of the defendant on oath, so as to deprive him of the benefit of his answer to the amendments, so far as it may be responsible to the bill. *Burres v. Looker*, 4 Paige, 227.

2095. Where the defendant has answered the bill on oath before any waiver, if the complainant is unwilling to reply upon an answer on oath to the amendments, his only remedy is to dismiss his bill, and commence a new suit, in which suit he can waive an answer on oath. *Ibid.*

2096. Where a bill has been filed for a particular purpose, and has been sworn to for the purpose of obtaining an injunction, which injunction has been dissolved upon the coming in of an answer denying the whole equity of the bill, the Court will not allow an amendment, the effect of which will be to change the whole character of the litigation. *Lloyd v. Brewster*, 4 Paige, 537.

2097. A party, under the privilege of amending, is not to introduce matter which would constitute a new bill. *Verplank v. Mercantile Insurance Company*, 1 Edw. 46.

2098. Amendments can only be granted when the bill is defective in parties, or in prayer for relief, or in the omission or mistake of a fact or circumstance connected with the substance, but not forming the substance itself, nor repugnant thereto. The latter part of this principle applies to all pleadings in equity. *Ibid.*

2099. Amendments to pleadings which are sworn to are allowed with great caution. *Ibid.*

2100. Material and substantive matter, and statements, allegations, and charges, which have been sworn to, cannot be stricken out; they are to be corrected by the addition of explanatory or supplemental statements, or an additional answer. This regulation holds as well in ordinary sworn bills as in those where injunctions are outstanding. *Ibid.*

2101. It seems, that (in a sworn bill) the complainants, and not their solicitor, ought to have sworn to the truth of proposed amendments; also, that the information upon which the new matter was founded had come to their knowledge since the filing of the original bill. *Ibid.*

2102. If the complainant greatly delays urging on the other defendants, the one who stands ready to enter a rule to produce witnesses may move to have the bill dismissed as to him, for want of prosecution. *Vermilyea v. Odell*, 1 Edw. 817.

2103. Where the service of the subpoena has been upon the wife or servant of the defendant at his house or place of business, the complainant must proceed, by attachment or other process, to compel an appearance, before the bill can be taken as confessed. *Sawyer v. Sawyer*, 3 Paige, 263.

2104. According to the practice of this Court, a bill cannot be taken as confessed upon a substituted service. *Ibid.*

F. Taking the bill pro confesso.

2104*. Where a bill against several defendants makes an admission favourable to some, against whom the bill is taken pro confesso, but the admission is unfavourable as to others, who appear and take issue and disprove it, it must yet be taken as true in respect to those who did not answer. *Puttison v. Hull*, 9 Cow. 747.

2105. A bill answered in part may be taken

as confessed in other parts not answered. *Wasson v. Livingston*, 1 Hopk. 595.

G. Putting the plaintiff to his election.

2106. Where a suit was commenced in this Court in consequence of an inequitable defence interposed to a suit at law for the same cause of action, the Court refused to compel the complainant to elect in which suit he would proceed, as long as no attempt was made to prosecute the suit at law. *Thompson, Executor, v. Graham and others*, 1 Paige, 452.

2107. It is undoubtedly true; that at law, the tender of the deed, or offer to perform specifically after suit brought for non-performance, would not affect or take away the right to proceed with the suit; but the commencement of an action is not *ipso facto* a deprivation of right to go into equity for leave to perform the contract. *Brush v. Vanderbergh*, 1 Edw. 21.

H. Amending the answer; filing answer, or a supplemental answer.

2108. A defendant will not be permitted to open the proofs in a cause in Chancery for the purpose of re-examining a witness as to a usurious contract, and to amend the answer so as to embrace a statement of such contract, unless he pay, or offer to pay, the money actually lent, with the legal interest thereof. *Beach v. Fulton Bank, in error*, 3 Wend. 573.

2109. After answer filed, the defendant obtained an exemption of his person from imprisonment, under the act; *held*, that he may file a supplemental answer to present this fact, and that he ought to state and avail himself of the exemption at the earliest day. *Anonymous*, 1 Hopk. 87.

2110. Where, in a suit against twelve defendants, an answer was put in and filed, purporting to be the joint and several answers of all, but was in fact not signed or sworn to by one of the defendants; and after a replication was filed, proofs taken, the cause set down for hearing, a motion for re-examination of witnesses, a denial of the same, an appeal from such decision, and a motion for leave to file a supplemental answer, a separate answer was filed, without leave of the Court, by the defendant who had not joined in the original answer, setting forth substantially the same defence, asked to be allowed to set forth in the supplemental answer; *it was held*, that the separate answer was filed irregularly, and it was directed to be taken off the files of the Court. *The Fulton Bank v. Beach and others*, 2 Paige, 307.

2111. *It seems*, that where the parties agree that an answer may be put in without oath or signature, it is of course for the Court so to order. *Ibid*.

2112. The defendant in a suit in Chancery is not entitled to a bill of particulars of the complainant's demand previous to putting in his answer; the forms of the Court rendering a bill of particulars unnecessary. *Cornell v. Boatswink*, 3 Paige, 160.

2113. A bill can only be taken as confessed upon a personal service of the *subpoena*, except in the case of proceedings under the revised statutes against absent defendants, or where

the Court directs the appearance of the defendant to be entered upon his being brought into Court upon a *habeas corpus*, or other process. *Sawyer v. Sawyer*, 3 Paige, 263.

2114. Where a defendant conforms to the 191st rule, and consents to be personally examined, the complainant cannot compel an answer, although he may have entered an order requiring the defendant to answer or be attached. *Merrill v. Blackwell*, 1 Edw. 466.

I. Exceptions to the answer.

2115. In a case where the proceedings had been various and perplexed, and the accounts were intricate, though the complainants filed some exceptions, which were in effect repetitions of others, yet as they tended to present the subject in a different point of view, the Court would not disallow them as repetitions, or as argumentative. *Methodist Church v. Jaques*, 1 Hopk. 453.

2116. And in the peculiar circumstances of this case, the Court would not disallow an exception which was long and systematic, and so framed as to present, in effect, the substance of such a report as the complainants contended ought to have been made. *Ibid*.

2117. But the allowance of this exception was so limited as to become a direction to the master no further than the principles of it were adopted by the particular directions now given. *Ibid*.

2118. Where exceptions to an answer have been allowed, and the defendant, on the application of the adverse party, puts in an entire new answer to the bill, the complainant has no right to treat it as an answer to the exceptions only; but if the new answer is insufficient, he must file new exceptions. *Hall v. Wood*, 1 Paige, 404.

2119. If the defendant in his answer sets up a distinct matter by way of avoidance, which is not called for by the bill, the same, if irrelevant or immaterial, may be excepted to for impertinence, or the complainant may have the benefit of the objection upon the hearing. *Spencer v. Van Duzen and Jones*, 1 Paige, 555.

2120. Exceptions for scandal or impertinence, under the 53d rule, must point out the exceptionable matter with sufficient certainty to enable the adverse party and the officers of the Court to ascertain what particular parts of the pleadings or proceedings are to be stricken out if the exceptions are allowed. *Whitmarsh v. Campbell*, 1 Paige, 645.

2121. If several parts of the answer or other proceedings are deemed impertinent, each part should form the subject of a separate exception. *Ibid*.

2122. Where exceptions to a former answer and amendments to the bill are answered together, if neither the exceptions nor the amendments are fully answered, the complainant may file new exceptions founded on the new matter introduced into the bill by way of amendment. *The Bennington Iron Company and others v. Campbell and others*, 2 Paige, 160.

2123. If the new exceptions are not submitted to by the defendant within the eight days allowed for that purpose, the answer should, by

2167. But where it is referred to a master to superintend the production or delivery, or the party is directed to produce and deliver on oath before a master, or under the direction of a master, all parties interested in the production or delivery may examine such party as to the fact whether the order of the Court has been fully and fairly complied with. *Ibid.*

2168. In such cases the master should allow a reasonable time to inspect the books and papers delivered, and to prepare interrogatories for the examination of the parties, if necessary. *Ibid.*

2169. A party who cannot be presumed to have positive knowledge of the fact may swear according to his information and belief; and if it be not denied by the adverse party, who can swear positively upon the subject, it will be deemed as admitted. *Attorney-general v. Bank of Columbia*, 1 Paige, 511.

2170. The master's certificate as to the insufficiency of an examination of a party on interrogatories does not require an order of confirmation. *Case and wife v. Abeel*, 1 Paige, 630.

2171. If the master's certificate is not excepted to within eight days after notice of the filing thereof, it becomes absolute of course. *Ibid.*

2172. The practice in relation to exceptions to answers for insufficiency must be adopted and pursued, as far as the same is applicable to exceptions to the examination of a party. *Ibid.*

2173. If the examination is reported insufficient, the master may allow new interrogatories to be added by the adverse party, and the exceptions and new interrogatories must be answered together. *Ibid.*

2174. If the examination is certified by the master to be sufficient, the adverse party cannot re-examine the defendant to the same point without permission of the Court. *Ibid.*

2175. Where notice of the order to produce witnesses has been served upon the agent of the solicitor for the opposite party, each party has double the usual time to produce his witnesses. *James v. Berry and others*, 1 Paige, 647.

2176. If the adverse party wishes to shorten the time, he must obtain an order upon his part, and serve notice thereof upon the opposite solicitor, either personally or by leaving the same at his office. *Ibid.*

2177. Where a party is examined as a witness between other parties in the suit, he is always examined subject to all just exceptions; and if he is interested, the objection may be taken at the hearing, although it has not been previously made. *The Mohawk Bank v. Atwater*, 2 Paige, 54.

2178. But in ordinary cases the objection to a witness must be made at the time of his examination, or before the closing of the proofs in the cause. *Ibid.*

2179. Where a bill filed by a corporation aggregate to foreclose a mortgage is taken as confessed against an absentee, and a reference is made to a master to take proof of the facts and circumstances stated in the bill, it is proper, under the revised statutes, (2 R. L. 137, sec. 138.) to examine the officers of the corporation as to

the payments which ought to be credited on the mortgage. *The Ontario Bank v. Strong and others*, 2 Paige, 301.

2180. Where an order to produce witnesses had been extended by the agreement of the parties; it was held, that an order to extend the time to produce witnesses, obtained upon an application *ex parte* to the chancellor, after the time limited in the first order had expired, but before the expiration of the time as enlarged by the agreement, was regular. *Fitch and another v. Hazletyne and another*, 2 Paige, 416.

2181. But where the agreement to enlarge the time to produce witnesses contained a stipulation that the defendant should have fifteen days to produce testimony on his part, after the examination of a witness named on the part of the complainant had closed; it was held, that this fact should have been stated in the affidavit presented to the chancellor upon the *ex parte* application, in order that a similar provision might have been inserted in the order granted by him; it was also held, that the affidavit should have stated that the time to produce witnesses had been once extended by stipulation, that the chancellor might have taken this circumstance into consideration in deciding upon the propriety of granting further time. *Ibid.*

2182. Where a feigned issue is awarded, the Court may impose such restrictions upon the parties as will prevent all fraud or surprise upon the trial of such issue. *Spithorp and others v. Comstock and others*, 2 Paige, 482.

2183. Where the Court of Chancery directs an action to be brought, although particular directions are given, the parties in other respects are left to their legal rights; and the application for a new trial in such a case must be made to the Court of law in which the action is brought, and subject to the rules which govern such Court in other cases. *Ibid.*

2184. Where an issue is directed, it is to inform the conscience of the chancellor, and the application for a new trial must be made to this Court. *Ibid.*

2185. The Court of Chancery will not direct a new trial of a feigned issue merely on the ground that improper testimony was received on the trial, or that the judge rejected that which was proper, if, on the whole facts and circumstances, the chancellor is satisfied the result ought not to have been different, if such testimony had been rejected in the one case or received in the other. *Ibid.*

2186. Where one of the defendants in a bill of interpleader by his answer makes a claim against the complainant beyond the amount admitted to be due and paid into Court, and which is not claimed by the other defendants, he will be permitted to proceed at law to establish his right to that part of his demand which is not in controversy with the other defendants. *The President, Directors, and Company of the City Bank v. Bangs and others*, 2 Paige, 570.

2187. Previous to a final hearing of a cause, the Court only orders the production of books and papers upon two principles; security pending the litigation, and discovery or inspection for the purposes of the suit. *Watts v. Lawrence*, 3 Paige, 159.

2188. Where, by a mistake of the solicitor for the defendant, which the counsel of the opposite party was aware of, but did not attempt to correct, the names of the defendant's witnesses were not furnished at the commencement of the examination of the complainant's witnesses before the examiner, the Court, upon an affidavit of the solicitor explaining the mistake, and upon a general affidavit of the defendant, under the advice of counsel, as to the materiality of the witnesses, permitted the witnesses to be examined, saving to the complainant the right to examine other witnesses on his part. *Gaul v. Miller*, 3 Paige, 192.

2189. Where the attention of the party is called to the provisions of the 83d rule at the commencement of the examination, or he has a full knowledge of the existence of that rule, and notwithstanding he neglects to furnish the list of his witnesses, he will not be allowed to examine his witnesses, without stating on oath the substance of what he expects to prove by their testimony, in addition to the excuse for not having complied with the rule. *Ibid*.

2190. Where one of the parties has obtained a special order enlarging the time to produce witnesses beyond the forty days limited by the original order, the 86th rule does not preclude the adverse party from applying *ex parte* for a similar order, at any time before the time limited by the extended order has actually expired. *Osgood v. Joslin*, 3 Paige, 195.

2191. If one party obtains an order to extend the time to produce witnesses, it operates as an enlargement of the forty day rule; and both parties have a right to take testimony during the extended time. *Ibid*.

2192. If an objection to the competency of a witness is made, by the party against whom he is called, as soon as the interest of the witness is discovered, and the examiner overrules the objection, or reviews the question, or the party calling the witness insists upon proceeding against the decision of the examiner, the adverse party may cross-examine the witness, and then move to suppress his deposition; or he may object to the competency of such witness on the hearing. *Rogers v. Dibble*, 3 Paige, 238.

2193. Where the objection to the competency of a witness does not appear upon the pleadings, or upon the testimony of witnesses previously examined, the party against whom the witness is called may raise the objection whenever the facts on which it is founded are disclosed by the witness. *Ibid*.

2194. He may also at the commencement of the examination raise the objection that the witness is interested, and afterwards establish the fact of interest by other witnesses. *Ibid*.

2195. Where the defendants in a suit have conflicting claims arising out of the subject-matter of the suit, as to which the decree will be conclusive, they should be permitted to take proof, to establish the facts as against each other, as well as between themselves and the complainant. *Webb v. Fell*, 3 Paige, 368.

2196. Issues should be directed only in those cases where there is a want of evidence, or where the evidence is contradictory, or so nearly balanced as to render an open and rigid cross-

examination of the witnesses before a jury necessary. *Thwmsend v. Graves*, 3 Paige, 453.

2197. A fact charged in the bill, but which is neither admitted nor denied by the answer, cannot avail the complainant unless it is established by proof. *Brockway v. Copp*, 3 Paige, 539.

2198. One witness is sufficient to sustain an allegation in the bill which is only denied by the defendant according to his recollection and belief. *Town v. Needham*, 3 Paige, 546.

2199. Where the interest of a witness is of such a nature that it can be released, and the adverse party suffers him to be examined without objection, and makes no objection to his testimony before the proofs in the cause are closed, it will be too late to object to the competency of the witness upon the hearing of the cause. *Ibid*.

2200. Proofs cannot regularly be taken as to one of the defendants in a cause, to whose answer a replication has been filed, until the answers of the other defendants have been put in, or the bill has been taken as confessed against them. *Vermilhey v. Odell*, 4 Paige, 121.

2201. The right which is given to a party, by the 85th rule of the Court of Chancery, to proceed with the examination notwithstanding the decision of the examiner that the witness is incompetent, or that the interrogatory is irrelevant and improper, cannot properly be exercised except in cases where the solicitor or counsel of such party has reason to doubt the correctness of the decision; and if the solicitor or counsel who is conducting the examination insists upon proceeding, in a case where there is no reasonable ground for doubt as to the correctness of the decision, he will be personally charged with the costs of the application to the Court to suppress the deposition, or to expunge the objectionable testimony. *Scott v. Young*, 4 Paige, 542.

2202. The examiner has no right to reserve the question upon an objection to the competency of a witness, or to the propriety of an interrogatory, where he has no rational doubt as to the validity of the objection. It is his duty in such cases to decide the question, and to have the solicitor or counsel conducting the examination to proceed with the illegal testimony at the peril of being personally charged with costs. *Ibid*.

2203. An affidavit may be sworn to before a state senator, he being *ex officio* a judge of the Court for the Correction of Errors, which is a Court of record. *Craig v. Briggs*, 4 Paige, 548.

2204. It is not a sufficient compliance with the rule requiring the objection to the competency of a witness to be made before his testimony is closed, for the counsel for the adverse party merely to reserve to himself the right to object to the testimony of the witness thereafter, on the ground of interest; but the objection to his testimony must be distinctly made, and the nature of his interest stated, so that the objection may be noted or passed upon by the examiner. *Gregory v. Dodge*, 4 Paige, 557.

2205. Where the interest of a witness appears from his own examination, the objection to his competency on that ground should be made before his examination is closed. *Ibid*.

2206. But if the adverse party intends to prove the witness incompetent by other testimony, the objection to the witness should be made before his examination is closed, and the nature of his interest, or the other ground of objection to his competency, should be distinctly stated, that they may be noted by the examiner; and it will then be sufficient, if the party making the objection proves the facts stated as the grounds thereof at any time before the proofs in the cause are closed. *Ibid.*

2207. Where original papers are used in opposition to an application which is denied, the party using such papers must file them, so that the adverse party may obtain copies thereof. *Bloodgood v. Clark*, 4 Paige, 575.

2208. Where the complainant amends his bill after answer put in, it is irregular to file a replication to the first answer before the time for answering the amendments has expired, although the complainant waives the necessity of an answer to the amendment. *Richardson v. Richardson*, 5 Paige, 58.

2209. Although the answer is served on the agent of the complainant's solicitor, double the usual time must elapse before such answer will be deemed sufficient; yet the replication must be filed within ten days after the answer is considered as perfect, in the same manner as if such service had been on the solicitor in person. *Kane v. Van Vranken*, 5 Paige, 62.

2210. Where the defendants are not jointly interested in respect to the claim made against them by the bill, the complainant may waive an answer on oath as to some of them, and not as to the others. *Bulkley v. Van Wyck*, 5 Paige, 536.

2211. In ordinary cases, the complainant cannot be compelled, upon motion, to submit his books, or other documentary evidence in his possession, to the inspection of the defendant, to enable the latter to answer the bill and make his defence in the suit. But if the complainant, upon request, refuses to permit the defendant to inspect such books or documents, he cannot afterwards object that the answer is insufficient in not stating their contents. And where the books or documents of the complainant are material for the defendant's defence of the suit, the defendant must file a cross bill against the complainant for the discovery of them. *Kelly v. Echford*, 5 Paige, 548.

2212. The rule is different as to partnership books and papers, to the inspection of which both parties have an equal right, but which are in the hands of one of the copartners, or of his assignees or representatives. In such a case, upon the application of either party, and in any stage of the suit, the adverse party will be compelled to deposit the partnership books and papers which are in his possession, or under his control, into the hands of an officer of the Court, for the inspection of the party making such application, and that such party may take copies thereof, if necessary. *Ibid.*

2213. In Courts of law it is a matter of course to compel a party who has the possession of a document belonging equally to both, to produce the same for the inspection of his adversary for the purpose of the suit. *Ibid.*

2214. Where a defendant admits that he is primarily liable to the complainant for the payment of the demand for which the suit is brought, he may be examined, either by the complainant or his co-defendants, as a witness in the cause. *Bradley v. Root*, 5 Paige, 632.

2215. Where the complainant examines a witness against the original defendant in the cause, and it appeared upon such examination that the witness was primarily liable for the payment of part of the claim for which the suit was brought, and he was thereupon made a defendant by a supplemental bill, and suffered such bill to be taken as confessed against him; held, that the complainant was not precluded from having a decree against the defendant who had thus been examined as a witness before he was a party to the suit. *Ibid.*

2216. If a complainant examines a defendant, who is primarily liable for the payment of the demand for which the suit is brought, as a witness against a co-defendant, who is only secondarily liable, he cannot have a decree against either of such defendants upon that part of the case to which he examined one of them as a witness. *Ibid.*

2217. The rule that a complainant cannot have a decree against a defendant whom he has examined as a witness in the cause, does not apply to the case of a mere formal defendant, as an executor or trustee, against whom no personal decree is sought, and who has no personal interest in the question as to which he is examined as a witness against his co-defendants, nor to the case of a defendant, who, by his answer, admits his own liability, or who suffers the bill to be taken as confessed against him. *Ibid.*

2218. The testimony of the witness is complete, so far as the party calling him is concerned, where the direct examination is finished and signed by the witness; but the party calling him is bound to keep the witness before the examiner a sufficient length of time afterwards to enable the adverse party to complete the cross-examination, or the deposition may be suppressed. *Trustees of Watertown v. Cowen*, 5 Paige, 516.

2219. Where a commission to examine witnesses has not been returned, it will be necessary to make an application to the Court to extend the time for closing the proofs; otherwise they can be closed, as in ordinary cases. *Earnett v. Pardoe*, 1 Edw. 11.

2220. A witness who demurs to a question put to him in the examiner's office cannot bring the matter before the Court. It is for the party who puts the question to do so; and if he does not, no one else ought or can. *Mowatt v. Graham*, 1 Edw. 13.

2221. The rules which formerly governed Courts of law in granting new trials, upon the ground of testimony improperly admitted or rejected, has never been adopted in equity. *Mulock v. Mulock*, 1 Edw. 14.

2222. The object of a feigned issue in this Court is to satisfy the mind of the equity judge upon matter of fact; and the object is attained when his conscience is satisfied that at the trial justice has been substantially done. *Ibid.*

2223. If, from the whole case, there is sufficient to show the verdict was substantially right, a new trial will not be granted. *Ibid.*

2224. Chancery will often grant a second, and sometimes a third, fourth, and even a fifth trial of a feigned issue, in cases where a Court of law would not disturb a first verdict. *Patterson v. Jackson*, 1 Edw. 96.

2225. *It seems*, where a feigned issue is awarded to try a suggested forgery in a receipt held by a complainant, the defendants are bound by the same rules of evidence as if the party was upon his trial under an indictment for forgery. *Ibid.*

2226. A person made a party to a suit after testimony taken cannot be affected by such proof. *Jenkins v. Bibbee*, 1 Edw. 377.

2227. *It seems*, that where a question of fraud depends, not upon the answer and the testimony of one witness, but upon facts and circumstances disclosed by the pleadings and proofs on both sides, all of which, taken together, still leave the point in doubt, the defendant has a right to read his answer on a feigned issue. At any rate, it is a fair matter of discretion to give him the benefit of evidence before the jury as fully as it exists upon the pleadings and proofs. It would follow that the bill should be read, with a view to the better understanding of the answer. *Sturtevant v. Waterbury*, 1 Edw. 442.

2228. Where conveyances had been decreed valid, the grantors were allowed the liberty to read the answers of the grantees on an issue, in order to show the motives for purchasing; provided the opposite party attempted to issue the conveyances on the trial. *Ibid.*

2229. A defendant may require security for costs, at any stage of a suit, from a non-resident complainant, who resides out of the jurisdiction at the commencement of the suit, and continues so. *Burges v. Gregory*, 1 Edw. 449.

2230. One defendant cannot enter a rule to produce witnesses until the cause is in as forward a state as to the other defendants. *Vermilyea v. Odell*, 1 Edw. 617.

2231. Copies of direct interrogatories to be put to witnesses under a joint commission are to be served by each party upon the other simultaneously. *Brush v. Vanderberg*, 1 Edw. 619.

L. Hearing and rehearing.

2232. Where an answer to a bill filed is responsive to the bill, and within the discovery sought, it is legal evidence in all cases. *Woodcock v. Bennett*, 1 Cow. 711.

2233. And this, whether it is a denial of some fact alleged by the complainant, or sets up a fact by way of avoidance merely. *Ibid.*

2234. Where the complainant in Chancery omits to reply, and sets down the cause for hearing on bill and answer, the latter will be taken as conclusive proof of the facts which it sets up by way of defence. *Dale v. McEvers*, 3 Cow. 118.

2235. If the complainant mean to question the truth of the answer, he should reply, and give the defendant an opportunity to take his proofs. *Ibid.*

2236. Where the owner of an equity of redemption filed her bill against an assignee of the mortgagee, to have it delivered up and cancelled, on the ground that it was paid, and that she had recovered in an ejectment against the assignee upon the point of payment; and the assignee answered the bill, and proofs were taken, and the cause brought to a hearing; when it was discovered that the mortgagee had assigned the mortgage conditionally; and that since the bill filed, the mortgage had been redelivered to him for the violation of the condition; and he was thereupon brought in and made a party upon a supplemental bill; upon which he answered both the original and supplemental bills at large, denying payment of the mortgage; to which the plaintiff put in a general replication, and brought the cause to a hearing without taking any proofs, as between her and the mortgagee; *held*, that the facts set up in the answer of the mortgagee must be taken, on the hearing, as true; and that he was not affected by the proofs taken between the original parties, but should have been allowed to prove the truth of his answer. *Hopkins v. M'Laren*, 4 Cow. 667.

2237. *Held*, also, that the recovery in ejectment was not conclusive against him. *Ibid.*

2238. An answer to a bill in Chancery, charging fraud, responsive to the bill denying the charge, and uncontradicted by evidence, rebuts the idea of fraud. *Murray v. Blatchford*, 1 Wend. 583.

2239. An answer in Chancery, responsive to and fully denying a material allegation in a bill, will prevail, unless it be disproved by more than one witness. *Stafford v. Bryan*, 3 Wend. 539.

2240. An answer in Chancery, although responsive to a bill, if impeached in material facts by the proofs in the cause, is, like all other evidence, entitled to only diminished credit. *Forsyth v. Clark*, 3 Wend. 637.

2241. On a bill to redeem stock, alleging that the same had been pledged for \$500, *it was held*, that an answer that the stock was pledged for \$800 in addition to the \$500 alleged in the bill, was responsive to the bill, and did not set up a new and distinct matter, in avoidance of the equity admitted by the answer, and that the answer must prevail against the evidence of a single witness, unsupported by others, and not corroborated by circumstances. *Dunham v. Jackson*, 6 Wend. 92.

2242. Where a bill in Chancery was filed by a party to be relieved from the payment of a note of \$5000, alleged to have been given in renewal of a loan previously made to the complainant, and there was no proof to support the allegation other than what was found in the answer of the defendant; and in that it was averred that the note in question was taken for a further loan, over and above the previous loan, and that the whole sum for which the note in question was given was advanced by the defendant; *it was held*, by a majority of the Court, that inasmuch as the answer in this respect was responsive to the bill, it was evidence for the defendant, and the complainant, being concluded by it, was not entitled to relief. *Jackson v. Hart*, 11 Wend. 343.

2243. *It, however*, appearing that the former

loan had been made upon the hypothecation of stock, and that the defendant, although cautioned against relying upon the personal responsibility of the complainant, had, according to the answer, made a subsequent loan to the complainant of so large a sum as \$5000, without taking any security therefor, and without even reserving interest in the note taken, the chief justice (and a large minority of the Court voted with him) was of opinion that the answer was not conclusive upon the complainant, and that on the contrary thereof, under the account given of the transaction by the defendant, and the absence of proof to support such account, the complainant was entitled to relief. *Ibid.*

2244. A rehearing under the 70th rule of the Court is of course. No notice of the petition is necessary; nor will the Court give an order to stay proceedings, as the rehearing stays them of course. *Harrison v. Hull*, 1 Hopk. 112.

2245. It is the practice of the Court to order deeds and papers contested as false and fraudulent, to be brought into Court for inspection. *Ibid.*

2246. Bill of discovery and an account, among other things, of moneys received of R. The answer stated in substance, that the moneys received of R. were paid over by the defendant, but did not specify the amount, which amount was subsequently proved by R.; held, that upon taking the account before a master, this allegation of the defendant is such an answer to the inquiries of the bill as must be received, there being no opposing testimony. *Methodist Church v. Jaques*, 1 Hopk. 453.

2247. But in relation to other items, where the statements of the defendant's answer were vague and general, he was not allowed to discharge himself by such answer; the receipt of the money appearing by other testimony. *Ibid.*

2248. Upon the answer of the officers or agents of a corporation, no decree for relief can be founded either as against them or the corporation. *Vermilya v. The Fulton Bank and others*, 1 Hopk. 37.

2249. After putting in their answer, they may be sworn as witnesses on the part of the complainant, and the corporation will have the benefit of their cross-examination. *Ibid.*

2250. If the complainant wishes to prove any fact on the hearing not admitted by the answer, he must file a replication to the answer. *Mills and Minton v. Pittman*, 1 Paige, 490.

2251. Where the fact to be proved is matter of record, the complainant, after filing his replication, may give notice of his intention to produce the record, or an exemplification thereof, at the hearing, and then obtain his order to produce witnesses and close the proofs in the usual manner. *Ibid.*

2252. Where a deposit is made upon obtaining an injunction, by way of security for costs, the right to the money cannot be decided until the final hearing of the cause on the merits. *Leggitt v. Dubois and Walton*, 1 Paige, 574.

2253. The defendant is not entitled to the deposit immediately upon the dissolution of the injunction on bill and answer. *Ibid.*

2254. Where the answer of the defendant is responsive to the bill, it is evidence in his

favour, and is conclusive, unless disproved by more than one witness. *Stofford v. Bryan*, 1 Paige, 239.

2255. A rehearing of a cause is not a matter of course, except in the cases provided for by the rules of the Court. *Land v. Wickham*, 1 Paige, 256.

2256. In other cases a rehearing rests in the discretion of the chancellor. *Ibid.*

2257. Where a decree of one chancellor is reversed by his successor in office, a rehearing will be granted by a third chancellor on causes shown. *Ibid.*

2258. If a motion for rehearing is made for delay, it will be refused. *Ibid.*

2259. Where, upon the hearing of a cause, the counsel for the defendants abandoned the defence, after hearing the opening argument in behalf of the complainants, the Court refused to grant a rehearing upon the ordinary certificate of counsel. *De Carters and others v. La Forge and others*, 1 Paige, 574.

2260. To obtain a rehearing under such circumstances, the defendant will be required to show a violation of duty on the part of their counsel, or that he had clearly mistaken either the law or the facts. *Ibid.*

2261. Where one of two defendants was examined as a witness for the complainant, subject to all just exceptions, and his testimony upon the hearing was rejected upon the ground of interest, and a final decree has been made in the cause, a rehearing will not be granted to enable the complainant to release the interest of the witness, and to re-examine him. *Dunham v. Winans and Dunham*, 2 Paige, 24.

2262. After a decree in the cause, it requires a very special case to justify the Court in opening the proofs, even to establish a new fact which a party has neglected through inadvertence to prove. *Ibid.*

2263. A new trial or rehearing is never granted to enable a party to obtain cumulative testimony, or for the purpose of contradicting witnesses examined by the adverse party. *Ibid.*

2264. If a cross bill is taken as confessed, it may be used in evidence against the complainant in the original suit on the hearing, and will have the same effect as if he admitted the same facts in his answer. *White v. Buloid and others*, 2 Paige, 164.

2265. If a supplemental bill is unnecessarily or improperly filed, it may be dismissed at the hearing, although the defendant obtains a decree on the original bill. *Eager and others v. Price and others*, 2 Paige, 334.

2266. If a plea is overruled as false, the complainant will not lose the benefit of an answer if a discovery is necessary; but he may have an order to examine the defendant on interrogatories before a master, as to the discoveries sought by the bill. *Dows and others v. M'Almichael*, 2 Paige, 345.

2267. If at the hearing the plea is not found to be true, it will be overruled as false, and the complainant will be entitled to a decree as on a bill taken as confessed. *Ibid.*

2268. If the whole ground of the suit has been removed by the death of the complainant, the Court will not hear an argument merely

to determine a question of costs. *Johnson v. Thomas*, 2 Paige, 377.

2269. The Court will not hear a cause merely to decide a claim for costs, although the parties compromise the suit, reserving the question of costs for the decision of the Court. *Stewart and others v. Ellice*, 2 Paige, 604.

2270. Where a question which has been decided by an interlocutory decision or order, as upon a demurrer, comes again directly before the Court upon the final hearing, and is necessarily involved in the decision and decree which is then made, the Appellate Court, upon an appeal from such final decree, must review the decision upon that question, if it was raised by the appellant's counsel on the final hearing in the Court below. *Teal v. Woodworth*, 3 Paige, 470.

2271. Where the complainant sets up an agreement in his bill which would be invalid by the statute of frauds if not in writing, and the defendant by his answer denies the agreement, it is not necessary for him to insist upon the statute as a bar; but the complainant, at the hearing, must establish the agreement by written evidence. *Ontario Bank v. Root*, 3 Paige, 478.

2272. If a defendant puts in his answer, and goes to hearing, without objecting to the jurisdiction of the Court, on the ground that the complainant has a perfect remedy at law, it is too late to make that objection at the hearing. *Le Roy v. Platt*, 4 Paige, 77.

2273. Where an irregularity has occurred previous to the reference of the cause to a vice-chancellor to hear and decide the same, so that the cause was not in fact in readiness for a hearing, the vice-chancellor is not authorized to hear the application to set aside the proceedings for the irregularity; but the application must be made to the chancellor to vacate the order of reference, and to correct the previous irregularity. *Manhattan Company v. Evertson*, 4 Paige, 276.

2274. The objection of a misjoinder of parties, complainants, should be taken either by demurrer or in the answer of the defendant; it is too late to urge a formal objection of this kind for the first time at the hearing. *Trustees of Watertown v. Owen*, 4 Paige, 510.

2275. To enable a party to read documentary evidence at the hearing, under the provisions of the 75th rule, it is not necessary that notice of his intention to do so should have been given to the adverse party ten days before the time limited in the order to produce proofs expired; but it is sufficient if the notice is given ten days previous to the actual entry of the order to close the proofs. *Kellogg v. Wood*, 4 Paige, 578.

2276. Where the *jurat* to the answer is defective, and the defendant has leave to amend by adding a proper *jurat* to the answer on file, the amendment is not complete until a copy of the amended *jurat* is served on the complainant's solicitor, who has thirty days thereafter to put in his replication. *Taylor v. Bogert*, 5 Paige, 33.

2277. Where a written agreement, set out in the bill, was admitted by the answer of one defendant, but was not admitted by the other

defendants who claimed through him; and the complainant's counsel, under a misapprehension of the law, closed the proofs, and brought the cause to a hearing without making formal proof of the written agreement; and the objection being taken at the hearing, that the agreement should have been proved as against those defendants who had not admitted its execution; *held*, that the Court might suspend the argument, and give the complainant an opportunity to prove the agreement in the usual way before an examiner. *Desplaces v. Gorie*, 5 Paige, 252.

2278. Where an answer on oath is not waived by the complainant in his bill, and there is no *jurat* to the copy of the answer served, if the complainant files a replication, and goes to a hearing without objection, the irregularity is waived; and he cannot at the hearing deprive the defendant of the benefit of the answer, so far as it is responsive to the bill, by objection to the want of a *jurat* to the copy of the answer as served. *Reed v. Warner*, 5 Paige, 650.

2279. The question of delay in the performance of a contract, and acquiescence in the delay, can only be properly determined at the hearing of a cause, and not on a motion. *Brush v. Vandenberg*, 1 Edw. 21.

2280. Where a cause is set down for hearing upon bill and answer, no evidence can be gone into. In this case it was asked that certain receipts might be proved at the hearing, which was refused. *De Peyster v. Coldon*, 1 Edw. 63.

2281. Where a guardian has joint rights under a will with an infant, and the latter is made a joint complainant with him, and sues by such guardian as a next friend, the Court will not sustain an objection, taken at the hearing, that such infant ought to have been made a defendant, unless it clearly appears that the suit is adverse to her interest. *Bowen v. Idley*, 1 Edw. 148.

2282. Matter of fact in an answer, which is not within the discovery sought, but set up in avoidance, must be proved, or made out by circumstances, before a defendant can have the benefit of it. *Altwater v. Fowler*, 1 Edw. 417.

2283. Where an answer is positive, no decree can be made against it upon the testimony of a single witness. If, however, there are circumstances which strengthen the witness and entitle him to great credit, this forms an exception. In weighing circumstances, equal credit is to be given to each, and it is to be forgotten that one is a disinterested witness. *Sturtevant v. Waterbury*, 1 Edw. 442.

M. Reference to a master's report, and exceptions.

2284. Exceptions to an answer being referred to a master, it is not necessary for the defendant who has argued the exceptions to attend again before the master, and make objections on the summons to hear the report. This case forms an exception to the general rule, according to which, a party intending to except must state his objections on hearing the draft of the report. *Mackie v. Cairns*, 1 Hopk. 9.

2285. On taking exceptions to a master's report, the party excepting is not bound either to make a deposit or to set down the excep-

tions to be argued; either party may set them down. No deposits in this Court, except by express rule. *Stafford v. Rogers*, 1 Hopk. 98.

2286. Under the act of the 17th April, 1823, parties and their counsel have a right to be present at the examination of witnesses, and to cross-examine in all cases; and this as well upon commissions issued to examine witnesses out of the state as in other cases. *Steer v. Steer*, 1 Hopk. 369.

2287. On exceptions, the master was ordered to return the testimony, and the case being complex, the Court would not make any special order as to the costs of it. *Irvine v. Humphreys*, 1 Hopk. 364.

2288. In suits against a guardian, he is not compellable to produce before the master his books of accounts, containing entries of his private concerns. *Clarkson v. De Peyster*, 1 Hopk. 424.

2289. By a decision in error the defendant, I. D. J., was to be allowed for the sums paid for the support of Mrs. J., his wife, for several years; *held*, that though the burden of the proof rests on the defendant, yet it must be reasonable proof, according to the circumstances of the case. Actual vouchers for such expenses are not to be required. Much may be left to reasonable presumption; and general evidence of what must be the expenses of a family in like circumstances may form, to a great extent, the criterion. *Methodist Church v. Jaques*, 1 Hopk. 453.

2290. A party examined before a master, by order of Court, on the matters in reference, has a right to give every explanation in relation to the matters inquired about; but he is not thereby made a witness for himself as to other and distinct matters. *Armstrong v. Wood*, 1 Hopk. 453.

2291. But the master having received the defendant's testimony at large, and being now out of office, and that testimony having had an extensive influence upon the report, a new reference was directed. *Ibid.*

2292. Upon a bill taken as confessed, and an order of reference thereupon to a master, such allegations of the bill as are distinct and positive are to be taken as true, without proof. *Williams v. Curwin*, 1 Hopk. 471.

2293. And such allegations as are indefinite, and such demands of the complainant as are uncertain, must be established by proofs. *Ibid.*

2294. So demands which, from their nature or the course of the Court, require an examination of details, must be made out by evidence, to be produced by the complainant. *Ibid.*

2295. Where several exceptions are taken to an answer, and allowed by the master, a single exception to the report, insisting upon the sufficiency of the answer generally, cannot be sustained, if any of the exceptions to the answer are well taken. *Candler v. Pettit*, 1 Paige, 427.

2296. Exceptions to an answer are always referred in the first instance to a master. *Byington v. Wood*, 1 Paige, 145.

2297. If either party neglects to appear before the master and argue the exceptions, he will not afterwards be permitted to bring them

before the Court by exceptions to the master's report. *Ibid.*

2298. No exceptions can be taken to a master's report which are not founded upon objections distinctly taken before the master. *Ibid.*

2299. In case of a reference to state an account, the objections to the report are taken and argued after the draft of the report is prepared. *Ibid.*

2300. In such cases objections may be taken by a party who has not previously appeared before the master; but he cannot introduce any new matter in evidence to support such objections. *Ibid.*

2301. Where there is one general exception to the master's report, embracing all the exceptions allowed by him, and the master, in allowing the exceptions, was right as to any of them, this general exception to the master's report will be overruled. *Noble and others v. Wilson and others*, 1 Paige, 164.

2302. Where the reference is upon the new exceptions alone, the master cannot inquire whether the old exceptions were fully answered, or whether any part of the original bill to which the old exceptions did not relate was answered by the first answer of the defendant. *Bennington Iron Company v. Campbell*, 2 Paige, 160.

2303. If the new exceptions clearly relate to the original bill, and not to the amendments thereto, the defendant may move to take them from the files for irregularity; or if he has doubts on the subject, he may urge the objection before the master on the reference. *Ibid.*

2304. Where the reference on such exceptions has been proceeded in, if they do not relate to the amendments, the exceptions will be permitted to remain on the files; but the master's report allowing the new exceptions will be overruled. *Ibid.*

2305. Where the defendants in a suit are not personally served with process, and do not appear, a reference must be made to a master to take proof of the facts and circumstances stated in the bill before a decree can be made. *Amyer v. Gault and M. Nemara*, 2 Paige, 264.

2306. Where the master reported an answer insufficient, and upon exceptions to his report the same was confirmed by default, and a second answer was referred to the master upon the old exceptions; *held*, that the defendants were precluded from objecting that the original exceptions were not well taken. *Eager v. Firwall and Price*, 2 Paige, 369.

2307. On a reference to a master to settle the rights of the defendants in a bill of interpleader as between themselves, the Court will give them the benefit of a discovery, as against each other, if they or either of them desire it. *The President, Directors, and Company of the City Bank v. Bangs and others*, 2 Paige, 570.

2308. Where a complainant seeks to recover an unliquidated account against the defendant, upon a general allegation of indebtedness, without any specification of the items of the account, the Court at the hearing will not go into the items, but will refer it to a master to take the accounts between the parties; on which refer

ence the defendant will be permitted to make any legal or equitable defence which he may have to the several items of the account. *Cornell v. Bostwick*, 3 Paige, 160.

2309. Where it is referred to a master to examine and report as to particular facts, or as to any other matter, it is his duty to draw the conclusions from the evidence before him, and to report such conclusions only; and it is irregular and improper to set forth the evidence in his report, without the special direction of the Court. *In the matter of Hemiup*, 3 Paige, 305.

2310. Where the master incorporates the testimony into his report without the special direction of the Court, although it is done upon the solicitation of counsel, he will not be allowed for it on the taxation of his costs. *Ibid.*

2311. If the conclusion which the master is required to draw is a question of law, and not a mere legal presumption of a fact, he is permitted, in the exercise of a sound discretion and without an order for that purpose, to make a special report submitting the legal question to the decision of the Court. *Ibid.*

2312. Upon a special report, the master should not report the evidence, but he should draw all the conclusions of fact, as in a special verdict, leaving the question of law alone for the decision of the Court. *Ibid.*

2313. The master is only permitted to make a special report, where by the order of reference some equity is reserved, so that the case must be brought before the Court for further directions upon the coming in of the report; but where all the consequential directions are contained in the decree or order of reference, the master must decide the questions of law as well as of fact which arise on the reference; so that the decree may be executed upon the confirmation of the master's report in the register's office or otherwise. *Ibid.*

2314. Where a plea is ordered to stand for an answer, with liberty to except, or the plea is accompanied by an answer which will enable the complainant to except without special leave, the master, upon a reference of the exceptions, must decide as to the sufficiency of the answer, considering the plea as a part thereof. *Orcutt v. Orms*, 3 Paige, 459.

2315. Where there has been one reference on exceptions to an answer, if a second or third answer is referred for insufficiency on the old exceptions, it should be referred to the same master, if he remains in office, and is competent to act in the case. *Leggett v. Dubois*, 3 Paige, 477.

2316. Where a party is required to bring in his account before the master in the form of debtor and creditor, under the 107th rule, he must bring in his whole account, and for the whole time for which he is accountable, as established by the decretal order of the Court. *Story v. Brown*, 4 Paige, 112.

2317. The account must also be accompanied by the usual affidavit of the party that the account, including both debits and credits, is correct, and that he does not know of any error or omission in the account to the prejudice of any of the other parties. *Ibid.*

2318. The master, upon the return of the ret. summons, should regulate the manner of

executing the reference, and the several steps to be taken by the parties, so far as it can then be conveniently done; and at any subsequent attendance of the parties before him, he should give such further directions in relation to the proceedings as have become necessary in the progress of the reference. *Ibid.*

2319. A master's summons or warrant should either be properly underwritten, or the nature of the reference to be proceeded in, or the object of the attendance required, should be briefly stated in the body of the warrant. *Marshallan Company v. Everison*, 4 Paige, 276.

2320. Whether the proceedings will be set aside for irregularity, upon the service of a general warrant, where the person upon whom the warrant is served is not limited thereby? *Quære. Ibid.*

2321. Where several exceptions to an answer are allowed by the master, and but one exception is taken to the report, embracing all the exceptions allowed, if any of those exceptions were well taken, the exception to the master's report will be overruled. *Franklin v. Keeler*, 4 Paige, 382.

2322. The master will, in no case, be allowed more than four dollars per day, including his taxable fees on the reference and for the reports; and if his taxable fees amount to that sum or nearly so, no extra allowance will be made. *Woodruff v. Straw*, 4 Paige, 407.

2323. Where the suit is pending before a vice-chancellor, the application for an extra allowance to a master for taking an account must be made to such vice-chancellor; and an order for such allowance must be entered with the clerk. *Ibid.*

2324. To obtain an extra allowance to a master, his affidavit should state the time he has been actually and necessarily employed in the reference, and the gross amount of his taxable fees, including his charges for the report. *Ibid.*

2325. Upon the allowance of an exception to a master's report as to the amount of damages sustained, the Court can modify the report, and settle the amount, without referring it back to the master. *Taylor v. Read*, 4 Paige, 561.

2326. A few unnecessary words in a bill or answer do not render the pleadings impertinent, and the master should not allow an exception on account of a few unnecessary words, except when they will lead to the introduction of improper evidence by putting in issue matters which are foreign to the cause, or where such words may embarrass the defendant in answering the complainant's bill. *Hawley v. Wolberton*, 5 Paige, 522.

2327. Costs of the suit may be taxed after the Court has refused to grant a new trial and made a decree, though before a master has reported as to an amount for alimony. *Mulock v. Mulock*, 1 Edw. 14.

N. Decree.

2328. On a bill filed by the creditors of a grantor, that B., the grantee, might be compelled to receive what was justly due to him, suggesting, however, fraud in the mortgage, and praying general relief; it was held, that under the prayer for general relief, it was com

petent for a Court of equity to set aside the mortgage as fraudulent, the facts warranting such conclusion, although the *specific relief* asked was permission to redeem. *Bailey v. Burton*, 8 Wend. 339.

2329. Under the general prayer, the complainant is entitled to any relief consistent with the case made, though inconsistent with the specific relief prayed for. *Ibid.*

2330. Costs refused on decree for the complainant, the matter having been before submitted to arbitration, and the decree varying but little from the award. *Freeland v. Mannahan*, 1 Hopk. 276.

2331. No decree for sale until the amount of the encumbrances is reported. *Gardiner v. Garsnis*, 1 Hopk. 306.

2332. No decree will be made for the distribution of a fund in Court, unless all the parties interested in the fund are brought before the Court. *De la Vergne v. Everson and others*, 1 Paige, 181.

2333. Where a party delayed a year and six months in applying to the chancellor to correct a mistake made in drawing up a decree, leave to amend the decree was refused. *Rodgers v. Rodgers*, 1 Paige, 188.

2334. A decree can only be questioned by a bill of review. *Elliott, Executor, v. Bell and others*, 1 Paige, 263.

2335. A decree between co-defendants may be made, grounded upon the pleadings and proof between the complainants and defendants. *Ibid.*

2336. But such a decree, to be binding, must be founded upon and connected with the subject-matter in litigation between the complainant and one or more of the defendants. *Ibid.*

2337. A decree made upon bill and answer cannot affect the rights of any of the parties as to other matters which were not the subject of litigation in that suit. *Ibid.*

2338. An omission of the solicitor or counsel to sign an answer will not affect the validity of a decree. *Sears and wife v. Hyer and others*, 1 Paige, 483.

2339. Where a bill is filed by a creditor or for the payment of a particular legacy, if the defendant admits a sufficiency of assets, a decree for the payment may be made without any general account of the estate, or notice to the other creditors or legatees. *Hallett and Davis v. Hallett and others*, 2 Paige, 15.

2340. If the complainants do not proceed with due diligence under a general decree for an account, any person coming in under the decree will be permitted to prosecute the suit, and may file a supplemental bill if necessary. *Ibid.*

2341. But if it appears by the answer that there is a sufficiency of assets, the decree must be for a general account and distribution of the fund among all those who may come in and establish their claims under the decree. *Ibid.*

2342. Where the decree is final as to any branch of the cause, or as to any of the parties thereto, it must be enrolled before a deed can be executed on a sale under the decree, and before an execution can be issued to enforce the performance of such decree. *Minthorne's Executors v. Tumpkins' Executors*, 2 Paige, 102.

2343. If the enrolment of any subsequent decree is necessary, it is to be made by a continuance on the record of the first enrolment. *Ibid.*

2344. Where a bill of interpleader is filed against two defendants, and one of them is not personally served with process, and does not appear, and the bill is taken as confessed against him, the defendant who appears will not be entitled to the possession of the fund until the expiration of the time limited by the statute for the other defendant to appear, unless he gives security to repay the fund in case the other defendant appears and establishes his right to the same. *Aymer v. Gaulk and M'Namara*, 2 Paige, 284.

2345. If a bill of interpleader is ripe for a decision as between the defendants, as well as between them and the complainants, the Court settles the conflicting claims of the parties, and makes a final decree on the first hearing. *The President, Directors, and Company of the City Bank v. Bangs and others*, 2 Paige, 570.

2346. Where the suit is not in readiness for a decision as between the defendants, the Court merely decides that the bill is properly filed, and dismisses the complainant with his costs up to that time; and directs an action to be brought, or an issue, or a reference to ascertain and settle the rights of the defendants to the fund in controversy. *Ibid.*

2347. Where, upon a bill filed to compel the defendant to discover and deliver over to the complainants a pass-book alleged to belong to them, and which they wanted to use as evidence against him in a suit at law, and the defendant by his answer admitted that the pass-book was in his possession, and referred to it in such a manner as to entitle them to an inspection of the same as a part of the answer; *held*, that the complainants were not entitled to use the pass-book as evidence in their suit at law, separate from the defendant's answer, previous to a final decree declaring their right to the same. *Watts v. Lawrence*, 3 Paige, 159.

2348. Where the Christian name of an appraiser was omitted in drawing up a decree for the appraisement and sale of trust property, the Court directed it to be inserted in the original decree in the register's minutes, it being a mere matter of form. *De Caters v. Le Ray de Chaumont*, 3 Paige, 178.

2349. By examining a defendant as a witness, the complainant precludes himself from having any decree against such defendant personally; and the complainant must pay costs to such defendant, although he might not have been entitled to costs if the complainant had not examined him as a witness. *Fulton Bank v. New York and Sharon Canal Company*, 4 Paige, 127.

2350. A creditor coming in under a decree, to prove a claim which is not set out in the pleadings or proofs in the cause, must present the particulars of his claim to the master; and he must also support the same by his affidavit, stating that the amount claimed is justly due, and that neither he nor any other person by his order, or for his use, has received the amount thus claimed, or any part thereof, or any security

or satisfaction for the same. *Morris v. Mowatt*, 4 Paige, 149.

2351. After a decree in the cause, settling the amount due to the complainants, the Court refused to let them in to prove a new claim not set up in the pleadings, and which was also a sale claim of more than ten years' standing. *Ibid.*

2352. A creditor, upon a proper case being shown by petition, may be permitted to come in and prove his debts under a decree, at any time while the fund or any part thereof is under the control of the Court, notwithstanding the time limited by the master for the creditors to come in and prove their debts has expired. *Brooks v. Gibbons*, 4 Paige, 374.

2353. If one of the respondents, in an appeal to the Court for the Correction of Errors, dies after issue joined upon the petition of appeal, and that Court, without noticing his death, reverses the decision of the chancellor, and makes a new decree against all the respondents, such decree is not void, and the Court of Chancery is bound to carry it into effect against the surviving parties and the representatives of the decedent. *Rogers v. Patterson*, 4 Paige, 409.

2354. A defendant who has appeared by a solicitor is entitled to notice of all the subsequent proceedings in the cause, although he suffers the complainant's bill to be taken as confessed; and a decree taken against him *ex parte*, without notice to his solicitor of the hearing, will be set aside as irregular. *Hart v. Small*, 4 Paige, 551.

2355. Where the decree of a vice-chancellor settles the rights of the parties, and disposes of the general costs of the cause, and also contains the consequential directions for carrying the decree into effect upon the coming in and confirmation of the report of a master, to whom a reference is directed to ascertain the amount to be paid, it is, substantially, a final decree, although the case is subsequently brought before the vice-chancellor, upon exceptions to the report; and an appeal from a decretal order, allowing or disallowing such exceptions, will not authorize the chancellor to reverse or alter the original decree of the vice-chancellor. *Taylor v. Read*, 4 Paige, 561.

2356. By the *lex loci rei sitæ*, property, belonging to a person who is not within the jurisdiction of the Court in which a suit is brought, may be made subject to the jurisdiction of such Court, so as to render such judgment or decree binding as a proceeding *in rem* against the property which is within such jurisdiction; but if the defendant, or party proceeded against, does not reside within the jurisdiction of the state or county where the suit is brought, and is not served with process, and does not appear, the judgment or decree in such suit is purely local; and it has no extra territorial effect or validity *in personam* against the defendant. *Bates v. Delavan*, 5 Paige, 299.

2357. Where a first mortgagee files a bill of foreclosure, and after a decree, but before a sale, the mortgagor pays the interest due and costs, the after mortgagees cannot have the benefit of the decree, except by filing a supplemental bill. *Rankin v. Dutch Church*, 1 Edw. 20.

2358. An administrator who is applying to a surrogate for leave to sell real estate, in order to pay debts, will be restrained by perpetual injunction where a decree for foreclosure and sale of the same premises has been had in this Court, and is in force. *Breevort v. M'Jimsey*, 1 Edw. 551.

O. Attachment.

2359. Where, upon an appeal by a defendant from an interlocutory decision of a vice-chancellor, such decision is reversed with costs by the chancellor, and no order is obtained to remit the proceedings to the vice-chancellor, the defendant may either cause the order to be enrolled, and obtain an execution for his costs on the appeal, or he may proceed as for a contempt, and apply for an attachment against the complainant for the non-payment of the costs. *Brockway and M'Farland v. Copp*, 2 Paige, 578.

2360. Ten days given to pay costs accruing on exceptions to answers on attachments for non-payment of the same; and twenty days allowed for putting in further answers. In the mean time the bonds given upon the attachment were to be operative. *Feldberg v. Kellogg*, 1 Edw. 27.

2361. The ancient mode of attachment and sequestration may still be resorted to in a proper case. *White v. Geraerdt*, 1 Edw. 336.

2362. This Court can, through a sequestration, lay hold of property of every description, anywhere within its jurisdiction, belonging to a party in contempt, for not obeying a decree; and it also has power to apply it in satisfaction; and where the delay of an attachment and sequestration would jeopardize the rights of the opposite party, the latter may, in the first instance, file a fresh bill, thereby restraining the property and party in contempt, and thus obtain the effect of the former decree. *Ibid.*

P. Appeal from a vice-chancellor.

2363. Practice under the revised statutes as to removing causes from a vice-chancellor to the chancellor before hearing, and as to referring causes and motions to a vice-chancellor for his decision. *Ames v. Blunt and others*, 2 Paige, 94.

2364. If a cause commenced before a vice-chancellor is directed to be heard by the chancellor, the whole cause is before the chancellor, and all orders and decrees thereafter made by him are to be entered by the register or assistant register. *Ibid.*

2365. Where a chancellor holds a term of the vice-chancellor's Court, the orders and decrees made by him are to be entered with the clerk of the vice-chancellor. *Ibid.*

2366. Where a cause pending before the chancellor is in readiness for a hearing, either party may apply for leave to have it heard before a vice-chancellor. *Ibid.*

2367. The petition for such reference should state the situation of the cause; and notice of the application must be given to the adverse party. *Ibid.*

2368. If a greater number of causes are placed on the calendar of the chancellor, or submitted to him, than he can hear and decide, he will, without any application from either party, refer

such causes as he thinks proper to the vice-chancellor. *Ibid.*

2369. Principles on which selections of causes for the vice-chancellors' decision will be made. *Ibid.*

2370. Where the order referring a cause to a vice-chancellor to hear and decide the same is general, the whole cause is before him, and all subsequent orders and proceedings therein are to be made and had before the vice-chancellor. *Ibid.*

2371. Where some particular motion or branch of a cause only is referred to a vice-chancellor, the general proceedings in the cause must continue to be had before the chancellor. *Ibid.*

2372. If a special motion or other special application is referred to a vice-chancellor for his decision, the chancellor may at the same time direct that all other proceedings and questions in the cause be had and heard before such vice-chancellor. *Ibid.*

2373. On appeal from an interlocutory order of a vice-chancellor, the question of affirming or reversing his decision must depend upon the facts which were before him at the time the decision was made. *White v. Bukoid and others*, 2 Paige, 164.

2374. Appeal causes are to be placed on the calendar of the chancellor as of the same date at which they were originally entitled to be placed on the calendar of the Court below. *Belknap v. Tremble and others*, 2 Paige, 277.

2375. Where a suit comes up by an appeal from a vice-chancellor, if the present vice-chancellor of the circuit from which the suit came was originally of counsel in the cause, the suit will be retained by the chancellor. *Souzer and wife v. De Meyer and De Meyer*, 2 Paige, 575.

R. Bill of revivor.

2376. The suit abated by the death of the complainant after a decretal order establishing a right in favour of one of the defendants; that defendant filed a bill of revivor within twenty days after the abatement, and before the executing of the former, complainant appeared to have proved the will; *held*, that the representatives of the complainants have the first right to revive. *It seems*, that they shall have a reasonable time for the purpose. *Pell v. Elliott*, 1 Hopk. 86.

2377. The order was, that the present defendants show cause in twenty days why the suits should not stand revived, unless they should apply for further time, saving their rights by way of defence. *Ibid.*

2378. Upon the abatement of a suit by the death of one of several complainants, it is at the election of the surviving complainants whether he will revive the suit. *Pelle v. Coon*, 1 Hopk. 450.

2379. The Court will limit a time within which they shall make that election. *Ibid.*

2380. And if they do not revive within the time, the Court will order that they be precluded from any further prosecution of the suit. *Ibid.*

2381. On the death of a party to a suit in Chancery, if the cause of action survives to or against some other of the parties, so that a perfect decree as to every part of the subject of

litigation can be made between the surviving parties, the suit does not abate as to the survivors; and on motion of either party, the Court will order the suit to proceed between such survivors. *Leggett v. Dubois and others*, 2 Paige, 211.

2382. Where a cause of action against a deceased party does not survive, but some third person becomes vested with his interest or subject to his liabilities, the complainant may elect to proceed without reviving the suit against the representatives of the deceased party; provided a perfect decree can be made between the survivors without bringing such representatives before the Court. *Ibid.*

2383. In such cases the complainant must revive the suit against the representatives of the deceased party, or elect to proceed against the surviving defendants, within such time as may be deemed reasonable by the Court, or the defendants may revive the suit. *Ibid.*

2384. To revive a suit under the provisions of the revised statutes without a bill of revivor, the party must proceed upon petition, which is a substitute for the bill of revivor. *Ibid.*

2385. But an order to proceed without reviving may be obtained on an affidavit showing the death of the party, and that the cause of action has survived. *Ibid.*

2386. If a suit abates pending an injunction, the defendant, or his representatives who are restrained by such injunction, may have an order that the complainant or his representatives revive within such reasonable time as may be fixed by the Court for that purpose, or that the injunction be dissolved. *Ibid.*

2387. Where the representative of a deceased complainant applies for an order to revive under the statute, he should give notice of the application to the surviving parties who have appeared in the suit. And the order of revival should state the particular character in which he is permitted to revive and continue the suit; and the subsequent proceedings are to be entered accordingly. *Ibid.*

2388. Where a person, claiming to be devisee of a deceased complainant who had filed a bill to redeem, obtained, on an *ex parte* motion, an order to revive the suit in her favour, *held*, that the defendant might at the hearing object that the suit was not legally revived. *Ibid.*

2389. If it appears that the complainant had no right to revive the suit, the defendant may avail himself of the objection at the hearing. *Douglas v. Sherman*, 2 Paige, 358.

2390. The provisions of the revised statutes, authorizing the revival of a suit on motion or petition, extend only to those cases where, by the former practice of the Court, the proceedings could be revived and continued by a simple bill of revivor. *Ibid.*

2391. Where, by the death of a party, his interest or title to the property in controversy is transmitted to the representative which the law gives or ascertains, a simple bill of revivor, or a petition under the statute, is sufficient to continue the proceedings in favour of or against such representative. *Ibid.*

2392. Where, by the event which abates the suit, the interest of a party is transmitted by

devise or otherwise, so that the title to the property, as well as the person entitled thereto, may be a subject of litigation in the suit, an original bill in the nature of a bill of revivor and supplement is necessary. *Ibid.*

2393. The executrix of the mortgagor, or of his grantee, having no interest in the premises, is not entitled to redeem; and cannot revive a suit for that purpose commenced by the testator in his lifetime. *Ibid.*

2394. Where an executor applies to revive a suit, he must show that he has taken probate of the will of the decedent. *Ibid.*

2395. At law, where an execution is in the hands of the sheriff at the time of the abatement of the suit by the death of a defendant, the proceedings under the execution will not be stayed, as it can be executed without any further order of the Court. *The Washington Insurance Company v. Slea and others*, 2 Paige, 365.

2396. But if a new execution is necessary, or any other proceeding which is either actually or constructively to be done by the Court, the proceedings must be suspended until it is revived by *scire facias*. *Ibid.*

2397. It seems, that the same rules prevail in equity, at least in favour of parties who have acquired rights under an execution issued upon a decree previous to the abatement of the suit. *Ibid.*

2398. Whether the purchaser at a master's sale, under similar circumstances, would obtain a valid title where an order of confirmation is necessary before the sale becomes absolute? *Quære. Ibid.*

2399. Where a decree cannot be carried into effect without a direct application to the Court, an order for that purpose cannot be made after an abatement by the defendant's death, and before the suit is revived. *Ibid.*

2400. It seems, that any thing which could be legally urged by plea or otherwise, as a defence to a bill of revivor, constitutes a valid ground of objection to an order to revive under the statute. *Ibid.*

2401. Where a cause was argued before a former chancellor, but before a decision therein he went out of office, and also the complainant died, held, that the cause could not be re-argued before the new chancellor without being revived. *Johnson v. Thomas*, 2 Paige, 377.

2402. The personal representatives of a deceased sole complainant may be substituted as complainants, on motion or petition under the statute, without resorting to a formal bill of revivor. *White v. Buloid and others*, 2 Paige, 475.

2403. But if the other parties in the cause who have appeared do not join in the application to substitute the representatives of the deceased complainant as parties in his place, they must have due notice of the application. *Ibid.*

2404. Where one of two complainants dies pending the suit, and the cause of action survives, the surviving complainant, if he wishes the suit to proceed in his name as survivor, must make a special application to the Court for that purpose. *Brown and others v. Story*, 2 Paige, 594.

2405. A bill of revivor, when necessary, may be filed of course, without any order of the Court granting permission to file such bill. *Pendleton v. Fay*, 3 Paige, 204.

2406. If a bill of revivor is unnecessarily or improperly filed, the objection may be taken by plea or demurrer. *Ibid.*

2407. Where a complainant has a right to revive the suit, he may add to the bill of revivor such supplemental matter as is proper to be added, by way of supplement merely, in that stage of the suit. *Ibid.*

2408. If any matters contained in a bill of revivor, or a supplement, are irrelevant or improper, the defendant may avail himself of the objection either by plea or demurrer, or by exceptions for impertinence. *Ibid.*

2409. A bill of revivor and supplement in the nature of a bill of review must be founded upon an affidavit of the discovery of new matter, and cannot be filed without the special leave of the Court; neither can it be filed without making the deposit, or giving the security required upon a bill of revivor. *Ibid.*

2410. A suit in Chancery may be revived by a surviving complainant against the infant representatives of a deceased complainant, by petition and the service of an order, under the general provisions of the revised statutes. *Willen-son v. Parish*, 3 Paige, 653.

2411. The petition to revive must contain substantially the same facts which are required to be set forth in a bill of revivor, and must also state that eighty days have elapsed since the death of the deceased complainant, and that his representatives have not caused themselves to be made complainants; and a copy of the order must be served upon the parties against whom the revival is sought. *Ibid.*

2412. If the representatives of the deceased party neglect to appear and answer the petition or to disclaim, the order that the suit stand revived becomes absolute against them by default, and a formal appearance may be entered for them. *Ibid.*

2413. No decree or order of revival can be made against an infant by default under the provisions of the revised statutes; but if the infant neglects to appear and procure the appointment of a guardian, the same steps for the appointment of a guardian *ad litem* must be taken as in other cases where the infant neglects to appear. *Ibid.*

2414. If the parties against whom a suit is sought to be revived are beyond the jurisdiction of the Court, or cannot be found to be served with the order, a formal bill of revivor must be filed, and the like proceedings had, to obtain their appearance, as are required in the case of absent, concealed or non-resident defendants. *Ibid.*

2415. Partition suits are embraced within the general provisions of the revised statutes relative to the revival of suits; but if a suit for partition is revived against an infant heir, the guardian *ad litem* of the infant must give the same security which would have been required if the infant had been one of the original parties to the suit. *Ibid.*

2416. If the husband dies pending a partition

suit to which his wife is not made a party, the suit can only be revived or continued against the widow, as to her right of dower in the premises, by an original bill in the nature of a bill of revivor and supplement. *Ibid.*

2417. Upon a bill for an account and distribution of an estate, if one of the distributees dies pending the suit, it must be revived against his personal representatives, and not against his next of kin. *Jenkins v. Freyer*, 4 Paige, 47.

2418. Where a suit abates after an appeal, but before the Court for the Correction of Errors becomes possessed of the cause, it must be revived in the Court below, before any further proceedings can be had on the appeal. But if the abatement takes place after the Appellate Court has become possessed of the cause, that Court, upon petition, may order the suit to stand revived in the name of the representatives of the deceased party. *Rogers v. Patterson*, 4 Paige, 409.

2419. Where a decree is made in the Court for the Correction of Errors against a deceased party after his death, the suit must be revived in the Court of Chancery against his representatives, before any proceedings can be had to carry the decree into effect. *Ibid.*

2420. After a decree in a cause by which the defendant has acquired an interest, he has a right to revive the suit, upon a petition and order, if the complainant or his representatives neglect to revive; and it is not optional with the representatives of the deceased complainant either to have the suit revived or to have the bill dismissed as to them. *Ibid.*

2421. The order for the revival of a cause upon petition should be entitled as in the original cause at the time of the abatement; but all subsequent orders and proceedings must be entitled in the cause as revived. *Rogers v. Patterson*, 4 Paige, 460.

2422. Where a bill, cross bill, a supplemental bill in the nature of a bill to review, between the same parties and relating to the same subject, are all abated by the death of one of the parties, the whole proceedings may be revived by one bill of revivor. The party reviving will not, therefore, be allowed the costs of two or more separate bills for that purpose. *Wilde v. Jenkins*, 4 Paige, 481.

2423. The statute relative to absent, concealed, and non-resident defendants applies to bills of revivor as well as original bills. *Otis v. Wells*, 1 Edw. 83.

2424. Form of an order for a non-resident defendant to show cause why a suit should not be revived against him as heir at law of a deceased party. *Ibid.*

S. *Suing in forma pauperis.*

2425. A party must be an object of charity, otherwise the privilege of prosecuting in *forma pauperis* will not be granted to him. *Isnard v. Cazeaux*, 1 Paige, 39.

2426. Applications for this privilege are not encouraged. *Ibid.*

2427. Whether under the statute of this state a party can be admitted in any case to defend in *forma pauperis*? *Quære. Brown v. Story*, 1 Paige, 588.

XLVII. PRINCIPAL AND AGENT.

A. *When notice to the agent is notice to the principal.*

B. *Liability of an agent.*

C. *Power of an agent.*

D. *Commissions.*

A. *When notice to the agent is notice to the principal.*

2428. Notice to the agent of a party is legal notice to the principal where it is the duty of such agent to act upon the notice, or to communicate the information to his principal, in the proper discharge of his trust as such agent. And this rule applies to the agents of corporations as well as others. *Fullen Bank v. New York and Sharon Canal Company*, 4 Paige, 137.

B. *Liability of an agent.*

2429. Where a person was entitled to a share of the personal estate of an intestate, and the agent of other persons entitled also to portions of such estate had received all the proceeds of the same, and remitted the whole to his principals, and afterwards there came into his hands a portion of the proceeds of the real estate which belonged wholly to his principals; it was held, that such person, whose share of the personal estate had been so paid by such agent to his principals, had an equitable claim upon the proceeds of the real estate in the hands of the agent. *Duffy and others v. Buchanan and others*, 1 Paige, 453.

2430. The agent is not liable for the payment to his principals of the share of the personal estate which did not belong to them, having paid the same without notice. *Ibid.*

2431. The remedy of the person entitled to the share of the personal estate so paid by mistake to the principals is against such principals or the personal representatives of the intestate. *Ibid.*

2432. In general, where money is paid to an agent to be paid over to his principal, which is accordingly paid over without notice not to do so, no suit will lie against the agent to recover it back; but the money must be paid with the intent to pass it to the credit of the principal. *Frye v. Lockwood*, 4 Paige, 454.

2433. And the rule does not extend to an agent who obtains money illegally by compulsion or extortion, and especially where a suit brought to recover it of the agent is defended at the risk and expense of the principal. *Ibid.*

2434. Thus where a deputy-marshal of the United States, upon a warrant, demanded money, as due for a fine imposed by a pretended court-martial of the United States, whose proceedings were *coram non iudice* and void, which money was paid on demand, paid over to the marshal without notice not to do it, and a suit was brought against the deputy to recover it back, and the suit was defended by the marshal or secretary at war; held, that the action lay against the deputy. *Ibid.*

2435. Such a payment is not voluntary within the meaning of the rule, that a voluntary payment of money will not constitute a ground of action. *Ibid.*

2436. An agent who is employed to purchase an estate, or to transact any particular business for another, cannot purchase the estate for himself, or act for his own benefit in relation to the subject-matter of such agency, to the injury of the person by whom he is employed. *Reed v. Warner*, 5 Paige, 660.

C. Power of an agent.

2437. Where discretionary power is expressly conferred on subordinate agents, it must prevail, and nothing less than fraud will vitiate its exercise. *Mead v. Walker*, 1 Hopk. 587.

2438. Where the power of such agents is raised by implication, it is subject to the supervision of law, both for fraud and for error. *Ibid.*

2439. A commission merchant has such an interest in the goods consigned to him for sale, that he may insure them to their full value in his own name. *Brisban v. Boyd*, 4 Paige, 17.

2440. But it is not his duty to insure the goods for the benefit of his principal, without some express or implied directions from the latter to that effect. *Ibid.*

2441. And if the goods, being stored in the usual place, are destroyed by fire, the commission merchant will not be responsible to his principal for the loss. *Ibid.*

D. Commissions.

2442. Under the regulations of the Chamber of Commerce, the agent is entitled to two and a half per cent. for effecting a loan of money, and becoming security for the repayment thereof; but he is not entitled to an additional commission for paying over the money to the principal or upon his order. *Colton v. Dunham and Wedgworth*, 2 Paige, 268.

XLVIII. PRINCIPAL AND SURETY.

2443. Where the creditor, without the consent of the surety, makes a valid and binding contract with the principal debtor to give him further time for payment, the surety is discharged. *Sailly v. Elmore*, 2 Paige, 497.

2444. So he will be discharged by any arrangement between the principal debtor and the creditor which operates as a fraud upon the surety; as where the money has been offered to the creditor, and he, without the consent of the surety, requested the debtor to retain it longer. So where the creditor fraudulently colludes with the debtor to conceal from the surety the fact of the non-payment of the debt until the debtor becomes insolvent. *Ibid.*

2445. But a mere consent of the creditor to a delay because the principal debtor has not the ability to make immediate payment, and without any new consideration, does not discharge the surety. *Ibid.*

2446. It is only in those cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a Court of equity, as a matter of course, and without any agreement to that ef-

fect, substitutes him in the place of the creditor. *Sanford v. M'Lean*, 3 Paige, 117.

2447. In other cases, the debt of a creditor, which is paid with the money of a third person, without any agreement that the security should be assigned or kept on foot for the benefit of such third person, is absolutely extinguished. *Ibid.*

2448. Where the creditor, without the consent of the surety, makes a binding agreement with the principal debtor to extend the time of payment of the debt, the surety is discharged; and this rule extends to those cases where the surety only pledges his property for the debt of the principal, as well as to those in which the surety becomes personally bound. *Neimcewicz v. Gahn*, 3 Paige, 614.

2449. Where a surety is compelled to pay the debt of his principal, in order to save his property or to discharge his personal liability, he has an equitable right to be substituted in the place of the creditor, as to all his remedies against the principal debtor and his estate. *Ibid.*

2450. If a creditor, without the consent of the surety, relinquishes a subsidiary security which he holds against the principal debtor or his estate, he discharges the liability of the surety *pro tanto*. *Ibid.*

2451. But if the fact of suretiship does not appear upon the face of the contract, the liability of a surety will not be discharged, either by extending indulgence to the principal debtor, or by the relinquishment of other securities, if the creditor at the time of the act complained of did not know that he stood in the situation of a surety. *Ibid.*

XLIX. PROMISSORY NOTE.

2452. Where the loser is sued at law upon a note given upon an illegal bet or wager, he may file a bill in Chancery for a discovery of the consideration of the note in aid of his defence at law, although the amount of the note is less than one hundred dollars. *Schrappel v. Redfield*, 5 Paige, 245.

L. RECEIVER.

2452*. The doctrine of *lis pendens* is not applicable to an interlocutory proceeding: as where notice was given of an intended application to the chancellor, by one of three administrators, for the suspension of the powers of the administration, and the appointment of a receiver, on the alleged grounds of the insolvency of one of the co-administrators, and the advanced age and infirmities of the other. *Murray v. Blatchford*, 1 Wend. 583.

2453. A receiver of an estate, who has procured such order, may take collateral security for the payment of the debt; and where his doing so is manifestly for the benefit of the fund, it will be presumed that he acted by direction of the Court, unless the contrary be shown. *Beardsley v. Warner*, 6 Wend. 610.

2454. The part owners of a steam vessel being in litigation to settle their rights in this Court, and a receiver having been appointed, under whom the vessel had sailed two years, and a third season approaching; a sale of the vessel was ordered on petition, though opposed by a minority of the owners. *Crane v. Furd*, 1 Hopk. 114.

2455. It is unfit and inconvenient to continue

such operations so long under the directions of the Court. *Ibid.*

2456. This Court has a general power to order a sale, resting on like grounds with that of the maritime Courts; and this, though the bill was not framed for the purpose of sale, and though some of the defendants had suffered the bill to be taken *pro confesso*, and those defendants had no notice of this petition, the power to sell being incident. *Ibid.*

2457. And though one ground of opposition to the sale was, that the parties in possession of the vessel had purposely mismanaged the concern. *Ibid.*

2458. P. I., being seised and possessed of a considerable real and personal estate, devised and bequeathed the same to trustees in trust, after the payment of legacies, and upon contingencies which afterwards happened, for the complainants, a corporation. One of the trustees having received a large amount of personal property, and being in the receipt of the rents and profits of the real property, the complainants filed their bill against the trustees to obtain the benefit of the devise, and moved on the bill for the appointment of a receiver. *Orphan's Asylum v. M'Cartee*, 1 Hopk. 429.

2459. Held, that on this motion, the Court will not take into consideration the question whether the devise is valid or not. *Ibid.*

2460. That the trustee mixes the trust fund with his own is not a sufficient ground for the appointment of a receiver. *Ibid.*

2461. The true principle which governs the discretion of the Court in this case is, that the fund must be in danger. *Ibid.*

2462. It is not enough that the trustee may have no rights, and that no injury can ensue; especially where the trustee is such under the appointment of a testator. *Ibid.*

2463. As a general rule, a receiver should not be appointed without notice to the parties interested. *The People v. Norton and others*, 1 Paige, 17.

2464. But this rule is subject to exceptions in special cases, where irreparable injury would be sustained by the delay. *Ibid.*

2465. So a receiver will be appointed without notice, upon the application of the complainant, where the defendant has absconded to prevent service of the *subpoena* to appear and answer the bill; or has left the state, and is not expected to return for several months, and has no residence or place of business where a *subpoena* can be served. *Ibid.*

2466. The defendant, however, has a right afterwards to apply for relief against the order appointing such receiver. *Ibid.*

2467. Form of order appointing a receiver. *In the matter of the Franklin Bank*, 1 Paige, 85.

2468. Where there has been negligence or improper conduct on the part of a trustee, and the fund is in danger, the appointment of a receiver upon the application of the *cestui que trust* is a matter of right. *Jenkins and others v. Jenkins and others*, 1 Paige, 243.

2469. Where a debtor in failing circumstances assigns his property to a person who is insolvent, in trust for his creditors, a receiver will be appointed, upon the application of such

creditors, to take charge of the property so assigned. *Haggerty and others v. Pittman, Strong, and Bovee*, 1 Paige, 298.

2470. Upon proceedings against a bank under the statute for insolvency, an officer of the corporation is not a proper person to be appointed the receiver. *Attorney-general v. Bank of Columbia*, 1 Paige, 511.

2471. Where the corporation appealed from the decision of the Court, both as to the appointment of a receiver and as to the principle adopted of excluding the officers of the corporation from the appointment, the Court would not, pending the appeal, appoint a receiver, as long as there was no ground to apprehend danger to the fund before a decision could be had on the appeal. *Ibid.*

2472. Where the holders of the majority of the stock of the corporation neglect to choose officers to take charge of the property of the corporation, a receiver will be appointed, upon the application of the owners of a minority of the stock, to take possession of the effects of the corporation, and to preserve the same for the benefit of the stockholders generally. *Lawrence v. The Greenwich Fire Insurance Company*, 1 Paige, 587.

2473. Where two creditors had filed separate bills against the debtor to reach his property, and in one suit a receiver had been appointed, and in the other an injunction granted, restraining the debtor from parting with his books and papers, and from collecting his debts, &c., upon an application to the Court, he was directed to deliver over to the receiver appointed in the first suit all the property and effects in his hands, together with his books and papers, to be collected and converted into money, for the benefit of such of the parties as it should subsequently appear were entitled to the same. *Osborn and another v. Heyer and Burdett*, 2 Paige, 342.

2474. Where the defendant is restrained by injunction from collecting his debts, and preserving or disposing of perishable property, it is the duty of the complainant to apply for the appointment of a receiver; and if he neglects to do so, the Court will dissolve the injunction so far as to permit the defendant to collect the debts and dispose of the property himself. *Ibid.*

2475. A receiver cannot be appointed to deprive the defendant of the possession of his property, *ex parte*, without giving him an opportunity to be heard in relation to his rights, except in very special cases, as where he is out of the jurisdiction of the Court. *Verplank and others v. The Mercantile Insurance Company of New York and Barker*, 2 Paige, 438.

2476. In cases where it is proper to appoint a receiver *ex parte*, the particular circumstances which render such a summary proceeding necessary should be distinctly stated in the bill or petition on which the application is founded. *Ibid.*

2477. The receiver of a moneyed corporation appointed under the 41st section of the title of the revised statutes, which directs the manner of proceeding against corporations in law and equity, unless his powers are restricted by the

order appointing him, is absolutely vested with all the property and effects of the corporation; and he may dispose thereof, and distribute the proceeds among the stockholders. *Ibid.*

2478. But a receiver appointed under the provisions of the 36th section is a mere common law receiver, to protect the fund during litigation, and he has no powers except such as are conferred by the order appointing him. *Ibid.*

2479. It is the duty of receivers of corporations, appointed under the 41st section of tit. 4, of ch. 8, of p. 3, of the revised statutes, to allow all claims against the corporation which they shall be satisfied are legal and just. But no claims should be allowed by them which could not have been recovered against the corporation either in law or equity. *Attorney-general v. Life and Fire Ins. Company*, 4 Paige, 224.

2480. If the receivers disallow a claim, and referees are appointed in the manner prescribed by the statute, to determine as to the validity of the claim, the receivers may permit those for whose benefit the defence against the claim is made, to manage the defence; but it must be made under the direction of the receivers. *Ibid.*

2481. Upon a bill filed by one of the partners to close a partnership concern, it is a matter of course to appoint a receiver, if the parties cannot agree among themselves as to the disposition and control of the property. And where it is necessary to preserve the good-will of the business, the receiver may be directed to carry it on under the direction of the Court until a sale can be effected. *Marten v. Van Shaick and Bloodgood*, 4 Paige, 479.

2482. Where the defendant, in a creditor's bill, is restrained by injunction from collecting his debts, and disposing of property which is liable to waste, it is the duty of the complainant to apply for the appointment of a receiver. *Bloodgood v. Clark*, 4 Paige, 575.

2483. Upon a creditor's bill, for the purpose of reaching the property of the defendant after the return of an execution unsatisfied, it is a matter of course to appoint a receiver of the defendant's property, if the equity of the bill is not denied upon the hearing of the application. *Ibid.*

2484. It is not a sufficient answer to the application for a receiver upon a creditor's bill, that the defendant has not yet answered the bill, or that he denies that he has any property. *Ibid.*

2485. Where the Court of Chancery directs a receiver to institute a suit at law in the name of a third person, the nominal plaintiff may be enjoined from discontinuing or releasing the action, or from applying to the Court of law to stay the proceedings therein; but the receiver will not be permitted to bring an action, in the name of a third person, against his consent, without giving security to indemnify him against the costs of the suit. *In the matter of Merritt*, 5 Paige, 125.

2486. The Court by whom a receiver is appointed has jurisdiction to restrain him from prosecuting an unjust and vexatious suit at law, in the name of a third person, without his consent, although the persons applying for such

relief are not parties to the suit in which the receiver was appointed. *Ibid.*

2487. Where a person who was proved to be insolvent was in possession of mortgaged premises, which were claimed by another under a decree of foreclosure and sale to him, and the person so in possession filed a bill to redeem the premises, on the ground that he was not a party to the bill of foreclosure, the Court directed a receiver to be appointed to receive the rents and profits of the premises pending the litigation, unless the complainant should elect to deliver up the possession, or give security for the rents and profits, or pay into Court the mortgage money admitted to be due. *Frekinghuysen v. Colden*, Paige, 204.

2488. The Court will not grant a sequestration, or appoint a receiver of a corporation, against whom an execution has been returned unsatisfied, upon an *ex parte* application of the judgment creditor. But upon filing a petition duly verified, an order to show cause, at a future day, why the prayer of the petitioner should not be granted, may be entered; and an injunction will be allowed, restraining the officers of the company from selling, assigning, transferring, or encumbering the property or effects of the incorporation in the mean time. *Devoe v. The Ithaca and Owego R. R. Co.* 5 Paige, 521.

2489. As a general rule, a receiver appointed in a cause should not employ the solicitor of either of the parties in the suit to assist him in the discharge of his duties as receiver. *Ryckman v. Parkins*, 5 Paige, 543.

2490. There can be no ground for a receiver in a case of partnership where the partner applying to the Court has the property in his own possession, and the other does not object to such possession. *Smith v. Lowe*, 1 Edw. 33.

2491. A receiver, in bringing suit, is not to employ the solicitor or counsel of any of the parties or persons interested in the property. *In the matter of Dinsley*, 1 Edw. 576.

LI. RELEASE.

2192. It is a strong rule of equity that a general release shall be confined to what was under consideration at the time of giving it. *M'Intire v. Clark*, 1 Edw. 34.

2493. The general words in a release of "all claims and demands whatsoever" are to be restricted to the subject-matter of the release. Thus, where P. M. executed a release to T. B. C., by which he acknowledged to have received from the said T. B. C. a conveyance of a lot of ground described as lot No. 184, valued at \$200, in full satisfaction and discharge of all claims and demands whatsoever, and in consideration thereof and of \$1, released and discharged the said T. B. C. of and from all claims and demands whatsoever; it was held, that the release was to be restricted to the claims and demands which P. M. had against T. B. C. for the said lot of ground No. 184; or to some demand of \$200, which the conveyance was intended to satisfy. *Ibid.*

LII. SOLICITOR AND COUNSEL.

2494. The station of a solicitor of this Court is an office within the meaning of the present constitution, and the solicitor is to take the oath by that constitution prescribed, and no other. This applies to all other offices. *In the matter of Wood*, 1 Hopk. 6.

2495. Where a solicitor has been duly appointed by a party, and has acted as such, he cannot be displaced by an appointment of another solicitor, without an order of the Court. *Mumford v. Murray*, 1 Hopk. 369.

2496. The functions and duty of a solicitor are in this state analogous to those of an attorney in the Courts of law. *Ibid.*

2497. It is the duty of counsel to peruse and examine the pleadings before they sign them; and they are personally liable if such pleadings contain scandalous or impertinent matter. *Doe v. Green and others*, 2 Paige, 347.

2498. The solicitor is guilty of a misdemeanor if he puts the name of a counsellor to a pleading without his knowledge and consent. *Ibid.*

2499. It is the duty of a solicitor who procures the appointment of a guardian, &c., to inform him of his duties under the rule, and how to perform them, and of the consequences of his neglect. *In the matter of Seaman and others, receivers, &c.* 2 Paige, 409.

2500. The taxation of items for services not performed by the solicitor, or where the number of the folios are overcharged, will not protect him from the penalty prescribed by the statute for unlawfully demanding or receiving fees for services not performed. *Rogers v. Rogers*, 2 Paige, 460.

2501. The drafts of pleadings in litigated causes should be submitted to the actual examination of the senior counsel before they are engrossed and filed. *Ibid.*

2502. Where a solicitor forged the name of a person as deputy register to a paper purporting to be a copy of an order obtained on his application as solicitor, declaring the marriage between a husband and his wife void, for the purpose of enabling the husband to impose upon his wife, and induce her to believe that she was legally divorced, such solicitor was removed from his office as solicitor. *In the matter of Peterson*, 3 Paige, 510.

2503. If a deceit is practised by a solicitor in his character as such, although not in a suit pending in the Court, he may be removed from his office as solicitor. *Ibid.*

2504. The effect of such removal by the Court of Chancery is to deprive the solicitor of the power of practising as a solicitor, attorney, or counsellor in any other Court. *Ibid.*

2505. Where an order had been obtained for the payment, by the defendants, of the costs of exceptions to their answer to the complainant's solicitor, who subsequently gave notice to them that he claimed a lien for his costs in the suit, and that they must not settle with the complainant for the same; and they afterwards settled with the complainant, and secured to him the amount claimed, each party agreeing to bear

one-half of the costs of both parties to the suit; held, that the solicitor of the complainant had a lien upon the taxed costs on the exceptions, but that he had no lien as against the defendants for the general costs of the suit, which had never been decreed against them. *Tillot v. Bronson*, 4 Paige, 501.

2506. Where the parties to a suit make a collusive settlement thereof before a decree, for the purpose of defrauding the solicitor of his costs, his remedy is to proceed with the suit in the name of his client, notwithstanding the collusive settlement. *Ibid.*

2507. The lien of the attorney for his costs of the suit is paramount to the claim of the adverse party to set off a judgment recovered against the client in another suit. *Gridley v. Garrison*, 4 Paige, 647.

2508. The counsel who signs a pleading containing scandalous or imperfect matter is guilty of a contempt of the Court, and is personally liable to the adverse party for the costs of the proceedings to have the scandalous or impertinent matter expunged. *Somers v. Torrey*, 5 Paige, 54.

2509. Where the solicitor of a party makes a useless application to the Court to correct a mere technical irregularity which cannot injure or materially delay his client, he will not be allowed the costs of such application as against the adverse party. Neither will he be allowed the costs of opposing a motion by the adverse party to correct irregularity, which motion is rendered necessary by reason of his refusal, upon a proper application, to waive the irregularity. *Kane v. Van Franken*, 5 Paige, 62.

2510. The solicitor himself is personally liable for the costs of correcting an irregular proceeding, occasioned by his negligence or gross ignorance, which is prejudicial to the rights of the adverse party; and if the costs are charged upon the client in the first instance, he may recover them in an action against his solicitor. *Ibid.*

2511. The solicitor who draws, and the counsel who signs, a scandalous or impertinent pleading or proceeding, are personally liable for the costs of expunging the scandalous or impertinent matter, and ought to be charged therewith in the first instance, although their client is also liable to the adverse party for such costs. And if the solicitor or counsel is compelled to pay such costs, he has no legal or equitable claim upon his client to refund the amount thus paid. *Powell v. Kane*, 5 Paige, 265.

2512. Where a solicitor commenced a suit in Chancery for the recovery of a demand due to the complainant, and the counsel employed by such solicitor afterwards compromised the suit, and received from the defendant \$287 45, besides costs, and paid the same over to the solicitor, except \$50, which was left in the hands of the counsel, to be paid to the complainant, provided he would receive it in full of his demand, and the solicitor afterwards refused to account to the complainant, or to pay him more than the \$50; held, that the counsel was not liable to the complainant for the money which had been paid over to the solicitor before he had at-

lice of the complainant's claim for the whole amount. But the counsel was held to be personally liable for the \$50 which he paid over to the solicitor after he had been served with a notice of an application to the Court to compel him and the solicitor to pay over the money received from the defendant upon the compromise of the suit. *In the matter of Bleakley*, 5 Paige, 311.

2513. Where a solicitor collects money for his client, which he refuses to pay over, the Court will enforce the payment of the money by a commitment for a contempt; and if he persists in his disobedience to the order of the Court, the chancellor may order him to be stricken from the roll of solicitors. *Ibid*.

2514. It is illegal for a solicitor to contract with his client for a part of the demand in litigation, in addition to his legal costs and expenses in the suit, if he succeeds in the litigation; and such agreements, as they tend to champerty and maintenance, will not be sanctioned by the Court. *Ibid*.

2515. The solicitor for the party in whose behalf a witness is examined, or cross-examined, is personally liable to the examiner for his fees, in taking the testimony of the witness for the benefit of his client. *Trustees of Watertown v. Cowen*, 5 Paige, 510.

2516. The fees of the examiner, upon the cross-examination of a witness, are chargeable to the solicitor of the party for whose benefit or at whose request such cross-examination is taken; and not to the solicitor of the party calling such witness. *Ibid*.

2517. It is no part of the duty of the solicitor, as such, to be at the expense of ascertaining the residences of the parties, or any other facts of that nature, for the purpose of enabling him to commence and prosecute the suit. And if the client employs his solicitor to ascertain such facts for him, it is a proper allowance for taxation between solicitor and client, but not as between party and party. *Hovey v. Hovey*, 5 Paige, 551.

2518. The solicitor for a defendant or for the guardian *ad litem* of an infant, who neglects to attend to the rights of his client upon the hearing of the cause, is not entitled to costs on such hearing, although he has a decree for his general costs in the cause. *Mitchell v. Blain*, 5 Paige, 588.

LIII. SCIRE FACIAS.

2519. Although a *scire facias* is a judicial and not an original writ, yet it assumes the form and has all the attributes of an action at law. *Thompson v. Hammond*, 1 Edw. 497.

2520. A judgment by *scire facias* is of the same force as any other; and a defendant cannot avail himself of his own neglect or omission as a ground on which afterwards to ask relief in equity. *Ibid*.

2521. A revival of a judgment by *scire facias* creates no new lien. It merely makes an execution regular. After-judgments gain priority when the ten years have run out. *Graff v. Kipp*, 1 Edw. 619.

LIV. SET-OFF.

2522. W., holding a mortgage against C. and S., became indebted to them in \$3000, on an open account; after which, the complainants recorded a judgment against C. and S. W. subsequently assigned his mortgage to the bank of N., without endorsing or crediting the \$3000. The complainants tendered to the bank the amount supposed to be due and more; and now filed their bill for redemption and assignment to them for an account, and to have the \$3000 allowed on the mortgage. The debt of \$3000 from W. to C. and S. is to be allowed as a set-off. Before the judgment, it was optional with the mortgagee, but a matter of right in the mortgagors to make this set-off. That right passed by the judgment to the judgment creditors. The bank of N., as assignee of the mortgage, took it subject to all equities, and among others to this set-off. *Roosvelt v. Bank of Niagara*, 1 Hopk. 579.

2523. A debtor to a bank whose charter is repealed has an equitable right to offset every demand which he had against the bank at the time of the repeal of its charter, but no demands which he afterwards purchased. *M'Laren v. Pennington and others*, 1 Paige, 102.

2524. A defendant, in a suit at law, who has a separate demand against the plaintiff, which is not a subject of offset there, cannot have relief in Chancery, unless the plaintiff is insolvent. *Reed v. The Bank of Newburgh*, 1 Paige, 915.

2525. But if his demand arises out of the same transaction as that of the plaintiff, so that in equity the plaintiff would have no right to recover against him, and the defendant cannot avail himself of his defence at law, he will be relieved in Chancery. *Ibid*.

2526. A party cannot set off a judgment unless he is the beneficial as well as the nominal owner of it. *Aikin and Ten Eyck v. Satterles and Satterlee*, 1 Paige, 289.

2527. Where A. indemnified T., a sheriff, against selling S.'s goods, for which S. recovered a judgment against T.; held, that A. and T. could not set off against S. a judgment which A. had purchased for less than one-third of its amount, and taken an assignment of it in the sheriff's name. *Ibid*.

2528. Demands, in reference to offset, are considered due to and from the same persons, in the same right, where the plaintiff may sue and the defendant be sued in their own names, without specifying any representative character, and where the party to the suit has a lien upon, or a legal right to the application of the fund when collected. *Miller v. Receiver of the Franklin Bank*, 1 Paige, 444.

2529. The public administrator of the city of New York is entitled to offset against a debt due from him to a bank, a demand for deposits in a bank, whether made in his own name or as public administrator, and also the bills of the institution in his hands. *Ibid*.

2530. The right of a debtor to a bank to offset any demand he held against the bank at the time it stopped payment, is not altered by the appointment of a receiver. *In the matter of the*

Receiver of the Middle District Bank, 1 Paige, 585.

2531. If the receiver is compelled to resort to an endorser where the real debtor is unable to pay, such endorser can offset the bills of the bank which he held at the time it stopped payment, unless he is indemnified by the real debtor. *Ibid.*

2532. Where bills of a bank are obtained by one of its debtors after it stops payment, they cannot be set off by such debtor against the debt he owes the bank. *Ibid.*

2533. A party against whom a decree for costs has been made will not be permitted to offset against such costs a decree or judgment in his favour, in relation to a distinct matter, to the prejudice of the solicitor's lien. *Dunkin v. Vandenberg*, 1 Paige, 622.

2534. But where different claims arise in the course of the same suit, or in relation to the same matter, they may be arranged and offset agreeable to equity, without reference to the solicitor's lien. *Ibid.*

2535. The solicitor's lien is only on the clear balance due to his client after all the equities arising out of that particular litigation are settled. *Ibid.*

2536. The Court of Chancery will not, on motion, allow a debt which is not ascertained by judgment or decree to be offset against a decree for costs to the prejudice of the solicitor's lien; although the validity of the debt is admitted by the client. *Ibid.*

2537. The power of the Court of Chancery to offset one judgment or decree against another, on motion, is the same as that of the common law Courts. But on a bill filed for an offset, the jurisdiction of the Court of Chancery is more extensive than that of the common law Courts. *Ibid.*

2538. Where there is no set-off at law, there must be special circumstances of equity to authorize a set-off in Chancery. *Mead v. Merritt and Peck*, 2 Paige, 403.

2539. Equity requires that cross demands should be set off against each other. *Lindsay and others v. Jackson and M'Jimpsey*, 2 Paige, 581.

2540. And in a case not within the statute of set-off, Chancery will permit an equitable set-off, if, from the nature of the claim, or the situation of the parties, justice cannot be obtained by a cross action. *Ibid.*

2541. The insolvency of one of the parties is a sufficient ground for the Court to exercise its equitable jurisdiction in allowing an equitable set-off. *Ibid.*

2542. And a set-off will be allowed where the defendant is insolvent; although the debt of the complainant to the defendant is not due. *Ibid.*

2543. Otherwise, if the debt of the defendant to the complainant was payable at a future day. *Ibid.*

2544. It is no objection to the set-off of one judgment against another, on motion, that the party making the application has the adverse party in execution on his judgment. *Utica Insurance Company v. Power*, 3 Paige, 305.

2545. If a debtor is arrested upon a *ca. sa.*,

and then is discharged from imprisonment, with the consent of the plaintiff, the judgment upon which the *ca. sa.* issued is extinguished as a liquidated demand, and cannot be set off on motion against another judgment. *Ibid.*

2546. Where the solicitor in a suit is entitled to the costs awarded against the adverse party, the latter has an equitable claim to have such costs offset, or applied upon a judgment in his favour, against the solicitor. *Ibid.*

2547. The assignee of a bill of costs due to a solicitor takes the same subject to an equitable right of set-off, which existed against the solicitor at the time of the assignment. *Ibid.*

2548. The Court of Chancery will entertain a suit for an equitable set-off of one judgment against another, although the complainant has another remedy by a summary application to the Courts of law in which the judgment against him was recovered. *Gridley v. Garrison*, 4 Paige, 647.

2549. But as the complainant, in ordinary cases, has a more cheap and expeditious remedy, by the application to the equity powers of the Courts of law, such suits in this Court will be discouraged by refusing costs to the complainant, except in special cases. *Ibid.*

2550. Where C. received a negotiable note from I., payable at a future day, which he endorsed and passed away in the ordinary course of business, and I. held two negotiable notes against C. for about the same amount, which were payable a short time after the note which he had originally given to C. became due; and before any of the notes became due, I. became insolvent, and made an assignment for the benefit of his creditors, which assignment included C.'s notes, which were endorsed and transferred to the assignee, and C. was afterwards compelled, as endorser, to pay and take up the note originally given to him by I.; held, that C. could not in equity offset the note so taken up by him against his own notes in the hands of the assignee. *Aliter*, if C. had been the owner and holder of I.'s note at the time of the assignment for the benefit of his creditors; as the circumstance of the note not being due would not have impaired C.'s equitable right to a set-off in such a case. *Chance v. Isaacs*, 5 Paige, 592.

2551. Where debenture certificates are given for goods bonded and subsequently exported, if the bond given for the duties is not paid, and a suit is subsequently brought thereon, the debenture certificates should be applied in part payment as of the time when the bond fell due, so that interest shall not be charged upon any greater sum than the balance remaining due upon the bond, after deducting the amount of the certificate. *Norton v. Ludlow*, 5 Paige, 519.

2552. Neither at law nor in equity can there be a set-off against a distress for rent. *Wolcott v. Sullivan*, 1 Edw. 399.

2553. Where a party claims a set-off, and yet settles the debt without further steps to establish his right, this amounts to a voluntary payment. *Morton v. Ludlow*, 1 Edw. 639.

2554. It would seem, that a debtor to the United States upon custom house bonds may plead at law, by way of set-off, in an action

upon such bonds, the amount of debentures (relating to them) which he holds. *Ibid.*

2555. Although custom house bonds lay over, and judgments are obtained upon them, yet the debtor is entitled in equity to a set-off upon debentures connected with such bonds from the time they are due, and the interest is only to run from that period upon the balances of the bonds. *Jones v. Moore*, 1 Edw. 632.

2556. Some decision in relation to the right of set-off on debentures against judgments upon custom house bonds, as in the last case. *Morton v. Ludlow*, 1 Edw. 639.

LV. SHERIFF.

2557. If the sheriff improperly returns an execution unsatisfied, when there is property of the defendant in his bailiwick sufficient to pay the judgment, either wholly or in part, the proper remedy of the defendant is by an application to the Court out of which the execution issued, to set aside the return; or by a suit against the sheriff. *Stoors and others v. Kelsey and others*, 2 Paige, 418.

2558. It is the duty of the sheriff to sell lands in parcels where the property is so situated that it will probably produce more by that mode of selling; or where a part only is required to satisfy the execution. *The Mohawk Bank v. Atwater*, 2 Paige, 64.

2559. But a sale of several parcels together does not render the sale void, but only voidable; and after a great lapse of time the sale will not be disturbed. *Ibid.*

LVI. SHIPS AND SHIP OWNERS.

A. Owners of ships.

B. Authority and duty of master.

C. Insurance of a vessel.

A. Owner of ships.

2560. Where several persons had a joint interest in a ship and cargo, in the nature of a limited partnership, and an insurance company loaned money to one of the partners, with the assent of the copartners, upon *respondentia* upon his interest in the cargo only, and a part of the cargo was afterwards sold by the master for the repair of the ship; *held*, that the insurance company was entitled to claim a remuneration *pro tanto* out of the proceeds of a sale of the ship. *American Insurance Company v. Custer*, 3 Paige, 324.

B. Authority and duty of master.

2561. The master of a ship in a foreign port may, in a case of necessity, sell a part or hypothecate the whole of the cargo to repair the ship for the purpose of enabling him to complete the voyage. *Ibid.*

2562. Where the master is compelled to use his own private funds, or to take the property of a shipper, for the repair of the ship in a

foreign port, the master or shipper has a lien upon the ship for the expenses of such repairs, although there is no actual hypothecation thereof. *Ibid.*

2563. If an individual makes a voluntary loan to the master for the repair of the ship, and takes other security for the loan without reserving to himself a lien upon the ship, the lien is waived. *Ibid.*

2564. The lien upon a ship, for repairs furnished in a foreign port, must be enforced within a reasonable time, or the ship will not be liable therefor in the hands of a *bona fide* assignee. *Ibid.*

2565. But it will be sufficient, if the party entitled to the lien proceeds to enforce it within a reasonable time after the termination of the voyage during which the repairs were made, and before the ship sails upon a second voyage. *Ibid.*

C. Insurance of a vessel.

2566. Words amounting to a warranty of a vessel being then at a particular port, or physically there, must have a place in the policy as forming part of the contract. *Callaghan v. The Atlantic Insurance Company of New York*, 1 Edw. 64.

2567. Distinction between an express warranty and a representation. *Ibid.*

2568. For the purpose of determining whether words amount to a warranty, the circumstances, occasion of using, and object of them must be scrutinized. *Ibid.*

2569. The words in a memorandum for insurance, "on ship Nancy, J. S. master, at and from the port of G. (where she now is, &c.,"") amount to a warranty, and underwriters in making out a policy would be entitled to insert them as part of the contract. *Ibid.*

2570. Any positive averment or allegation on the face of an instrument, and making a part of the written contract, whether inserted in the body of it, or written in the margin transversely or otherwise, amounts to a warranty or condition. *Ibid.*

2571. There may be several warranties in the same policy, founded upon separate and distinct facts; and it is immaterial in what part of the policy they are inserted. *Ibid.*

2572. A representation merely in a memorandum for insurance is to be scrutinized according to its effects upon the contract. *Ibid.*

2573. A representation fairly made out will vitiate a policy, although it be in some degree erroneous. But if it contains the assertion of a material circumstance, which the insured makes in an unqualified manner without knowledge of its truth or falsehood, the same will vitiate the policy in case it turns out to be false. *Ibid.*

2574. Underwriters are entitled to all remedies which the assured had against the master and owner; and the assured cannot transfer them to the latter so as to defeat such remedies. *Atlantic Insurance Company v. Storrow*, 1 Edw. 621.

2575. And where a judgment was had against underwriters upon a total loss, and the assured received the amount from the owner, and assigned the policy and gave up the bill of lading

to the latter; it was held, that the underwriters should be credited on the judgment the amount for which the master or owner was liable. *Ibid.*

LVII. STATUTES.

2576. Under the act of the 18th of April, 1816, for draining the great marsh or swamp on the Canasara creek, in the towns of Sullivan and Lenox, in the county of Madison, the proprietors of the lands overflowed by that creek have a right to drain the marsh according to the provisions of the act, although in so doing they would divert the water from the mill of the complainants, which is situated on the Chittenango creek; inasmuch as at the time the act was passed they could have drained the marsh in the manner contemplated by that act without injuring the mill of the complainants on the stream below; since which time the greater portion of the waters of the Chittenango creek have been diverted by the state to supply the Erie canal. By the 5th section of the act, the complainants have a complete remedy against the proprietors of the land to be benefited for all damages they may sustain in consequence of the draining of the marsh. *French and another v. Kirkland and others*, 1 Paige, 117.

2577. Whether they would have such remedy against the state? *Quære. Ibid.*

2578. The object of the law of Congress organizing the board of Florida commissioners was to ascertain who were entitled to indemnity against the Spanish government; not to investigate all the various equities which arise as to the distribution of the fund awarded for any particular injury. *Delafield and others v. Cullen and others*, 1 Paige, 139.

2579. The act of March 6, 1807, to raise moneys to drain the drowned lands in the county of Orange, gives the right of voting for commissioners under the act only to persons who own lands in fee. *Phillips and others v. Wickham and others*, 1 Paige, 590.

2580. The provisions contained in the 2d section of the act of March, 1799, incorporating the Cayuga Bridge Company, prohibiting all other persons from erecting a bridge or establishing a ferry within three miles of the place where the company should erect their bridge, do not extend to the bridge erected by the company across the outlet of Cayuga lake, in 1809; the company having previously, by erecting a bridge across the Cayuga lake, between the villages of east and west Cayuga, located the site of the bridge authorized to be erected by the aforesaid act. *Cayuga Bridge Company v. Magee and others*, 2 Paige, 116.

2581. Exclusive privileges contained in a private act of incorporation, which are in derogation of the common law rights of the citizens at large, ought not to be extended by implication. *Ibid.*

2582. They must be construed strictly against the company, according to the principles of the common law. *Ibid.*

2583. In suits pending at the time the revised

statutes went into operation, the rights of the parties remain unaltered; but the remedy must be pursued according to such statutes, as far as is possible without impairing the right. *Snyder v. Gaulh*, 2 Paige, 284.

2584. The 186th section of the act of April, 1812, relating to the city of New York, does not authorize the collector to levy the assessment upon property found on the premises, unless it belongs to the person who was the owner or occupant of the premises at the time the assessment was made; and if it belongs to such owner or occupant, it is not necessary to distraint it or the premises. *Gouverneur and wife v. The Mayor, Alderman, and Commonalty of the City of New York, and others*, 2 Paige, 434.

2585. The property of a subsequent occupant cannot be sold under the warrant of the corporation, although he is bound by a covenant with the owner of the premises to pay the assessment. *Ibid.*

2586. Where the lessee and occupant had covenanted to pay all taxes and assessments on the premises, and the corporation were informed thereof by the landlord, and requested to direct the assessment to be collected out of the personal estate of the lessee, which they refused to do without any reasonable grounds for such refusal, they were enjoined from proceeding against the property of the landlord, or from selling the real estate for the assessment. *Ibid.*

2587. In the United States, where the legislative power is limited by written constitutions, a declaratory statute cannot have the legal effect of depriving an individual of a vested right, or of changing the rule of construction as to a pre-existing law. *Salters v. Tobias*, 3 Paige, 338.

2588. Statutes which are intended to deprive creditors of all remedy for the recovery of their debts should be construed strictly, and cannot be extended by implication beyond the fair and legitimate meaning of the terms used by the legislature. *Ibid.*

2589. In setting up a defence under a public statute, it is not necessary, either in a Court of equity or law, to set forth the statute in the plea. It is sufficient to state the facts which are necessary to bring the case within the operation of the statute, and to insist that upon those facts the plaintiff's right or remedy is at an end. *Bogardus v. Trinity Church*, 4 Paige, 178.

2590. Where the Supreme Court has given a judicial construction to a provision of a recent statute, that decision, if not clearly wrong, should be followed by the Court of Chancery, so that different rules of construction may not prevail in the Courts of law and equity in relation to the same statutory provisions. *Merrill v. Townsend*, 5 Paige, 80.

2591. In construing a statute, the intention of the lawgivers, when once ascertained, is to prevail over the literal sense of the words which are used. Such intention is to be gathered from a consideration of all parts of the statute taken together. This may be presumed according to the necessity of the matter, and of that which is consonant to reason and good construction. *M'Dermut v. Lorillard*, 1 Edw. 273.

LVIII. SURROGATES.

2592. Surrogates, having exclusive jurisdiction in relation to the proof of wills of personal property, must determine all questions of fraud, imposition, and undue influence in procuring such wills, as well as the general question of the capacity of the testator. *Clarke and others v. Fisher and others*, 1 Paige, 171.

2593. Where a person appears before a surrogate to oppose probate of a will, he is bound, if required by the adverse party, to propound his interest, or show his right to contest the will. *The Public Administrator of New York v. Watts and Le Roy*, 1 Paige, 347.

2594. If issue is taken on the allegation of interest, the evidence in relation to that question, and that which relates to the validity of the will, should proceed *pari passu*. *Ibid*.

2595. A person claiming as next of kin should in his allegation of interest show how he was related to the deceased. *Ibid*.

2596. An allegation by a party coming to contest a will, that he is nearer of kin to the deceased than any other person in the United States, is not sufficient. *Ibid*.

2597. When executors or administrators are cited to account before a surrogate, it is the duty of the complainants, when required, to file a written allegation or libel stating the substance of their claims against the defendants. *Foster and Buch, Executors, v. Wilber and Olmstead*, 1 Paige, 537.

2598. The defendants may call on the surrogate to reject the allegation for insufficiency, or they may take issue upon the facts propounded, or put in a counter allegation in the nature of a plea in bar. *Ibid*.

2599. The surrogate before whom the will was proved, or by whom administration was granted, has power, upon the application of legatees, or next of kin, to compel executors as well as administrators to account, and to distribute the personal estate according to law, or the directions of the testator. *Ibid*.

2600. No surrogate can call executors or administrators to account, except where probate of the will or letters of administration were granted by him. *Ibid*.

2601. The Court has no power to rectify any other irregularities in a surrogate sale than those specified in section 61, 2 R. L. 110. *In the matter of Hemmip*, 3 Paige, 316.

2602. The remedy of the purchaser in other cases is either at law against the executor or administrator upon the covenants in his deed, or by bill against the heirs, upon the ground that they have been benefited by the proceeds of the sale. *Ibid*.

2603. Where, upon an application to confirm a sale of real estate, made under an irregular order of a surrogate, it appears that at the time the order for sale was made, there was personal estate in the hands of the administratrix more than sufficient to pay all the debts of the intestate, and there was no evidence that any part of the personal estate, or of the proceeds of the sale of the real estate, ever came to the hands of the heirs at law; held, that the assignee of the purchaser was not entitled to an order confirming

the sale, although the latter purchased the estate at the sale in good faith, without notice of the fraud committed by the administratrix. *In the matter of Hemmip*, 3 Paige, 306.

2604. The application to the chancellor, under the statute, to confirm a sale under an irregular and illegal order of a surrogate, proceeds upon the ground that the sale was unauthorized, and that the legal title remains in the heirs at law; and where the equities of the parties are equal, they will be left to their legal rights. *Ibid*.

2605. Where the parties interested in the taking of the account of an executor or administrator neglect to appear before the surrogate after having been duly cited, the executor or administrator will be entitled to proceed *ex parte*. *Kellett v. Radkban*, 4 Paige, 102.

2606. The citation of an infant should be served in the presence of his legal guardian, or of the person who has properly the actual care and custody of his person. *Ibid*.

2607. The citation should direct the infant to appear according to law, that is, by his guardian duly constituted. *Ibid*.

2608. If an infant who is cited before a surrogate has no general guardian, or if the general guardian has an interest adverse to the rights of the infant, a guardian *ad litem* must be appointed by the surrogate. *Ibid*.

2609. The petition of appeal upon an appeal from a surrogate's decree should name all the persons intended to be designated as the respondents, and should pray that they may answer the same. *Ibid*.

2610. Where one of the several legatees cites an executor to account before a surrogate, and upon the return of citation, the executor, instead of making the objection that he is not liable to account, obtains a citation for all the other legatees to be present at the taking of the accounts, he admits his liability, and he cannot afterwards set up, as a bar to the suit for an account, a previous settlement with the legatees. *Ibid*.

2611. Where an executor or administrator renders an account to the surrogate upon the application of either a creditor or legatee, or with a view to a final settlement of the account, he must swear to the correctness of the account, both as to the debits and credits; and all charges for payment or disbursements of sums exceeding twenty dollars must, if disputed, be established by the production of vouchers or other proper evidence. *Ibid*.

2612. An executor cannot appeal from the decision of a surrogate, in refusing to allow a claim of a creditor against the estate which the executor has neither paid nor become personally liable to pay. *Ibid*.

2613. Upon the affirmance of a decree of a surrogate, directing the payment of a balance found due from the appellant, the respondent may have the decree of affirmance enrolled, and may take out execution thereon in the Appellate Court. *Ibid*.

2614. Under the revised statutes, if the circumstances of the executor are such as not to afford adequate security for the faithful discharge of his trust, and the objection is made by a person interested in the estate, the surrogate is bound to require security from the executor,

although the testator at the time of making his will was aware that the executor was irresponsible. *Wood v. Wood*, 4 Paige, 299.

2615. Where the executor is about to remove from the state, the surrogate must require security from him, although the testator by his will directed the executor to remove with the property bequeathed into another state. *Ibid.*

2616. The sentence of a surrogate, or of a higher Court having power to review his decision, in relation to the competency of a testator to make a will of personal property, is not conclusive upon the parties to that litigation in a subsequent suit as to the validity of a devise of real estate contained in the same will. *Bogardus v. Clark*, 4 Paige, 623.

2617. The sentence of a surrogate, or of the chancellor upon an appeal from such sentence, as to the validity of a will of personal estate, is binding and conclusive in all Courts and places, until reversed by a higher tribunal. *Ibid.*

2618. Such sentence is in the nature of a proceeding *in rem*, to which any person having an interest in the subject of litigation may make himself a party, and who will therefore be bound by the sentence or decree, although he is not in fact a party to the suit. *Ibid.*

2619. A surrogate, upon the accounting of an administrator before him, has jurisdiction to declare the sale of a chattel interest in land which has been bid in by the administrator for his own benefit void, and to charge him with the full value of the premises at the time of such sale with interest, or with the present value and the nett income of the property from the time of the sale. *Stiles v. Busch*, 5 Paige, 139.

2620. The sentence or decree of a surrogate upon the final accounting of an administrator before him is, unless appealed from, conclusive as to the amount of the personal estate with which such administrator is chargeable, and it cannot be reviewed in a collateral suit. *Ibid.*

J.IX. TAXES.

2621. Complainant being assessed for the same personal property in two different counties; held, that a bill of interpleader against the two collectors is proper. *Thompson v. Ebbets*, 1 Hopk. 272.

2622. And having paid into Court the amount of the highest of the two taxes, he was dismissed with costs from the fund, after both defendants had answered, admitting the complainant's allegations. *Ibid.*

2623. Where there is a remedy given both against real and personal estate for the satisfaction of taxes and assessments, as a general rule, the remedy against the personal estate should be first exhausted, unless there is some specific and controlling equity to make it proper to proceed against the real estate in the first instance. *Gouverneur and wife v. The Mayor, Aldermen, and Commonalty of the City of New York*, 2 Paige, 434.

2624. A railroad corporation is not liable to taxation upon its capital, as personal estate, for that part thereof vested in the lands over which

the roads runs, and in the railways and other fixtures connected therewith; but that part of the corporate property should be taxed in the several towns and wards in which the same is situated, as real estate, and at its actual value at the time of its assessment. *Mohawk and Hudson Railroad Company v. Clute*, 4 Paige, 384.

2625. The capital stock of a railroad corporation not vested in its railways, or other real estate, is to be taxed as personal property, in the town or ward where the principal office or place for transacting the financial concerns of the company is situated. *Ibid.*

2626. Where the president of a railroad corporation furnished the statements required by the statute to be delivered to the assessors of the town in which the corporation was liable to be taxed upon its capital, but by mistake as to the law, omitted to deduct, as a part of the real estate of the corporation, that portion of its capital which was vested in the railways and other fixtures, and the corporation was assessed and taxed in that town in conformity to such statement, the Court of Chancery refused to restrain the re-collection of the tax. *Ibid.*

1627. A party who is taxed in two different towns for the same property, which is only liable to be taxed once, and where it is doubtful to which town the right to the tax belongs, may file a bill of interpleader to compel the collectors of the tax to settle the right between themselves. *Ibid.*

2628. A corporation liable to taxation upon its capital cannot be taxed for its surplus profits remaining on hand and undivided. It can only be taxed for so much of its capital stock paid in, or secured, as will remain after deducting therefrom the actual cost of the real estate of the company. *Bank of Ulica v. City of Ulica*, 4 Paige, 399.

2629. Where the illegality of an assessment and taxation of property appears upon the face of the warrant for the collection of the tax, trespass will lie against the collector who levies upon property for its payment. *Ibid.*

2630. If the error in an assessment appears upon the face of the assessment roll, or the assessment is made by the same body which imposes the tax, the party improperly taxed has a remedy at law, by *mandamus*, to compel such body to correct the taxation. *Ibid.*

LX. TENANTS IN COMMON.

2631. Where one of several tenants in common who is in possession of the premises held in common, claiming title to the whole, sells and conveys the same to a third person, who enters under that conveyance claiming title to the whole, it is such an ouster of the other tenants in common as to bar their right of entry after an adverse possession of twenty years. *Town v. Needham*, 3 Paige, 545.

2632. Where one tenant in common receives more than his share of the rents and profits of the estate held in common, his co-tenant has an equitable lien upon his undivided interest in the premises, which may be enforced against the

same while the parties continue to hold the premises in common. *Hanan v. Osborn*, 4 Paige, 336.

2633. Upon the death of a tenant in common who has received more than his share of the rents and profits of the estate, the amount due to his co-tenant, which is a personal charge, is payable primarily out of the personal estate of the decedent. *Ibid.*

2634. A tenant in common who has been in possession, and received the whole rents and profits of the estate, in accounting for such rents and profits to his co-tenants, is entitled to allowance for such sums as he may have paid for taxes or assessments on the premises, or for keeping the same in ordinary repair. *Ibid.*

LXI. TENANT FOR LIFE.

2635. A tenant for life has the right to take from the premises reasonable fire wood for the use not only of the house which she herself occupies, but also sufficient to supply the house of her servant who cultivates the land, provided it can be done without injury to the inheritance. *Gardiner v. Dering and Hempstead*, 1 Paige, 573.

LXII. TOWNS AND VILLAGES.

2636. The towns of this state are bodies politic of special character and limited powers. *Town of North Hempstead v. Town of Hempstead*, 1 Hopk. 288.

2637. The common lands respecting which they have a right to make regulations are those which they hold in their corporate capacity. *Ibid.*

2638. But a town has no capacity to hold lands not within its own limits. *Ibid.*

2639. The title of a town to its lands is held subject to the power of the Legislature over its limits, and no right of property is violated by the division of a town. *Ibid.*

2640. The original town of Hempstead was invested with power to hold lands by patents from the early governors of the colony, and those patents constituted the inhabitants a body corporate. *Ibid.*

2641. The division of the original town of Hempstead into two new towns was in itself an assignment to each of such of the lands of the pre-existing towns as are included in the limits of each new town respectively. *Ibid.*

2642. This division of the original town was a partition of its common lands in fact as well as in title. *Ibid.*

2643. Where M. purchased land in a village adjoining a public street, and it was at the same time agreed between him and the vendor that a triangular piece of land belonging to the latter, on the opposite side of the street, and in front of the land sold, should never be built upon, but should be deemed public property; and the vendor executed to M. a deed of the land sold, and a bond for the performance of the agreement as to the triangular piece of

land, and both instruments were duly proved and recorded; and H. afterwards purchased of M. the land opposite the triangular piece, after being informed by him of the privileges secured by the bond; *held*, that H. was entitled to the benefit of the easement, and that M. could not, without his consent, be permitted to make a new arrangement with the holders of the legal estate in the triangular piece of land by which buildings should be erected thereon. *In the matter of Lytle*, 3 Paige, 251.

2644. Easements are annexed to the estate of the owner of the dominant tenement, and pass to the grantee of such estate. They are also a charge upon the estate of the owner of the servient tenement, and follow such estate into the hands of those to whom the servient tenement or any part thereof is conveyed. *Ibid.*

2645. An easement is not destroyed by a division or a sale of a part of the estate to which it is appurtenant. And the assignee of any part of the dominant tenement may claim the benefit of the easement, so far as it is applicable to his part of the property, provided the right as to the several parcels can be enjoyed without any additional charge or burden upon the proprietor of the servient tenement. *Ibid.*

2646. Where the owners of land in a city or village lay out such land into lots, with streets and avenues intersecting the same, and sell the lots with reference to such streets and avenues, they cannot afterwards deprive their grantees of the benefit of having such streets and avenues kept open; and the same principle is applicable to a similar dedication of urban lands to be used as an open square or public walk. *Trustees of Watertown v. Crown*, 4 Paige, 510.

2647. Where lands are dedicated to the use of the inhabitants of a city or incorporated village for a public square, a bill may be filed in the name of the corporation to restrain the erection of a nuisance thereon, or to protect the equitable right of the corporators to the use of the public square as such. *Ibid.*



LXIV. TRUSTS.

A. *How trusts are created, and their incidents.*

B. *Trusts resulting, or by implication.*

C. *The trust estate, and cestui que trust.*

D. *Authority, duty, and responsibility of trustees.*

E. *Trustee's accounts; allowances to, and charges against a trustee.*

F. *Compensation of trustees*

A. *How trusts are created, and their incidents.*

2648. A person by his will appointed an executor, who afterwards became a judgment creditor of the testator. When the testator subsequently died, he left debts unpaid, and an estate consisting of personal property and lands. The personal estate was insufficient to pay the debts, and the person appointed executor accepted that trust, and acted as sole executor. This executor caused all the lands of the testator to be sold under an execution issued upon

the judgment held by himself as a creditor; and he became the purchaser. The sale and purchase were vacated at the instance of other persons interested in the estate of the testator. *Rogers v. Rogers*, 1 Hopk. 515.

2649. In such circumstances, an executor is charged with a trust affecting the lands; and if he purchased the lands, the sale will be annulled, as in the other cases of trustees purchasing the subjects of their trusts. *Ibid.*

2650. Where an insolvent trustee assigned a mortgage purporting on its face to be given to him as trustee, partly in payment of his own debt to the assignee, and partly for cash which he applied to his own private use, the assignee was held to be chargeable with notice of the misapplication of the trust fund. *Pendleton and wife v. Fay and others*, 3 Paige, 304.

2651. Where a party takes a conveyance of trust property, to enable the trustee to raise money thereon for his own private purposes, he is chargeable with the costs of a suit brought by the *cestui que* trust to set aside such conveyance. *Ibid.*

2652. A *bona fide* purchaser of trust property from a trustee, without notice of the trust, is not bound to see that the purchase money is applied to the objects of the trust. *White v. Carpenter*, 2 Paige, 217.

2653. A trustee cannot become a purchaser of the trust property, either directly or indirectly, on his own account, or as the agent of another, unless he obtains the consent of all the persons interested in the sale. *De Carters v. Le Roy de Chaumont*, 3 Paige, 178.

2654. If a trustee has a personal interest in the sale, which may be sacrificed if he is not allowed to become a bidder, the Court will substitute in his place a master, or another trustee, to execute the trust, if it can be done without injury to the interest of the *cestui que* trust. *Ibid.*

2655. The authority of the Court of Chancery to accept the resignation of a trustee, and to discharge him from his trust, and appoint a new trustee in his place, relates only to cases where the trustee has become vested with the trust estate, or has made himself answerable as trustee by accepting the trust, or by doing some act in his character of trustee. *In the matter of Stevenson*, 3 Paige, 430.

2656. By the common law, if a devise was to two upon trust, and one refused to accept the trust, it was a good devise to the trustee who did accept. *Ibid.*

2657. A trustee who holds the legal estate for the use of another person, and will refuse to convey to him, will not be allowed to purchase in an outstanding title for his own benefit. *Kellogg v. Wood*, 4 Paige, 578.

2658. Courts of equity, in regard to trust estates, adopt the rules of law applicable to legal estates, and in a partition suit, where all the *cestui que* trusts are before the Court, if the legal estate has devolved on the Court of Chancery by the death of the surviving trustee, the Court will appoint the master who sells the property a trustee, so as to carry the legal estate to the purchaser at the sale. *Quakney v. Henry*, 4 Paige, 345.

2659. In all cases of mere passive trusts, the revised statutes have vested the legal estate in the lands in the person or persons entitled to the actual possession, and to the whole beneficial interest in the lands under the trust. *Ibid.*

2660. Where real estate was, previous to the revised statutes, conveyed to a mother in fee, in trust for her daughter, and her heirs and assigns, provided she did not die under age without issue, but if she died under age and without issue, then for the sole use of the mother in fee, and the mother died during the minority of the daughter, who was the sole heir; held, that the whole legal and equitable estate in the premises then vested in the daughter. *In the matter of Dekay*, 4 Paige, 403.

2661. Where one of several trustees refuses to accept and execute the trust, the whole estate vests in the others, in the same manner as if he were dead, or had not been named a trustee. *King v. Donnelly*, 5 Paige, 46.

2662. But where land is devised in trust, and all the devisors decline the trust, the legal estate nominally vests in them for the benefit of the *cestui que* trust, if the trust itself is legal; although the execution of the trust in such a case devolves upon the Court of Chancery under the statute, so that the nominal trustees may be removed, and others appointed in their place if necessary. *Ibid.*

2663. A new trustee under the statute cannot be appointed except upon the application of a party interested in the execution of the trust, or by a decretal order made in a cause, where such new trustee is proper to carry into effect the decree of the Court. *Ibid.*

2664. In a partition suit, where the legal estate in an undivided share of the premises is in a trustee, if a new trustee is substituted in his place pending the suit by an appointment by the chancellor under the statute, the new trustee must be brought before the Court by a supplemental bill. *Ibid.*

2665. Every estate vested in executors or trustees, as such, is held by them in joint tenancy as between themselves. But the nature of their estate in the trust property, in reference to the rights of the *cestui que* trusts and others, depends entirely upon the nature of the rights or interests of the latter; so that when all the purposes of the trust as to any share of the trust property are illegal, or cease, the estate of the trustee ceases *pro tanto*. *Lorillard v. Oster*, 5 Paige, 172.

2666. Although some of the objects for which a trust is created, or some future interests limited upon the trust estate, are illegal or invalid, if any of the purposes for which the trust was created are legal and valid, and would authorize the creation of such an estate, the legal title vests in the trustees during the continuance of the valid objects of the trust; except in those cases where the legal and valid objects of the trust are so mixed up with those which are illegal and void, that it is impossible to sustain the one without giving effect to the other. And every disposition by the testator of an interest or right in the rents and profits of his real estate which are to accrue after his death,

which disposition, if valid, would have the effect of suspending the power of alienation of the entire fee for a longer period than is allowed by law, and every other future estate or interest limited upon the trust which would have that effect, must be considered and treated as absolutely void and inoperative, in determining the question as to the validity of the devise of the legal estate to the trustees, or as to the validity of the other trusts of the will. *Hawley v. James*, 5 Paige, 318.

2667. The devise of a trust term depending upon minorities, which term can in no event continue longer than during the actual minority of two or more infants in being at the creation of such term, and who have a beneficial interest therein, is valid under the provisions of the revised statutes; although such trust term is not made determinable upon the deaths of any two of such infants. But no contingent remainder can be limited upon such a term, unless the nature of the contingency upon which it is to vest is such that the remainder must vest in interest, if ever, during the continuance of not more than two lives in being at the death of the testator, or at the termination of such lives. *Ibid.*

2668. An annuity is a legacy of several annual sums in gross; and when payable out of the rents and profits of real estate, it is a charge upon the land. And, under the second subdivision of the fifty-fifth section of the article of the revised statutes relative to uses and trusts, an express trust may be created to lease lands, and to receive the rents and profits, for the payment of such annuities. *Ibid.*

2669. Where an express trust is created to lease lands, and receive the rents and profits thereof for the payment of annuities and other charges thereon, there is a resulting trust, as to the surplus rents and profits, in favour of the person who is presumptively entitled to the next eventual estate in such lands. *Ibid.*

2670. In analogy to the provision of the revised statutes authorizing the creation of a trust to receive the rents and profits of real estate, and to apply them to the use of the *cestui que* trust for life or any shorter period, so as to place the interest of the *cestui que* trust beyond the reach of creditors, except as to the surplus of such rents and profits beyond what is necessary for his support and maintenance, a valid trust of personal property may be created to apply the income thereof to the use of the *cestui que* trust in the same manner, so that his interest in the trust property will be placed beyond the reach of his creditors to the same extent. *Hallett v. Thompson*, 5 Paige, 583.

2671. But to protect the interests of a *cestui que* trust in personal property from the reach of his creditors, so far as the same is necessary for his support and maintenance, the trust must be of such a nature that the interest of the *cestui que* trust in the trust property is inalienable during his life, or so long as the trust continues; and the exception in the thirty-eighth section of the title of the revised statutes relative to the Court of Chancery, only applies to trusts of that description. *Ibid.*

2672. Where one of three persons appointed,

by a will, trustees of an express trust, refused to accept the trust, and executed a formal renunciation thereof, and after the death of one of the acting trustees the survivor applied to the chancellor to restore such renouncing trustee to the trust, which he was then willing to assume in conjunction with the survivor; *held*, that the Court had no authority to restore such renouncing trustee to the trust, or to appoint him a new trustee in conjunction with the survivor, who had originally assumed to act as one of the trustees. *In the matter of Van Schoonhoven*, 5 Paige, 559.

2673. The revised statutes only authorize the Court of Chancery to appoint a new trustee in the place of one who is removed by the Court, or whose resignation is accepted after he has assumed the trust; or in case of the death of a sole surviving trustee, so that there is no one left to execute the trust. *Ibid.*

2674. Where one of the persons appointed trustees of an express trust refuses to accept such trust, and executes a formal renunciation thereof, he cannot afterwards accept and execute the trust, except it be under a new appointment as trustee. *Ibid.*

2675. Where A. is mortgagee and trustee for creditors, and buys in the real estate (mortgaged to him) in his own name, but voluntarily for the benefit of the trust, and afterwards allows a resale for the like purpose, (subject to his just charges and expenses,) and the amount is credited to the trust fund, he cannot retract; especially as the debt owing to him from the trust estate had been satisfied. It has become trust property. *Pierson v. Thompson*, 1 Edw. 212.

2676. Where real estate is conveyed for the benefit of creditors, and an equity of redemption, embraced by the deed, is sold under an execution, but the judgment creditor ceases to claim the avails of the sale, they belong to the trustees, and not the administrator of the debtor. *Ibid.*

B. Trusts resulting, or by implication.

2677. In a grant for lands from the government where no consideration is paid for the land, a resulting trust cannot arise; nor will it arise in favour of a person who, in fraud of a law of the government, obtains for his own benefit the names of a number of persons to be inserted in the grant as *nominal* patentees. If such nominal patentees refuse to convey, they will hold the land both at law and in equity. *Jackson v. Miller*, 6 Wend. 228.

2678. Thomas L. and J. L. were owners of a farm in Orange county, which, in 1811, was, by a fraud upon them, mortgaged to R. The mortgage was foreclosed in Chancery, and the farm advertised for sale by a master. Before the sale, B., by an arrangement with Thomas L. and J. L., agreed to purchase in the farm for their benefit, for which he was to receive a stipulated compensation. R., the mortgagee, in order to favour Thomas L. and J. L., agreed with B. that he might bid off the property at \$1500, about half the amount of the mortgage. B., at the sale, prevented others bidding, by representing that he intended to buy for Thomas L. and J. L. B. purchased the farm at the master's sale for \$1540, about \$1000 below its

value. Afterwards B. refused to convey the farm to Thomas L. and J. L., or to account to them for the value, although they tendered to him the amount of his bid, with interest, and the sum agreed to be paid for his services; *it was held*, that B. was a trustee for Thomas L. and J. L., and had no other interest in the farm than that of a mortgagee to secure the repayment of the purchase money and the payment of the sum agreed to be allowed him for his services. *Brown v. Lynch and Lynch*, 1 Paige, 147.

2679. No resulting trust can be raised in favour of a grantor in opposition to the express terms of his conveyance. *Squire and wife v. Harder and others*, 1 Paige, 494.

2680. Where the grantor conveys in fee with warranty, he is estopped from alleging that he had an interest in the purchase money which created a resulting trust in his favour. *Ibid.*

2681. A resulting trust cannot be raised in favour of a person against the intention of the parties. *White v. Carpenter and others*, 2 Paige, 217.

2682. Where S. owned a farm in the county of Queens, and about ten acres in addition, and made an agreement with F. to exchange with him the ten acres for six acres adjacent to the farm, and possession was respectively taken by S. and F.; and before the conveyances were executed on this exchange, S. mortgaged his farm to G., and by mistake included in the mortgage the ten acres instead of the six acres, and the mortgage was foreclosed in Chancery in 1835, and the mortgaged premises ordered to be sold; and S., who was alone interested in the surplus to be raised on the sale, employed E., an auctioneer, to sell the property to pay off the mortgage; and the property was exposed to sale, and bid in for S.; and E. also attended the master's sale as the agent of S., at which sale a map which had been made of the farm, including the six acres, was exhibited, as containing the property to be sold; and the property was sold with reference to the map, and for an amount much exceeding the mortgage and costs, and H. became the purchaser; and after the sale S. obtained the legal title to the six acres; and having received the surplus moneys and becoming insolvent, upon a bill filed by H. praying for a decree to compel S. to convey to him the six acres; *it was held*, that S. having obtained the whole consideration money for the land, including the six acres, under circumstances which amounted to a fraud upon H., S. would be considered as a trustee for H., and would be decreed to convey to H. the six acres. *Howland v. Scott*, 2 Paige, 406.

2683. Where there is a resulting trust under a conveyance, it must arise at the time of the execution of the deed. *Rogers v. Murray*, 3 Paige, 390.

2684. After the legal title has passed to the grantee by the execution of the deed, a resulting trust cannot be raised by the subsequent application of the funds of a third person for the improvement of the property, or for the payment of the purchase money, so as to divest the legal estate of the grantee. *Ibid.*

2685. A resulting trust is the mere creature

of equity; and it cannot, therefore, arise where the parties have declared an express trust, which is evidenced by a written declaration of such express trust. *Leggett v. Dubois*, 5 Paige, 114.

2686. Where an attorney who was employed to collect or foreclose a mortgage, instead of foreclosing the same, took a conveyance of the equity of redemption to himself instead of his clients; *held*, that he took the legal title as a trustee for his clients, and that upon his death the legal estate descended to his heirs at law charged with the trust, and that the clients were entitled to a conveyance from the heirs, upon the repayment of the amount paid by the attorney for the equity of redemption, and the amount due for his services, and the value of the improvements made upon the premises by the heirs before they had notice of the existence of the trust; *held*, also, that one of the heirs who had purchased and paid for the shares of the other heirs in the trust premises, before he had any notice of the trust, was entitled to hold the shares thus conveyed to him discharged of the trust, and that the *cestui que* trust must look to the heirs who sold such shares for the purchase money received by them on the sale. *Giddings v. Eastman*, 5 Paige, 561.

2687. Where several heirs or devisees are turned into trustees by construction, as to lands devised or descended to them, but without any actual or constructive notice of the existence of the trust, one of such heirs or devisees may become a *bona fide* purchaser of the shares of his co-heirs or co-devisees, so as to entitle him to hold their shares of the land discharged of the trust, although the other share, which he held with them as a tenant in common, remains subject to the trust. *Ibid.*

C. The trust estate and *cestui que* trust.

2688. A conveyance of an estate will not be decreed in Chancery where the proof of the equitable title varies from that set up in the bill. *Forryth v. Clark et al.* 3 Wend. 637.

2689. Whether a trustee can support a release from his *cestui que* trust, founded upon a consideration grossly inadequate, although no actual fraud was intended? *Quere. Bolton v. Gardner*, 3 Paige, 273.

2690. Such trustee should at least be required to show, either that he was treating with the *cestui que* trust for a settlement at arm's length, or that previous to receiving the release he gave the *cestui que* trust a fair statement of the amount of the trust property. *Ibid.*

2691. The interest of a *cestui que* trust in real estate cannot be sold on an execution at law, unless the trustee holds the legal title as a clear simple trust for the benefit of the judgment debtor alone. *Ontario Bank v. Root*, 3 Paige, 478.

2692. Where there is a mistake in a deed to a trustee, who afterwards conveys the premises to the *cestui que* trust without any new consideration, the latter is not entitled to defend himself as a *bona fide* purchaser without notice of the mistake. *Le Roy v. Platt*, 4 Paige, 77.

D. Authority, duty, and responsibility of trustees.

2693. An executor or trustee cannot purchase the trust property from his co-executor or trustee

without being liable for the profits arising from the property purchased. *Case and wife v. Abel, Executor*, 1 Paige, 393.

2694. It is the duty of executors and trustees to keep the trust funds separate and distinct from their private funds. *Ibid.*

2695. If they use the trust funds or mix them with their private funds, they will be made liable for all losses which may arise from their neglect or mismanagement. *Ibid.*

2696. The directors of a joint stock corporation who wilfully abuse their trust or misapply the funds of the company, by which a loss is sustained, are personally liable, as trustees, to make good that loss; and they are also liable if they suffer the corporate funds to be lost or wasted by gross negligence and inattention to the duties of their trust. *Robinson v. Smith*, 3 Paige, 223.

2697. A trustee who has only a delegated discretionary power cannot give a general authority to another to execute such power, unless he is specially authorized to do so by the deed or will creating the trust; and where an estate is devised to trustees, with power to sell, a general authority to an agent to sell and convey lands belonging to the estate, or to contract absolutely for the sale of such lands, cannot be legally given by the trustees. *Hawley v. James*, 5 Paige, 318.

2698. Where the right or interest of a *cestui que trust* in property, which is to be invested in lands upon trust, to receive the rents and profits thereof for his use, is inalienable by the provision of the 63d section of the article of the revised statutes relative to uses and trusts, the trustee is not authorized, even with the assent of the *cestui que trust* and with the sanction of the Court of Chancery, to do any act which would be a virtual alienation of the trust fund directed to be so invested in trust. But where the fund is directed to be invested in the purchase of land in a particular place, upon such a trust, the Court of Chancery may, with the assent of all parties who have any interest in the trust fund, or in lands to be purchased therewith, authorize it to be invested in the purchase of real estate in another place, upon the same trusts; and the chancellor, as the general guardian of infants who are interested in the trust fund, may assent to such change of investment in their behalf. *Wood v. Wood*, 5 Paige, 596.

2699. An executor or a trustee appointed by the will of a testator is bound to carry into effect all the valid trusts of the will, unless he is excused from a strict performance by the parties interested therein, and with the sanction of the Court of Chancery, where the rights of infants are concerned. *Ibid.*

2700. Where the testator directed his property to be invested in the purchase of lands in the names of his children, but in trust for their testamentary guardian to receive the rents and profits for their use after as well as before they arrived at the age of twenty-one, so long as he thought proper; *held*, that such a trust was not authorized by the revised statutes; that no estate or interest vested in the trustee; and that he held the fund as testamentary guardian merely. *Ibid.*

2701. To enable a trustee to receive the rents and profits of lands for the use of another person, it is necessary that he should have the legal title to the land itself; and where the land itself is vested in the person beneficially interested therein, a valid power in the trust cannot be given to a trustee to receive the rents and profits of such lands for the use of the person who holds the legal title of the land. *Ibid.*

E. Trustee's account; allowances to, and charges against a trustee.

2702. The defendant's testator held notes against a manufacturing company, in trust for the complainant's intestate, which notes he invested in the stocks of a different manufacturing company. This being done in good faith, and being deemed advantageous at the time, the estate of the trustee shall not be charged with the loss. *Brown v. Campbell*, 1 Hopk. 233.

2703. The assignment by a trustee, as security for his private debt, of a bond and mortgage belonging to the trust fund, will make such trustee chargeable for the value of such bond and mortgage at the time of such assignment, with interest thereon. *Van Rensselaer and others v. Morris*, 1 Paige, 13.

2704. And such trustee will be so chargeable, although the mortgagor should, subsequent to such assignment, become insolvent, and the mortgaged premises be insufficient to discharge the mortgage debt. *Ibid.*

2705. Where money was awarded by the Florida commissioners upon a memorial of one of two joint owners, and the applicant claimed in his memorial the whole to himself, without naming his joint owner; *it was held*, that the joint owner not named was not bound to put in his claim and contest his right before the commissioners; that the person who received the money awarded was a trustee, and accountable in equity to the real parties interested in the fund. *Delafeld and others v. Calden and others*, 1 Paige, 139.

2706. A trustee in possession of land is required to account to the *cestui que trust*, not only for the rents and profits actually received, but also for the rents and profits which might have been received. *Rodgers v. Rodgers*, 1 Paige, 188.

2707. Where trustees make a heavy sacrifice which is deemed expedient at the time, they are not liable to make good the loss. *Pierson v. Thompson*, 1 Edw. 219.

2708. A trustee cannot charge the trust estate with the costs of defending actions of assault and battery recovered against him, although the acts arose in an attempt to protect the trust property. *Ibid.*

F. Compensation of trustees.

2709. Where certain persons were to subscribe for a large amount of stock, and hold it upon trusts afterwards declared, and they became trustees for the creditors of the person beneficially interested; *held*, they could not charge commissions upon the stock either as trustees or special agents. *Ibid.*

LXIV. VENDOR AND PURCHASER.

- A. *Of the vendor's lien on the estate sold for the purchase money.*
 B. *When and how purchasers are favoured and relieved in equity.*
 C. *Of notice to a purchaser, and how far he is affected by it.*
 D. *Of the purchase and sale of personal property.*

A. *Of the vendor's lien on the estate sold for the purchase money.*

2710. A grantor of lands has an equitable lien on the estate sold for the payment of the purchase money, and this lien is not waived by the grantor's taking the mere personal security of the purchaser only, unless there is an express agreement between the parties that the equitable lien be waived. But wherever any security is taken on the land sold or otherwise, for the whole or a part of the purchase money, the equitable lien will be waived, unless there is an express agreement that it shall be retained. *Fisk v. Howland and others*, 1 Paige, 20.

2711. So the lien is waived where a note or bond is taken of the vendee for the purchase money in which a third person joins as security. *Ibid.*

2712. Likewise, if a vendee sells to a third person without notice, the lien is lost. *Ibid.*

2713. Where upon a sale of lands the negotiable note of the purchaser is given for the purchase money, the vendor retains an equitable lien upon the land; but an endorsee is not, from the mere transfer of the note, entitled to the benefit of such lien, where the endorser has not been made liable upon his endorsement. *White v. Williams and others*, 1 Paige, 502.

2714. Where the vendor of land takes no mortgage or other security for the payment of the purchase money, he will have an equitable lien upon the land in the hands of the heirs of the purchaser, and upon the improvements made upon the land by the purchaser in his lifetime. *Warner v. Van Alstyne*, 5 Paige, 513.

2715. The widow of the purchaser takes her dower in the land subject to the equitable lien of the vendor for the unpaid purchase money. *Ibid.*

2716. The purchaser of land under a statute sale, for the payment of an assessment charged thereon, takes the land discharged from the equitable lien of the original owner for the purchase money remaining unpaid upon a former sale. *Ibid.*

B. *When and how purchasers are favoured and relieved in equity.*

2717. A bona fide purchaser of property at a judicial sale, under the order of a Court having jurisdiction of the subject-matter, is always protected, where the proceedings are only voidable, not void. *American Insurance Company v. Fisk*, 1 Paige, 90.

2718. And Courts ought to be liberal in sustaining the regularity of such sales, where there exists no doubt as to the fairness and official nature of the transaction. *Ibid.*

2719. The Courts are likewise protected, whose proceedings have been irregular, where

they have jurisdiction of the subject-matter. *Ibid.*

2720. Title to real estate can only be acquired or lost according to the law of the place where it is situated. *Horsford v. Nichols*, 1 Paige, 320.

2721. This rule applies to mortgages as well as to deeds absolute. *Ibid.*

2722. Where a person enters into possession of land under a conveyance from one claiming the title, such title is presumed to be good until the contrary is shown. *Pitney v. Leonard and Leonard*, 1 Paige, 461.

2723. Where T., being the owner of a lot of land, gave a mortgage on the same to H., who neglected to have the mortgage recorded; and afterwards, T. conveyed the mortgaged premises to A., who had no notice of the mortgage, in payment of a precedent debt; it was held, that A. was not a bona fide purchaser for a valuable consideration, within the meaning of the recording act, so as to give him a preference over the prior unregistered mortgage. *Dickerson v. Tillinghast*, 4 Paige, 215.

2724. To constitute a bona fide purchase for a valuable consideration, within the meaning of the act, the purchaser must, before he had notice of the prior equity to the holder of an unrecorded mortgage, have advanced a new consideration for the estate conveyed, or have relinquished some security for a pre-existing debt due him. The mere receiving of a conveyance in payment of a pre-existing debt is not sufficient. *Ibid.*

C. *Of notice to a purchaser, and how far he is affected by it.*

2725. A purchaser at sheriff's sale is chargeable with constructive notice of the equitable rights of a vendee of a debtor on a judgment against whom lands are sold, and takes the legal title subject to such right, where the vendee is in actual possession of the premises under a contract entered into prior to the attaching of the lien of the judgment. *Parks v. Jackson*, 11 Wend. 442.

2726. It seems, also, that the purchaser would be entitled to file a bill in the nature of a bill of interpleader, making the party with whom he contracted or his assignees, and the creditor who seeks to avoid the title of the assignee, defendants, and praying the direction of the Court as to whom the purchase money shall be paid. *Ibid.*

2727. Want of notice is matter of defence, which the party alleging it must aver by way of defence, and establish by proof. *Cunningham v. Erwin*, 1 Hopk. 48.

2728. He must also deny all knowledge of facts charged from which notice may be inferred. *Ibid.*

2729. This denial must be full, positive, and precise. *Ibid.*

2730. And if the party relies upon want of notice in another from whom he purchased, he must still aver the fact by plea or otherwise. *Ibid.*

2731. Where a party has sufficient to put him on inquiry, it is equivalent in equity to actual notice. *Pitney v. Leonard*, 1 Paige, 461.

2739. A purchaser, wherever he has sufficient information to put him on inquiry, in equity is considered as having notice; and in such a case he will not be deemed a *bona fide* purchaser. *Pendleton and wife v. Fay and others*, 2 Paige, 202.

2733. If the purchaser of real property knows that a person, other than the vendor, is in actual possession thereof at the time of his purchase, or before he has paid the purchase money and obtained a legal title, he cannot protect himself, as a *bona fide* purchaser, against the equitable rights of the person in possession, of whom he made no inquiries as to the nature of that possession. *Grimstone v. Carter*, 3 Paige, 421.

2734. Where two persons have equal equities, and neither has the legal title, the prior equity must prevail; and the one who has the subsequent equity will not be permitted to defeat the right of the other by obtaining a conveyance of the legal estate after he has notice of such prior equity. *Ibid.*

2735. There is no difference in principle between a purchaser in good faith under the recording act and a *bona fide* purchaser, as recognised by the decisions of Courts of equity in other cases. *Ibid.*

2736. A contract entered into under a mutual misconception of legal rights, amounting to a mistake of law in the contracting parties, by which the object of it cannot be accomplished, is as liable to be set aside or rescinded as a contract founded in mistake of matters of fact. *Champlin v. Laytin*, 1 Edw. 467.

D. Of the purchase and sale of personal property.

2737. Where a merchant contracted for goods, the price to be secured by his note endorsed by B. and C., and the goods in the mean time were forwarded to his residence; *held*, that the property was not changed until the delivery of the note, and that B. and C., to whom he assigned the goods to secure an antecedent debt, could not hold them against the vendor. *Keeler and Freeman v. Field and others*, 1 Paige, 312.

2738. Where L., on the 24th of August, 1826, sold to M., who was then in good credit, and supposed himself solvent, a quantity of goods, for which M. was to give his own notes, without security, payable in six, seven, eight, nine, and ten months; and the goods were delivered to M., and shipped by him for the West Indies on the 26th of August, 1826, and on the 4th of September thereafter, and before he had executed the notes, M. stopped payment; and on the 9th of the same month, M. assigned the goods to V. to secure him for a large sum of money for which he was responsible as endorser for M.; and on the 5th of September, L. applied to M. for a redelivery of the goods, and also afterwards in the same month claimed the goods from V., and both M. and V. refused to redeliver the goods to L., and M. and V. denied all fraud in the transaction, and V. denied all knowledge at the time of his purchase of the conditions of the sale by L. to M., and also of the non-payment for the goods on the part of M.; *it was held*, that the sale and delivery of the goods to M. was unconditional and valid, and was sufficient in law to change the property; that the assignment by M. to V. was also valid, and

that L. had no lien on the goods for the purchase money due him from M. *Lupin and others v. Marie and Varet*, 2 Paige, 169.

2739. The principles of stoppage *in transitu* does not apply to such a case; that right must be exercised, or an attempt made to exercise it, before the goods reach the possession of the vendee. *Ibid.*

2740. If goods upon a sale thereof are unconditionally delivered by the vendor to the vendee without any fraud upon the part of the latter, the vendor can only look to the personal security of the vendee for the payment of the purchase money; he has no equitable lien for the same on the goods. *Ibid.*

2741. Where goods are obtained from the vendor by means of a fraudulent misrepresentation of the vendee as to his situation and circumstances, the vendor may elect to consider the sale void, and may follow the goods, or the proceeds thereof, into the hands of a third person who has received them without paying any new consideration therefor; or he may affirm the sale and proceeds in the ordinary way against his vendee to recover the price of the goods. *Lloyd v. Brewster*, 4 Paige, 537.

2742. If a vendor who has been defrauded in the sale of his goods proceeds to judgment against the vendee, upon the contract of sale, after he is apprized of the fraud, his election is determined; and he cannot afterwards follow the goods, or the proceeds thereof, into the hands of a third person, on the ground of the fraud. *Ibid.*

2743. Whether a sale and delivery be conditional or not, depends upon the particular facts and circumstances of each case. *Buck v. Grimshaw*, 1 Edw. 140.

2744. It may be the subject of express stipulation in the contract of sale, or a matter of subsequent agreement when the delivery is made, or it may be inferred from the course of the transaction and the usage of a particular trade, that the vendor did not intend to make, or the vendee to receive, an absolute and unconditional delivery. But the condition must be made to appear as matter of evidence; otherwise, the legal presumption would follow, from the fact of a purchaser being in the actual possession of the goods, that the delivery to him was an absolute one. *Ibid.*

2745. B. sold G. two hundred and twenty bales of cotton for cash on delivery. A part was delivered without exaction of payment. G. put this part on board of a ship. Two days after, he failed. B. demanded payment, or a return of the part which had been delivered. G. was unable to do either; having, on the morning of the day when B. made the demand, delivered the bill of lading to S. S. & Co., who had made advances upon it. No fraud was charged against G. or S. S. & Co. *Held*, to be an absolute delivery which changed the right of property. *Ibid.*

LXV. VICE-CHANCELLOR.

2746. The fact that the vice-chancellor before whom a cause is pending has been the solicitor

or counsel for one of the parties therein, is sufficient to authorize the making of an application directly to the chancellor upon an interlocutory matter. *Jenkins v. Hinman*, 5 Paige, 309.

2747. A vice-chancellor may appoint his son a committee of a lunatic, and may hear and decide upon an application of such committee in behalf of the lunatic or his estate; the committee being only an officer of the Court, and having no personal interest in the questions to be decided by the vice-chancellor. *In the matter of Hopper*, 5 Paige, 489.

LXVI. WATER, AND WATER RIGHTS AND TITLES.

2748. The complainants having been long seised in fee and in undisputed possession of lands with a water-course running through them, on which they have mills; the defendants cannot, by an artificial channel made in their own land, divert the water from its natural course. *Reid v. Gifford*, 1 Hopk. 416.

2749. In such case the right of the complainants, being absolute and clear, requires no trial at law to establish its validity. *Ibid.*

2750. The complainants, being several proprietors of distinct lands and of separate parts of the water-course, have still such a community of interests in the subject of the suit that they may join in it. *Ibid.*

2751. The true reason for the interposition of equity in such case is, that the remedy at law is imperfect. *Ibid.*

2752. In this case a temporary injunction was granted upon the bill. But upon an explanatory answer positively denying the injury, the injunction was dissolved. *Ibid.*

2753. As a general rule, persons who own the lands on the different sides of a private stream hold to the middle of the stream. *Arthur and Wright v. Case and Harwood*, 1 Paige, 447.

2754. As a general rule, a grant of land bounded on tidewater extends only to high water mark. *Wiswall v. Hall*, 3 Paige, 313.

2755. Where the right to erect a wharf and to take tolls or wharfage is granted as appurtenant to a lot bounded upon tidewaters, it seems the right of wharfage, &c., will pass under the term of appurtenances in a subsequent conveyance of the lot. *Ibid.*

2756. Such right cannot be exercised by an individual citizen, except under a grant for that purpose from the sovereign power; or by prescription which is supposed to have been founded on a grant, but the evidence of which has been lost by the lapse of time. *Ibid.*

2757. The exclusive enjoyment of the use of water in a particular way for twenty years is sufficient to raise a presumption of title to such use; and it is not necessary that the water should have been used precisely in the same manner, or to propel the same machinery. *Belknap v. Trimble*, 3 Paige, 577.

2758. If the proprietor of land at the head of a stream changes the natural flow of the waters, and continues such change for twenty years, he cannot afterwards restore the flow of the water

to its natural state, to the injury of the proprietors of mills situated on such stream. *Ibid.*

2759. Where a dam is erected upon an ancient stream, to obtain a head of water for the use of one of the state canals, the surplus waters of the stream not wanted for public use, and which continue to flow over the dam and down the ancient channel, cannot legally be diverted, by a lessee of the surplus waters of the canal, to the injury of the owners of mill privileges on the stream below the dam. *Varick v. Smith*, 5 Paige, 137.

2760. But no person, except by the authority of the Legislature, or of the authorized agents of the state, has a right to tap the state dam, and draw off the surplus water of the artificial pond which is created by such dam for public purposes. *Ibid.*

2761. Customary mode of apportioning wharfage in the port of New York amongst joint owners. *Roosevelt v. Post*, 1 Edw. 579.

LXVII. WILL.

- A. *Who may make a will.*
- B. *Validity, execution, and proof of will.*
- C. *Construction of a will.*
- D. *Revocation.*

A. *Who may make a will.*

2762. A person, to be capable of making a will, must be possessed of a sound and disposing mind and memory, so as to be able to make a testamentary disposition of his property with sense and judgment in reference to the situation and amount of such property, and the relative claims of the different persons who are or might be the objects of his bounty. *Clark and others v. Fisher and others*, 1 Paige, 171.

2763. Where the derangement or loss of the powers of the mind some time previous to the making of the will is established, it devolves upon the party who seeks to maintain the will to show that such incapacity had ceased at the time it was executed. *Ibid.*

2764. In forming an opinion of the state of the testator's mind, it is proper to take into consideration the reasonableness of the will in reference to the amount of his property and the situation of his relatives. *Ibid.*

2765. Whenever a person whose mind is imbecile from disease is induced, by fraud, imposition, or undue influence, to make a testamentary disposition of his property different from what he could have done in the full possession of his faculties, the same will be set aside. *Ibid.*

B. *Validity, execution, and proof of a will*

2766. A testamentary paper purporting to be a will of real and personal estate was prepared by the testator in his own handwriting, with an attestation clause, and leaving blanks for the date, and upon his death, twenty-seven years afterwards, it was found among his valuable papers in this state, without subscribing witnesses, date, or signature; *held*, that it was an unex-

c. ted and unfinished instrument, and was not a valid will of a personal estate. *The Public Administrator of New York v. Wallis and Le Roy*, 1 Paige, 347.

2767. Where, from an inspection of a testamentary paper or otherwise, it appeared the deceased intended the same to operate as his will without any further act on his part, and without the addition of any other formalities, it is a valid will of personal property. *Ibid.*

2768. But if some other act or formality was supposed necessary by the testator, or was intended to be done or observed by him, it is an unfinished or unexecuted will, and is not valid unless the testator was arrested by death before he had a reasonable time to complete his will in the manner intended. *Ibid.*

2769. In issuing a commission to take proof of a will in a foreign country, for the purpose of establishing the same, and having it recorded as a will of real estate within this state, the same notice of the application for a commission must be given to the heirs at law of the testator, and the persons interested in contesting the will, as is required upon proving a will before a surrogate. *In the matter of Alkinson's will*, 2 Paige, 214.

2770. Persons authorized to contest the validity of the will may join in the commission, and may be permitted to name a commissioner on their part; and they will also be entitled to reasonable notice of the time and place of executing the commission. *Ibid.*

2771. No person should subscribe his name as a witness to a will until he is clearly satisfied that the testator is possessed of a sound and disposing mind and memory, and that in executing his will, he acts understandingly and with a full knowledge of its contents. *Scribner v. Crane and others*, 2 Paige, 147.

2772. The sound construction of the 12th and 16th sections of the act of April, 1830, amending the revised statutes, is that the chancellor may issue a commission to prove a will either of real or personal estate, in any case where, from the absence of the will, or the non-residence of the witnesses in this state, it cannot be proved before the surrogate. *In the matter of Hornby's will*, 2 Paige, 429.

2773. Such commission may be issued by the chancellor although all the subscribing witnesses to the will are dead; but in such a case, the proof taken will have no greater effect as evidence than a will proved before a surrogate without producing any of the subscribing witnesses thereto. *Ibid.*

2774. The chancellor alone can grant a commission to take proof of a will out of the state, and it cannot be issued by the direction of a vice-chancellor. All the proceedings must be entered in the office of the register in Albany. *Ibid.*

2775. If a will is destroyed in the lifetime of a testator without his knowledge, it may still be established upon satisfactory proof of its contents and destruction. *Bowen v. Idley*, 1 Edw. 148.

2776. A person shall not claim an interest under an instrument (either deed or will) without giving full effect to the same as far as he

can, and renouncing any right which would defeat it. *Leonard v. Crommelin*, 1 Edw. 207.

2777. He who makes his election is bound to abide by it, unless he can restore the property to its original situation; and the taking possession binds the performance although there be a loss. *Ibid.*

2778. A father having a life estate sold to H. the fee which belonged to his seven children, and covenanted they should join when of age. By will he devised his own property to them, on condition of their ratifying the sale; a deed of ratification and release was signed by five after they came of age; one of the others died without having done so, and A., the remaining son, took his own share of the father's estate, but did not execute the deed until after his death. A perpetual injunction from proceeding against the devisees of H., for his share of the property sold by the father, was decreed against A., and he was ordered to execute a release to them as well of the same as of his right in his deceased brother's share. *Ibid.*

2779. Although the insanity of a testator is passed upon by a surrogate, and on an appeal from his decision, the chancellor determines against the will, still it is only conclusive as regards the personal estate. The question whether there is a devise of the real estate or not remains open, and can only be set at rest through an issue or a trial at law. Therefore, in such a case, no partition can be had pending this question. *Bogardus v. Clarke*, 1 Edw. 266.

C. Construction of a will.

2780. Where a testator devised certain real estate to his widow for life, or during her widowhood; and after her death or marriage devised the same to his nephew in fee, provided he paid the legacies mentioned in the will, and directed that the legacies should be paid by the nephew, his heirs, executors, or administrators, whenever he or they should come in possession of the premises devised; it was held, that a payment of the legacies was a condition of the devise, and that if the devisee or his heirs should refuse to accept the devise and pay the legacies, the estate would descend to the heirs at law of the testator, but it would, in equity, be chargeable with the payment of the legacies. *Birdsall, Administratrix, v. Hewlett and others*, 1 Paige, 32.

2781. Where the subject of the devise or legacy is described by reference to some extrinsic fact, extrinsic evidence may be resorted to to ascertain that fact. *Pritchard v. Hicks and another, Executors*, 1 Paige, 270.

2782. So, where the words of a will are equally applicable to two persons or two things, parol evidence is admissible to show which person was the object of the testator's bounty, or which article he intended for the legatee. *Ibid.*

2783. Where a testator made a bequest to a person by a wrong Christian name, parol evidence was admitted to show what person was intended. *Connolly v. Pardon and others*, 1 Paige, 291.

2784. Where the testator gave his real and personal estate to executors in trust, to and for

the uses mentioned in the will, and then directed them to pay certain annuities to his wife and children during life, and the income of the estate was insufficient to pay all the annuities; *it was held*, that the executors were authorized to sell such part of the estate as would be necessary to raise a sufficient sum to purchase the annuities given in the will. *Bradhurst and others, Executors, v. Bradhurst and others*, 1 Paige, 331.

2785. Where an annuity is given by will to a man and his heirs in perpetuity, he acquires an absolute interest therein, and becomes entitled to the complete disposition of the fund set aside to produce the annuity. *Ibid.*

2786. If the annuity be given to a man and the heirs of his body, it is in the nature of an estate tail; and to prevent a perpetuity, the common law gives him an absolute interest in the annuity. *Ibid.*

2787. The rule is the same as to annuities given by a will, whether payable out of real or personal estate. *Ibid.*

2788. Where there is a limitation over of an annuity upon the failure of issue at the death of the annuitant, the limitation over is good, being in the nature of an executory devise. *Ibid.*

2789. Where one-third of a lot of land was devised by a husband to his wife for life in lieu of dower, and after his death his daughter purchased the lot subject to the life estate of her mother, and then died, leaving a will duly executed, by which she directed her executors to lease all her real estate not before devised, and out of the rents to pay her mother and several other persons annuities for life; *held*, that the mother was entitled to both the annuity and the life estate in one-third of the lot. *Harrington v. Cannon and Hughes*, 1 Paige, 569.

2790. *Aliter*, if the daughter had directed the annuity to be paid out of the rents of the whole lot. *Ibid.*

2791. Where the testator lived and cohabited with M. S. in a house provided and furnished by him, and while so living with her had by her four natural children, one son called John, and three daughters, who were with his knowledge and consent baptized by his name, and were educated and acknowledged by him as his children, and who were the only persons ever recognised by him as his children; and by his will the testator gave to his son John \$10,000 payable when he arrived at twenty-four, and to each of his daughters \$3000 payable at twenty-one; and directed his executors to pay to M. S. \$65 quarter yearly during her life, if she remained unmarried and had no more children; and appointed his executors guardians of his children during their minority; *it was held*, that this was a sufficient description of the testator's natural children by M. S. as the legatees intended by him. *Gardner v. Heyer and others*, 3 Paige, 11.

2792. Where L. S. by his will gave to his wife the one-third of the residue of his personal estate, after his debts and legacies were paid, and all the use of all the residue of the personal estate, and the occupation and enjoyment of the farm on which he the testator lived, so long

as she remained his widow; and in case of her marriage, he gave to her during life the use and occupation of one-third of his real estate; and in that event directed that the income of the remaining two-thirds should be applied to the education and maintenance of his children; and after the youngest child became of age, he directed his executors to divide all his real and personal estate equally among his children, to have and to hold to them and their heirs for ever, and declared that he intended the bequest and devise to his wife should be in lieu of dower; the wife elected to take under the provisions of the will; *it was held*, that the widow was entitled to the use of the whole estate during widowhood; that one-third of the personal estate was hers absolutely; and in case she married, that she should have the use of the real estate for life in lieu of dower. *Ovenhouse and others v. Shuler and others*, 2 Paige, 123.

2793. *It was also held*, that the children of the testator could compel the widow to account for all the personal estate, and that their share of the same should be invested, and the income paid to the widow during her life or widowhood, and that the principal after her death or marriage should be divided among them according to the provisions in the will. *Ibid.*

2794. If two parts of a will are irreconcilable with each other, the last part is generally to be taken as evidence of the latest intention of the testator: But this rule is only applied to those cases where the two provisions are totally inconsistent with each other, and where the real intention of the testator cannot be ascertained. *Ibid.*

2795. The leading principle in the construction of wills is, that the intention of the testator, if not consistent with the rules of law, must govern. And this intention is to be ascertained from the whole will taken together. *Ibid.*

2796. And where the intention of the testator is incorrectly expressed, the Court will carry it into effect by supplying the proper words. *Ibid.*

2797. The words of the will may be transposed in order to make a limitation sensible, or to effectuate the general intent of the testator. *Ibid.*

2798. Where R. H. appointed by his will three executors, and devised to them all his real estate upon several trusts, one of which was to execute all proper deeds, and take the proper measures for fulfilling all contracts entered into by the testator, or by them, for the sale of any part of his real estate; and the testator declared in his will that in case one or more of his executors should die before himself, or should decline to execute the trusts, if one so died or declined, the remaining two should nominate another person as their co-executor and trustee; and if two of them should die or decline, then the testator declared that his sons should nominate one person, and his daughters another, and the persons so nominated, if approved by the remaining executor, should become executors and trustees under the will; and if all the executors should die or decline, that then the testator's sons and daughters might choose two persons as aforesaid as ex-

entors and trustees, and which two persons might nominate and choose the third; and after the making of the will, the testator made a codicil thereto, and by it appointed two additional executors and trustees of his will, and then republished his said will with the codicil as a part thereof; four of the executors in February, 1830, proved the will, and one renounced; *it was held*, that unless a greater number than two declined the trust, it would not be necessary to supply their places in the manner prescribed in the will; and that the four who had qualified possessed every necessary power to execute all the trusts mentioned in the will. *Ogden and others, Executors, v. Smith*, 2 Paige, 196.

2792. Where A. by his will devised the use of his farm to his son and nephew for three years, and directed his executors, at the expiration of the term, to sell the farm and divide the proceeds among his five children; and also declared in his will that if any one of his children died before him leaving no children, or should die after his decease leaving no children, without having disposed of his or her share, that the share of such child should go to the survivors; but if any of the testator's children should die leaving children, then such children were to have the share of their parent in the same manner as such parent if living would have taken the same; and the son died within the three years leaving children; *it was held*, that the children took under the will, and not as heirs of their father, and that their mother was not entitled to dower in the farm, and that the creditors of the son had no claim upon that share of the estate for the payment of their debts. The death of the son before the expiration of the three years, and before the executors were authorized to sell, divested his interest, and the executory limitation over to his children immediately took effect. *Adams v. Beckman*, 1 Paige, 631.

2800. Wills in favour of natural children are to receive a like construction as those in favour of other persons. *Gardner v. Heger*, 2 Paige, 11.

2801. As a general rule, a devise to children, without other description, means legitimate children; and if the testator has such children, parol evidence cannot be admitted to show that a different class of persons was intended. *Ibid.*

2802. It is always proper to look into circumstances *dehors* the will, to ascertain whether there are any persons answering the description of the legatees named in the will. *Ibid.*

2803. If there are no such persons, then the situation of the testator's family may be proved, to enable the Court to ascertain the persons intended by the testator as the objects of his bounty. *Ibid.*

2804. Where a testator, being seized of a dwelling house and farm, and of other estate, both real and personal, gave a pecuniary legacy to his daughter, payable at twenty-one, or on her marriage; and gave to his wife the house and farm and his furniture for life, and one-third of his personal estate absolutely, and then concluded as follows: "And after the death of my wife, a case I should have no more children, I give, devise, and bequeath unto my said daughter E. L. my said dwelling house and farm, to-

gether with all the rest and residue of my personal and real estate;" *held*, that the wife did not take a life estate in such residue by implication. *Rathbone v. Dyckman*, 3 Paige, 9.

2805. Devises by implication are sustained only upon the principle of carrying into effect the intention of the testator; and unless it appears upon an examination of the whole will that such must have been his intention, there is no devise by implication. *Ibid.*

2806. An implication may be rebutted by a contrary implication which is equally strong. *Ibid.*

2807. The clear literal interpretation of words in a will may be departed from, if they will bear another construction, where other parts of the will manifest a different intention. *Ibid.*

2808. The strict grammatical sense of words in a will may be rejected to carry into effect the intent of the testator. *Ibid.*

2809. A limitation over to the mother, in case of the death of the daughter without leaving lawful issue, is valid as to personal estate, although previously to the revised statutes such a limitation as to real estate would have created an estate tail. *Ibid.*

2810. Where a testator, having two sons and a daughter, devised a certain portion of his real estate to one of his sons in fee, and directed that in the event of such son's intermarriage, and thereafter dying without leaving lawful issue, the real estate so devised should go to, descend, and be the property of his daughter, her heirs and assigns for ever, she surviving him; and the devisee afterwards in the lifetime of his sister died intestate, without issue, and without ever having been married; *held*, that the limitation over to the sister did not take effect. *Jenkins v. Van Schaick*, 3 Paige, 242.

2811. Where the testator by his will devised his real estate to his wife during her widowhood, with remainder to his six sons in fee, and bequeathed certain personal estate to his daughter, and then directed that if any of his sons or his daughter should die without issue, the survivors should have what was given by the will to the son or daughter so dying; *held*, that the limitation over to the survivors was good as an executory devise, and took effect upon the death of one of the sons without issue, although such son survived his mother. *Vedder v. Evertson*, 3 Paige, 281.

2812. Where the first limitation over in a devise is executory, all the subsequent limitations will also be executory until the first limitation vests in possession, although in their nature the subsequent limitations are contingent remainders. But the moment the first limitation over vests in possession, the subsequent limitations will be changed from executory devises to remainders, provided they can take effect as remainders. *Ibid.*

2813. If the first limitation over is not of such an estate as will support the second as a remainder, and such second limitation over can only be valid as an executory devise, the nature of the second limitation will not be altered by the vesting of the first limitation in possession before the happening of the contingency upon which the second limitation depends. *Ibid.*

2814. Where a limitation over can be supported as a contingent remainder, it will never be construed as an executory devise. *Ibid.*

2815. Where a testator by his will, after giving his estate to his four children, directed that all his debts should be borne and paid equally by such children; it was held, that one of the daughters could not file a bill against the executor of her father to recover a demand she had against the estate, without first relinquishing all benefit to which she was entitled under the will, or bringing the other children who were bound to contribute towards the payment of the debt before the Court as parties. *Van Epps v. Van Deusen*, 4 Paige, 64.

2816. In a general residuary bequest, a will of personal estate carries to the residuary legatees not only what is not disposed of to others, but also whatever is not legally disposed of, so as to pass to the persons intended as the objects of the testator's bounty. It is otherwise as to real estate. *James v. James*, 4 Paige, 115.

2817. Where a specific devise of real estate does not take effect, either from the incompetency of the devisee to take or otherwise, it descends to the heir at law as property not disposed of by the will. *Ibid.*

2818. Where a testator devised a house and lot to his wife for life, with power to dispose of the same by her will to their descendants in fee, with the power of selection as she might think proper; which devise, together with certain legacies, was by the will of the testator to be in lieu of his wife's right of dower; and the testator then devised the residuum of his estate not before bequeathed and devised to his wife, to trustees in trust for the purposes of the will; and the widow afterwards elected to take her dower instead of the provision made for her in the will; held, that the whole legal and equitable interest in the house and lot, subject to the widow's right of dower therein, descended to the heirs at law of the testator, and did not go to the trustees under the will. *Ibid.*

2819. Where the testator by his will devised to his granddaughter a house and lot of land, from and immediately after his youngest grandchild named in the will attained the age of twenty-one, to hold the same to the granddaughter for life, with remainder in fee to such child or children as might be born of her body; and devised other real estate in like manner to his other grandchildren for life, with remainder to their children for fee; and by a subsequent clause of his will, directed that if any of his grandchildren should die without leaving lawful issue at the time of their death, the devise to such grandchild so dying without issue should vest in the other grandchildren, their heirs and assigns for ever; held, that the granddaughter took a contingent estate for life in the houses and lot, which became vested in possession when the youngest grandchild of the testator arrived at the age of twenty-one; and that such of the children of the granddaughter as were then in existence, or, if none were then in existence, then those who were born afterwards, at their birth took a remainder in fee, subject to the contingency of their dying without leaving issue living at the death of their mother, and sub-

ject also to open and let in after-born children. *In the matter of Sanders and others*, 4 Paige, 293.

2820. After an express limitation to a man for life in a devise of lands, if the remainder is given or limited to his sons, or his children and their heirs, or the heirs of their bodies, he takes an estate for life only; and the sons or children, and not the father, take the residue of the estate by way of remainder. *Ibid.*

2821. The term children, in its natural sense, is a word of purchase, and it is to be taken to have been used as such, unless there are other expressions in the will which show that the testator intended to use it as a word of limitation only. *Ibid.*

2822. Where by the terms of the will an estate is given to a man and his children, if he has children at the time of the devise, he takes a joint estate with the children; but where there are no children in case at the time of making the will, the term children in such a devise may be construed as a word of limitation merely. *Ibid.*

2823. Where the testator died possessed of a large real and personal estate, leaving a widow and six children, some of whom were minors, and by his will, after giving various pecuniary legacies to his widow and children and others, directed his executors to provide for the support and education of his minor children out of the income of his real and personal estate, until they arrived at the age of twenty-one or married; and also directed his executors to invest the residue of his personal estate in real property, or in bonds and mortgages, or other permanent securities, until the death of the widow, and until the youngest child arrived at the age of twenty-five; and then to sell the real estate so purchased, together with that of which the testator died seised, and to divide all that then remained of the estate among the six children, or their issue, and to invest the share of each child in the name of the executors, and to pay over the income thereof to the children respectively for life; and that upon the death of the children, their several shares should go to their issue, and if any child died without issue, the share of such child should go to the other children or their issue; held, that the executors took an estate for years in the real property of the testator by implication, to enable them to receive the rents and profits thereof for the support and education of the minor children until the youngest arrived at the age of twenty-one or married; but that there was a resulting trust, in favour of the heirs at law of the testator, for so much of the rents and profits as were not wanted for that purpose; and that the reversion in the real estate after the expiration of that term descended to the heirs at law, subject to the power in trust to the executors to sell after the death of the widow, and after the youngest child arrived at the age of twenty-five; held also, that there was an implied trust of accumulation of the interest or income of the personal estate by the executors, until the time appointed for the division of the property among the children, which trust of accumulation was void under the provisions of the revised statutes; and that such interest or income belonged to the widow and children of the testator

as property not legally disposed of by his will. *Vail v. Vail*, 4 Paige, 317.

2824. Where a testator bequeathed to his children a contingent interest for life in the income which may accrue from a residuary fund after the happening of a particular event, they are not entitled, under the will, to the income of the fund previous to that time; and no valid bequest being made of such previous income, it must be distributed as in cases of intestacy. *Ibid.*

2825. Where the sister of the testator, at the time of the making of his will, and at his death, had but one child, and he devised the residue of his real and personal estate to such sister, to hold the same to her and her children for ever, with a devise over in case she should die and all her children should die, leaving no children; *held*, that under the revised statutes, the sister took an estate for life in the property, and that the child took a vested remainder in fee, subject to open and let in after-born children; and that the limitation over after the death of all the children of the sister without issue was void, being too remote as to the after-born children. *Hannan v. Osborn*, 4 Paige, 336.

2826. Where the testatrix devised her real estate to trustees in trust, to divide the rents and profits equally among her three children or their issue during the life of the children, and of the survivor of them, with cross-remainders in case of the death of either without issue during that time; and upon the death of the survivor, to sell the estate, and divide the proceeds thereof among the issue of such children, thus, if all left issue, then one-third to the issue of each; if two left issue, one-half to the issue of each; and if only one left issue, then such issue to take the whole; the issue of each to take as tenants in common, and if any grandchild of the testatrix died in the lifetime of its parents, leaving issue, and which issue should be living at the death of the surviving child of the testatrix, then such issue to take such share as the parent of issue would have been entitled to if living; and the two sons of a daughter of the testatrix died in the lifetime of their mother, the one leaving two children and the other four; *held*, that these grandchildren of the daughter took *per stripes* as to the representatives of their deceased parents respectively, and not *per capita*. *Cushing v. Henry*, 4 Paige, 345.

2827. The rule of *Shelly's* case only applies to a limitation of a remainder to the heir or the heirs of the body of the first taker; and a limitation of a remainder to the issue of the first taker, to take effect at his death, is valid, and the issue take the remainder as purchasers. *Ibid.*

2828. Where the testator devised his estate to his brother and his twelve nephews and nieces, and to the survivor or survivors of them, in trust, to receive the rents and profits of the estate, and apply them to the use of the twelve nephews and nieces, in equal shares, during their joint lives, and to the survivor or survivors of them so long as any of them should live, and to convey the remainder of the estate in fee to such of the descendants of the twelve as should then be existence; *held*, that the ultimate re-

mainder in fee to the descendants of the twelve nephews and nieces was void under the provisions of the revised statutes, as being too remote; that the interests of the twelve *cestuis que* trust under the will was not in the nature of a joint tenancy, but of a tenancy in common with cross-remainders; that the cross-remainders, limited upon the life interest in the share of the *cestui que* trust who should first die, were valid; but that all subsequent remainders in that share, and all the cross-remainders limited upon the life interests of the eleven survivors, in their original shares respectively, were void. *Lorillard v. Coster*, 5 Paige, 172.

2829. Where the testator devises his real and personal property to trustees, and directs certain portions of the real estate to be sold, and that the proceeds thereof, together with his personal property, shall be invested in the purchase of real estate upon certain trusts, which the heirs and next of kin insist are illegal and void, such heirs and next of kin are entitled to an immediate decision and decree of the Court upon the question as to the validity of the trusts which are supposed to be illegal, although the *cestuis que* trusts for whose benefit such purchase is directed to be made are not yet in existence or ascertained. *Ibid.*

2830. If a present vested interest in property is devised to a class of persons, none but those who are *in case*, so as to answer the description in the will, at the death of the testator, are included in such class as devisees. And though one year is allowed by law to the executor to collect and to ascertain the extent of a personal fund which the testator has directed to be turned into real estate for the benefit of the devisees, this does not alter the general rule as to the construction of wills devising a present interest in property to a class of persons. *Ibid.*

2831. Upon the principles of equitable conversion, money directed by a testator to be employed in the purchase of land, or land directed to be sold and turned into money, is, in a Court of equity, for all the purposes of the will, considered as that species of property into which it is directed to be converted; so far as the purposes for which such conversion was directed to be made are legal and carried into effect. And the same principle is applicable to a direction in a will to sell one piece of land, and convert it into another by purchase for the purposes of the will, under a valid power in trust. *Ibid.*

2832. The doctrine of equitable conversion of property depends upon the well established and familiar principle that a Court of equity looks upon that as done which the parties to an agreement or marriage settlement have contracted to do, or which the testator by his will has directed to be done; so far as the contract of the parties or the will of the decedent could have been carried into effect without violating any equitable principle or rule of law. *Ibid.*

2833. A devise of the rents and profits of land which are to accrue and be received after the death of a testator, is subject to the rules of the revised statutes in relation to future estates in land; and every disposition of such rents and profits, either through the medium of trustees or otherwise, which, if valid, would have the effect

of suspending the power of conveying an absolute fee in possession in the land for a longer period than is allowed by law, is a suspension of the power of future alienation by means of a future estate, which renders such a disposition invalid, so far as it would have that effect. *Ibid.*

2834. Where, by the rules of the common law, or by the provisions of a statute, an estate or interest of a particular character would, if valid, have the effect, either directly or indirectly, of suspending the absolute power of alienation of land beyond the limits prescribed by law, such estate or interest cannot be legally created. *Ibid.*

2835. If the intention of a deviser in a will, or of a grantor in a deed, is illegal or incapable of being carried into effect, the Court of Chancery is not authorized to frame and decree the execution of a new intention for the devisee or grantor as near as practicable to his original intent by extending the doctrine of *cy pres.* to such a case. But where separate and distinct interests or estates are created by will or deed, some of which are legal and others illegal, the Court must carry into effect so much of the intention of the testator or grantor as is consistent with the rules of law, where it is practicable to separate the legal from the illegal interests or estates thus created. *Ibid.*

2836. Where the testator, by his will, authorized his executors and trustees, upon the marriage of either of his daughters, to bestow a marriage portion upon her, if they should then think it discreet and proper; and one of the daughters afterwards married in the lifetime of the testator, who was then in health, and lived more than a month afterwards; *held*, that the executors and trustees were not authorized to give her a marriage portion out of the estate. *Hawley v. James*, 5 Paige, 318.

2837. The exchange of one piece of land for another by trustees, under a valid power for that purpose, is not an alienation of the trust property within the intent and meaning of the provisions of the revised statutes against rendering real estate inalienable for more than two lives in being at the creation of the estate; and the insertion of such a power in a will devising the testator's estate to trustees will not render the devise valid, if the rights or interests of the *cestuis que trust* are inalienable beyond the period allowed by law. *Ibid.*

2838. Where the testator directed certain advances to be made to his children, out of the rents and profits and income of his estate, should be charged to them with compound interest, and deducted from their shares of the estate upon a division thereof, for the purpose of increasing the amount which was to be distributed to others; *held*, that this was a direction for accumulation which was void under the provisions of the revised statutes. *Ibid.*

2839. To render a trust for an accumulation of the rents and profits or income of an estate valid, the accumulation must be for the sole benefit of an infant, and must be payable to him absolutely if he survives his minority. *Ibid.*

2840. Where the testator has a large estate left, after the payment of his debts, he may devise or bequeath it as a future estate undi-

minished in amount, if he does not violate any of the rules of law against perpetuities; and he may carve such intermediate estates; interests, legacies, or portions out of the income in the mean time as he may think proper, provided it can be done without an actual accumulation of rents and income for that purpose. But an accumulation of rents and profits for the purpose of raising a legacy or portion at a future day is illegal; except where such legacy or portion is for the sole benefit of a minor, who is in existence when such accumulation is directed to commence. *Ibid.*

2841. Where the testator devised his real and personal estate to trustees for a term, to receive the rents, profits, and income thereof in the mean time, for the payment of annuities and other legacies, and to raise portions for grandchildren, with a contingent remainder in eight and a half twelfths of the estate to seven of his children and two of his grandchildren, and no valid direction for accumulation was given; *held*, that eight-twelfths of the surplus income of the estate belonged to the seven children and two grandchildren of the testator, as being the persons presumptively entitled to the next eventual estate *pro tanto*; and as the contingent remainder as to the other three and a half twelfths of the estate was void; that the heirs at law were entitled to the surplus rents and profits of the real estate, and the widow and next of kin to the surplus income of the personal estate included in the three and a half twelfths. *Ibid.*

2842. Where the testator devised his estate to trustees for a term of years, depending upon the minorities of several infants, with contingent remainders for life, in eight and a half twelfths thereof, to seven children and two grandchildren, if they should survive the trust term, and become entitled by the happening of the contingency; with a power, in that event, of appointing the ultimate remainder in fee in their respective shares among their descendants; and gave substituted contingent remainders in the shares of such of the seven children and two grandchildren as might happen to die during the continuance of the trust term; *held*, that the remainders to the seven children and two grandchildren, in their several shares, were valid as contingent remainders limited on a term of years; and that if such remainders became vested in interest upon the termination of the trust, the ultimate remainders in fee to their descendants respectively were also valid, as they must vest in interest, if ever, at the termination of one life in being at the death of the testator; but that the substituted contingent remainders, in the shares of such of the seven children and two grandchildren as might happen to die during the trust term, were not limited in such a manner that they must necessarily vest in interest during the continuance or at the termination of any two lives in being at the death of the testator, and were therefore void. *Ibid.*

2843. Where the testator gave to his widow an annuity of \$3000, in lieu of her dower in his real estate, which annuity was stated in the will to be given to her for her own support, and for the education and support of her child

ren, and the widow, after his death, elected to take the dower in the real estate instead of the annuity given to her by the will; *held*, that by such election of the widow, the whole legacy failed, and that the annuity could not be apportioned so as to provide a support for the minor children out of the same. *Ibid.*

2844. Where the testator, by his will, devised certain real estate, and bequeathed certain articles of personal estate, to his wife in lieu of her dower, and devised and bequeathed all his real and personal estate, not therein before devised and bequeathed to his wife, to his executors in trust, and the widow afterwards elected to take her dower in the testator's real estate instead of the provision made for her in the will; *held*, that the property bequeathed to the widow did not pass under the trust clause in the will, and that it must be distributed as in case of intestacy. *Ibid.*

2845. Where the testator, by his will, directed his executors and trustees to sell certain real estate, and to invest the proceeds thereof, and the proceeds of his personal property, in the purchase of real estate, or the building of houses on his real estate, in New York, Albany, and Syracuse, or in loans, annuities, or in any other safe and proper manner, to be conveyed to his devisees at the termination of the trust term by him created; and declared it to be his will and intention that the investments should be so made from time to time, that at the time appointed for the termination of the trust and the division of his estate, the property should consist chiefly or altogether of real estate; *held*, that this was a direction for the conversion of the testator's personal property into real estate, for the purposes of the will; and that, in deciding as to the validity of the dispositions made by the testator of his property at the termination of the trust, the whole must be considered as converted into real estate. *Ibid.*

2846. A Court of equity considers money directed by a testator to be invested in land, and land directed to be sold and turned into money, as of that species of property into which it is directed to be converted, for all the valid purposes of the will. But where the object of the conversion is illegal, or fails either wholly or in part, there is a resulting use or trust, in so much of the property as is not legally or effectually disposed of, in favour of the heirs or distributees, who would have been entitled to the same if the conversion thereof had not been directed by the will of the testator. *Ibid.*

2847. Where the testator devised an undivided portion of his real and personal estate to trustees, in trust, to receive the rents, profits and income thereof, and to appropriate the same to the use of his daughter for life, free from the control of her husband, with remainder to her children in fee, and with a limitation over to the testator's two sons in case of the death of the daughter without leaving any child or children, or of the death of such child or children without lawful issue; *held*, that the word *or* in the last limitation was to be construed, and so as to make the ultimate limitation over to the sons dependent upon an indefinite failure of issue; and that such limitation over was void.

Held also, that the child of the daughter, who was *in esse* at the death of the testator, took a vested remainder in fee, which opened and let in an after-born child as a tenant in common in such remainder. *Van Vechten v. Pearson*, 5 Paige, 512.

2848. Where the testator directed the investment of his estate in the purchase of lands for the benefit of his three infant children, upon an express trust to receive the rents and profits of their several shares thereof, for their use, until they should attain the age of twenty-one or twenty-two, in the discretion of the trustees, with cross-remainders between themselves if they died before they came into possession of their several shares without issue, and with remainder to their heirs of the blood of the testator, if they all died before that time without issue; *held*, that the ultimate limitation over to their heirs was void, as being too remote. *Wood v. Wood*, 5 Paige, 596.

2849. The law of the testator's domicile governs the disposition of his personal estate and his real estate which is situate where he is domiciled; and where the testator was a resident of the state of New York at the time of his death, and by his will directed his personal property and the proceeds of his real estate there situate to be invested in real estate in the state of Ohio, upon trusts which were invalid by the laws of New York; *held*, that the devise in trust was invalid, as it was inconsistent with the law of the testator's domicile. *Ibid.*

2850. A testator directed the remainder of his personal estate to be divided into six equal parts, and bequeathed it as follows: to his stepdaughter M. one share; to his daughter S. one share; to the children of his daughter E. one share; to the children of his daughter M. one share; to the children of his daughter B. one share; and to the children of his son J. one share. But if his said children or his said stepdaughter should die without issue, the share of the party dying was to be equally divided between the survivors of his children or grandchildren. The daughter died without issue. The stepdaughter M. married and died, leaving issue. The question was, whether they had a right to any part of B.'s share; *held*, that they had not. *Barnet v. Greenzbeck*, 1 Edw. 42.

2851. The legal signification of issue, children, or grandchildren, and every word of the like species, when used in a will as descriptive of persons who are to take as devisees or legatees, applies to those only who are of the blood of the testator or person named as the parent, and does not comprehend those who may have acquired the name or character of children by marriage. They are *prima facie* excluded; but this rule gives way where there is a clear intention to the contrary, for the intent will govern and control the legal operations of words. *Ibid.*

2852. Where a recital in a will manifests an intention to make a present bequest, and the words of actual bequest are omitted by inadvertence or mistake, the words will be supplied; and the words will amount to an implied bequest. Therefore, where a testator gave "unto my cousin S. M., daughter of my uncle D. O., \$1000 more than the equal part above mentioned

to my uncle D. O.'s children," and nothing was above mentioned to them, but there was a prior clause which gave to the children of seven uncles named, (not naming D. O. among them,) \$5000 each; *it was held*, that the children of D. O. each took \$5000 by implication. *Marah v. Hague*, 1 Edw. 174.

2853. Grandchildren and great-grandchildren do not take as "children," except from necessity, and where the will would be inoperative, or where the testator has shown he did not intend to use the term according to its actual meaning, but in a restricted sense. They may sometimes be let in under a liberal construction of the word "children." *Ibid.* S. P. Tier v. Pennell, 1 Edw. 354.

2854. As a general rule, legacies are payable in one year, even though assets are not productive, or the executors have not reduced the property into possession; and there is no exception on the ground of a legatee's not being in a situation to receive or omitting to demand. *Ibid.*

2855. If the context of a will affords sufficient evidence of the identity of the person intended as a legatee, the will alone must be looked to in order to clear up the difficulty and determine the question. *Smith v. Smith*, 1 Edw. 189.

2856. But if the context fails, or after examining the whole of the will, it is still impossible to ascertain from such a source alone who is the proper person to take, then recourse must be had to parol evidence. *Ibid.*

2857. In no case, however, is the bequest to be deemed void for uncertainty as to the person, provided the person intended to take can be identified by any competent evidence. Where neither the will nor the extrinsic evidence is sufficient to remove the ambiguity in respect to a devisee or legatee, the devise or bequest must fail from uncertainty. *Ibid.*

2858. If a legacy be given to a person by a correct name, but with a wrong description or addition, the latter will not vitiate the bequest, but will be rejected. In the present case, a legacy was left "to Mary S., wife of Nathaniel S., \$3000." Mary S.'s husband was named Abraham, and Sarah S.'s husband was Nathaniel S. Upon extrinsic evidence and circumstances, *it was held*, that Mary S. was intended. *Ibid.*

2859. A. C. made his will; and after specific bequests, devised as follows: "I give and bequeath all the remainder of my estate, both real and personal, to my two sons, P. C. and N. C., to my said two sons, their heirs and assigns for ever." He appointed them executors, and added, "hereby empowering my said executors, should my personal estate be insufficient to pay my debts and the before mentioned legacies, to sell any of my lands which I may leave at my decease, at their discretion, and to give deeds of conveyance for the same, sufficient in law." *Held*, not to be a case in which the real estate became equitable assets for the payment of debts. The creditors of A. had a right of action against the sons personally, and their judgments attached upon the lands devised, the legal title being in the sons. *Pascalis v. Campbell*, 1 Edw. 201.

2860. A., by will, after devising specific bequests, bequeathed to his daughter C. \$4000, on her marriage, to the intent that she might receive as much as his other children, to all of whom he had made large gifts on their marriage. He devised, with limitations, a dwelling house to each of his four daughters, including C. (The son had one given to him during A.'s lifetime.) A fifth part of the residue of his estate was left to each child. A. married after making the will, and, by codicil, bequeathed to every after-born child "an equal share of my property with my other children, notwithstanding it may have been herein before appropriated." There was an after-born daughter. *Held*, that C.'s share was the standard for setting out the posthumous child's rights; and, therefore, the latter was entitled to \$4000, a house equal in value to C.'s, and a sixth of the residue. Also, that the after-born daughter took upon the same trusts and limitations to which the other daughters were subject. *Lawrence v. Lawrence*, 1 Edw. 241.

2861. R. C. devised real estate to his daughter A. and her husband for their joint lives, with remainder to such child or children as A. should leave at the time of her decease, and to their respective heirs, executors, administrators, and assigns for ever, share and share alike. A. left children, and a female grandchild, the daughter of a deceased son who had died in the lifetime of A. and her husband; *held*, that the grandchild was not entitled. *Tier v. Pennell*, 1 Edw. 354.

2862. If a will clearly indicates that the personal estate is to be exonerated from debts, the Court will not disappoint the intent. *Isenhardt v. Brown*, 1 Edw. 411.

2863. Where a daughter was to receive a legacy with interest from the time of the testator's death, and the Court had determined that the rights of a child *en ventre sa mere* stood upon the same footing, interest was given to such child from the time of such testator's dying, and not from its birth. *Lawrence v. Lawrence*, 1 Edw. 557.

2864. The Court having also decreed that the child was entitled to a sum of money (in order to put her on a par with other children) in lieu of a dwelling house which had been bequeathed by the testator to each of his other daughters, from the time of his decease; *it was held*, that the child was entitled to interest upon the money only from the time of her birth. *Ibid.*

2865. Whether a sum directed by a will to be raised out of the rents and profits of real estate is to be raised by annual rents and profits, or by sale or mortgage, is a question of intention, to be collected from the context of the will, and from the purposes to which the money is to be applied. *Kingland v. Belts*, 1 Edw. 536.

2866. Therefore, where a testator gave to his wife all his real and personal estate as long as she remained his widow, for the faithful bringing up and support of his children, but, in case of her marriage, gave her £30 a year for life in lieu of her dower, and gave the full possession of the real estate to her son in fee at twenty-one, but subject to the remarriage or death of such widow, and also to legacies of \$5000, each, to

the testator's daughters; *it was held*, that maintenance to the children must come out of the annual rents and profits so long as the widow remained unmarried, and that she could not raise the maintenance by sale or mortgage of the fee. And, also, as a consequence, that the daughters who claimed arrears of maintenance were not entitled to have the same satisfied out of a sale. *Ibid.*

D. Revocation.

2867. Where there is a general residuary clause in a will, if a specific legacy is revoked or becomes lapsed, it falls into the residue, to be disposed of under the general clause; but if the residue is given to several persons in common, and one of them dies, or his legacy is revoked, his share will go to the next of kin, and not to the other residuary legatees. *Floyd and Floyd, v. Barner and Ferris*, 1 Paige, 480.

CHEAT.

1. At common law an indictable cheat was such only as affected the public; such as common prudence could not guard against. The law was altered, and extended by statute to all cheats by false pretences. In all cases, an indictment for a cheat must set out particularly the false token or pretence. *Per Spencer, Senator. Lambert v. People*, 9 Cow. 578.

CITIZEN.

1. A citizen of one state becomes the citizen of any other state, when he makes such other state the place of his actual residence. *Rogers v. Rogers*, 1 Paige, 183.

COMMISSIONERS TO DO THE DUTIES OF A JUDGE OF THE SUPREME COURT.

1. A commissioner to do the duties of a judge, &c., has not power to make an order regulating the admission of attorneys. *Anon.* 2 Wend. 220.

2. Commissioners should hold parties to the shortest possible time for pleading; and where an enlargement of the rule to plead is asked for, and the effect of such enlargement will probably be the loss of a trial, unless short notice be accepted, such notice should be made a condition of the order. *Haywood v. Thayer*, 10 Wend. 571.

COMMISSIONERS TO TAKE ACKNOWLEDGMENTS OF DEEDS.

1. A commissioner under the act of April 19th, 1823, who is at the same time an acting master in Chancery, cannot take the acknowledgment. Vol. III. 28

ledgment or proof of deeds. *Ex parte Raymond*, 5 Cow. 491.

2. Where no rule is adopted by the judges of a county Court as to the number of commissioners to be appointed in the several towns of a county, not more than two can be appointed; and where, in such case, the offices of two commissioners expire, and the term of office of a third continues, an appointment of only one can be made. *The People v. Brown*, 7 Wend. 493.

3. Where, under such circumstances, one of the commissioners whose office expires is reappointed, the other cannot hold over, as by such reappointment the town has the full complement to which it is entitled. *Ibid.*

4. A commissioner of deeds appointed under the act of 1823 was entitled to hold his office for four years, and until the expiration of that period another could not be appointed in his place. *The People v. Waite*, 9 Wend. 58.

5. A commissioner has power to make an order compelling the production of a warrant of attorney in an action of ejectment. *Harris v. Mason*, 10 Wend. 568.

COMMON CARRIER.

1. The master or owners of a vessel transporting goods on the high seas are not common carriers, within the meaning of the rule, subjecting the latter to all losses or injuries which arise from any other cause than the act of God, or the enemies of country. And in an action against the master or owners, for loss or damage of goods, from any other cause, it should be submitted to the jury, upon the evidence, whether they used ordinary care and diligence. *Symar v. Adair*, 6 Cow. 266.

2. Either case or trover may be brought against a carrier for the non-delivery of goods, but in the latter action a conversion must be proved. *Packard v. Gelman*, 6 Cow. 757.

3. Common carrier received on board their sloop, to transport from New York to Troy, where they transferred them on board of a canal boat bound to the north, pursuant to the bailor's instructions; but were to receive no reward for the transfer or further transportation. The goods were lost by the upsetting of the canal boat; *held*, that their character of common carriers ceased at Troy; and having exercised ordinary care in seeing the goods placed on board a safe boat, they were not responsible for the loss. *Ackley v. Kellogg*, 8 Cow. 393.

4. A person, not a common carrier, who sends his servant to transport goods belonging to a particular person from one place to another, with special instructions not to take the goods of any other person for transportation, is not liable as a common carrier, in case of the loss or embezzlement of the goods. *Satterlee v. Groat*, 1 Wend. 379.

5. If a servant, with such instructions, takes goods from another person to transport, *quoad hoc*, he acts for himself, and on his own responsibility. *Ibid.*

6. A person once a common carrier is no more liable in that character than any other

person, if it be conclusively shown that he has abandoned the business. *Ibid.*

7. The owners of a steamboat carrying not only passengers, but light freight and parcels for hire, are common carriers, and answerable for the loss of a packet of bank bills delivered to the captain for carriage, (unless the loss has been occasioned by the act of God, or a public enemy,) although private instructions have been given to him by the owners not to carry money. *Allen et al. v. Sewall et al.* 2 Wend. 327.

8. Bank bills are goods within the meaning of the statute incorporating the Dutchess and Orange Steamboat Company, and declaring the members thereof individually liable, as carriers at common-law, for the transportation of all goods, wares, and merchandise delivered to their agents. *Ibid.*

9. Where a carrier is told that a packet containing money, which is delivered to him, is very valuable, though he is not informed that it contains money, there is no ground for an imputation of fraud or concealment. *Ibid.*

10. There need be no particular agreement for hire to render a common carrier liable. *Ibid.*

11. An arrangement between the owners of steamboats and their captains, allowing the avails of carrying bank bills as a privilege to the latter, does not discharge the owners, unless the shipper contracts with the captain himself, knowing that he receives the goods on his own account, as part of his privilege, and not in his character of agent for the owners. *Ibid.*

12. A boatman on the canals, employed in the transportation of property, is a common carrier, and has no right to sell any article sent by him to market without express authority from the owner. If an article so sent be purchased from a boatman, the owners may recover it from the purchaser. *Arnold et al. v. Halenbake et al.* 5 Wend. 33.

13. In an action against six, as proprietors of a steamboat, in which they were charged as common carriers, for the loss of property put on board for transportation, and the *gravamen* was stated to have arisen from a breach of duty, a plea in abatement, that there were fifty-four more proprietors, who were jointly liable, is bad. *Bank of Orange v. Brown et al.* 3 Wend. 158.

14. A steamboat company incorporated for the transportation of goods, wares, and merchandise, the members of which are by the act of incorporation made individually liable as common carriers, are not common carriers of packages of bank bills, unless it be shown that they have made the carriage of such packages a part of their ordinary business; and it was accordingly held, that the defendants, members of such a company, were not liable for the loss of a package of bank bills intrusted to the master of one of their boats, it appearing that he had been forbidden by his employers to carry money, that he had never knowingly carried any, that the usage was for persons sending money to compensate the masters, and that the owners charged freight only on specie. *Sewall v. Allen*, 6 Wend. 335.

15. The owners of a steamboat who undertake to tow a freight boat for hire are not bound

to more than ordinary care and skill in the management of their boat; they are not *quoad hoc* common carriers, and the law of common carriers is not applicable to such owners. *Caton v. Rumney*, 13 Wend. 386.

16. It seems, that in this case, the steamboat is not bound to vary from the ordinary and regular course of her voyage for the safety of the freight boat. *Ibid.*

17. A company, using steamboats and railroads for the transportation of passengers and their baggage, are liable as common carriers for damages happening to the baggage of passengers from a defect in the vehicles or machinery used, although the company is not chargeable with actual negligence, or want of skill or care in securing the safety of the baggage; if an injury happens to it, nothing will excuse the company but inevitable accident arising from superhuman causes, or the acts of the enemies of the country. Notice in the usual form, "all baggage at the risk of the owners," though brought home to the knowledge of the passengers, will not in such case excuse the company. *Camden and Amboy Railroad Company v. Burke*, 13 Wend. 611.

18. The same rule does not apply if injury happens to the persons of the passengers. In such cases, if the company have done all that human foresight and care can do to insure the safety of the passengers, they are not liable to respond in damages. *Ibid.*

COMMON.

1. Common of estovers cannot be apportioned. Where a farm entitled to estovers is divided by the act of the party among several tenants, neither of them can take estovers; they belong to the whole farm as an entirety, and not to part of it; and as no one portion of the farm entitled to common can enjoy the right, it is necessarily extinguished and can be revived, only by a new grant. *Van Rensselaer v. Bodcliff*, 10 Wend. 639.

2. Where common of estovers by operation of law, as by descent, devolves upon several, they cannot enjoy the right in severalty, but may unite in a conveyance, and vest the right in one individual. *Ibid.*

3. Common of pasture, whether appendant or appurtenant, it seems, is apportionable. *Ibid.*

4. If a commoner purchase a part of the lands out of which the common is to be taken, the right of common is lost. *Ibid.*

5. The owner of a manor, who grants leases conferring rights of common, may appropriate portions of the waste lands of the manor, provided he leaves enough for his tenants; but such appropriation must be an actual *bona fide* appropriation, not a mere enclosure of the waste lands by what is commonly called a possession fence. No one, however, but a tenant can question the *bona fides* of the appropriation. *Ibid.*

6. A party having title to lands, although not in the actual possession thereof, may maintain trespass against another not in the actual possession of the premises. *Ibid.*

7. Where a lessee is entitled to a right of estovers, for the use of his farm, in the unappropriated lands of his landlord, if the latter makes a colourable lease of all the unappropriated lands in the vicinity of the farm for the purpose of defeating the right of estovers, the lessee of such farm may resort to other lands of the lessor which are more distant, and where the wood and timber is more valuable. But in ordinary cases the taking of estovers of valuable timber, and at a great distance from the premises to which the right of estovers is appurtenant, would be deemed an unreasonable exercise of the privilege. It is, therefore, not impertinent in an answer to state the colourable lease as an excuse for the taking of the estovers upon such other premises of the landlord. *Van Rensselaer v. Brice*, 4 Paige, 174.

COMMON SCHOOLS.

1. The penalty imposed by the latter part of the twenty-second section of the act for the support of common schools, (sess. 42, ch. 161.) upon the clerks, &c. of school districts for the non-performance of their duties, does not extend to the defective performance or omission of a particular act, but only to a general non-performance of the duties of their office. *Spafford v. Hood*, 6 Cow. 478.

2. Accordingly it does not attach for the omission of the clerk to warn a part of the taxable inhabitants of a school district to attend a special meeting ordered by the trustees. *Ibid.* 3. The object of this section was, to compel a *bona fide* acceptance of the offices which it enumerates. *Ibid.*

4. A similar construction applies to the fifth section of the act for the assessment and collection of taxes, (2 R. L. 512.) which imposes a penalty upon assessors. Per *Sutherland, J.*, delivering the opinion of the Court. *Ibid.*

5. Where it is the intention of the Legislature to impose a penalty on an officer for the omission of any particular duty, they use language which is clear and explicit; e. g. 2 R. L. 274, imposing \$10 on overseers of highways for not warning people assessed to work, &c. *Ibid.*

6. The trustees of a school district, in making out a *tax list* attached to a warrant for raising moneys to build a school-house, must be guided by the *last* assessment roll of the assessors of the town of the taxable property of the inhabitants; after it has been reviewed and finally established; and if they err in adopting an erroneous basis for fixing the amount of tax to be paid by the taxable inhabitants, and issue their warrant, on which property is sold, they will be answerable as trespassers. But the collector who executes the warrant will not be a trespasser; the warrant as to him being a complete protection. *Alexander v. Hoyt*, 7 Wend. 89.

7. Contracts for teachers' wages, made by the trustees of a school district, are obligatory upon their successors in office. *Silver v. Cummings*, 7 Wend. 181.

8. In the case of trustees and collectors of school districts, general reputation of their being

such officers, and proof of their acting as such, is *prima facie* sufficient, without producing evidence of their election, especially where there is evidence of their acting under colour of an election. *Ring v. Groul*, 7 Wend. 341.

9. Evidence that a majority of the inhabitants of the district say that such persons are not trustees and collectors, is inadmissible. *Ibid.*

10. A defective or insufficient precept, by virtue of which the district meeting is convened for the election of officers, cannot be taken advantage of to charge the persons elected to such offices as trespassers for any of their official acts. *Ibid.*

11. An owner of lands not occupied by him, his agent, or servant, but in the actual occupation of a tenant, is not a taxable inhabitant, within the meaning of the common school act of 1819; the tenant and his sub-tenants are the persons upon whom the tax should be imposed, where the owner is a non-resident of the district in which the tax is assessed. *Dubois v. Thorne*, 8 Wend. 518.

12. Evidence that certain individuals are generally reputed to be and have acted as trustees and collectors of a common school district, is *prima facie* sufficient to establish their official character. *M'Coy v. Curtice*, 9 Wend. 17.

13. Two trustees may issue a warrant for the collection of a tax, and the presence of the third trustee at the issuing thereof will be presumed until the contrary be shown. *Ibid.*

14. In an action against the collector of a school district for taking property in obedience to a warrant of trustees for the collection of a tax, it is not competent to the plaintiff to show that the forms prescribed by the statute in organizing the district, or in the subsequent proceedings, had not been complied with; and it was accordingly held, that evidence that the notice required by law on the alteration of a school district to be given to trustees had not been given, was inadmissible. *Reynolds v. Moore*, 9 Wend. 35.

15. A collector of a school district, obtaining judgment in a suit against him for acts done in his official character, is entitled to double costs. *Ibid.*

16. The trustees of a common school district are liable in trespass for making an assessment, and issuing a warrant for the collection of a tax voted at a district meeting to raise money to purchase a site for a school-house, and building a new school-house on a site different from that on which the old school-house stood, where the previous consent of the commissioners of common schools has not been obtained to a change of the site of the school-house. *Baker v. Freeman*, 9 Wend. 36.

17. In assessments under the common school law, where a farm is divided by a town or county line, the whole farm must be assessed to the owner, in the town and district where his dwelling house is situated, and the portion of the farm lying out of the district is, for the purposes of this act, considered in law as being within the district, so that a district collector is authorized to make a levy on personal property on any portion of the farm, although such levy be made beyond the bounds of the town and county

in which his district was organized. *Ward v. Stylesworth*, 9 Wend. 281.

18. It is competent to the trustees of a common school district to become the endorsers of a promissory note, and to set off the same in an action of *assumpsit* against them; until the note is impeached, or suspicion cast upon the transaction, the trustees are under no obligation to show how they came by the note. *Brewster v. Caldwell*, 13 Wend. 28.

19. A school district collector may levy the school tax upon any goods lawfully in the possession of the person liable to pay the tax, although such person be not the owner of the goods. *Keeler v. Chicester*, 13 Wend. 629.

20. The authority to make such levy extends not only to the collection of taxes for erecting or repairing school-houses, but to all taxes which may be imposed by the trustees of the school district. *Ibid.*

CONDITION.

1. Agreements are independent, where on the one hand an article of merchandise is sold and contracted to be delivered on demand, and on the other payment is deferred until five months after the date of the contract. *Dox et al. v. Dry*, 3 Wend. 356.

2. The non-payment of the whole consideration is no excuse for the non-performance of a contract, where a part is received, unless it clearly appears that the payment of the whole consideration was a condition precedent. *Ibid.*

3. The place of payment of a note payable in salt or other portable article is the residence of the creditor, where the time of payment is fixed by the contract, but the place not designated. *Goodwin v. Holbrook*, 4 Wend. 377.

4. Where, in a contract for the payment of a sum of money in salt, the party contracting to make the payment agreed to pack the salt in barrels in the usual way of packing salt, and the contract specified that the barrels were to be furnished and delivered at the place of manufacture by the party to whom the payment was to be made; *it was held*, that the debtor would not be in default for not delivering the salt, unless it should appear that the creditor had furnished the barrels, or had waived the performance of that part of the contract by which the manufacturer was bound to pack the salt in barrels. *Ibid.*

5. Where a party is bound by contract to give such security for the performance of covenants as shall be approved by a third person, the giving security is a condition precedent to the bringing of an action; an averment that the party was ready and willing, &c., but that the security was not required of him, is not enough. *M'Intire v. Clark*, 7 Wend. 330.

CONSIGNOR AND CONSIGNEE.

1. A consignee or factor making advances on the goods of his consignor or principal to an

amount even beyond their value, is yet bound to obey the instructions of the latter as to the time of sale, though there be no agreement to that effect. And if, being instructed to sell immediately, he refuse the first offer, in expectation of a more favourable market, and afterwards sell at less than the offer, he is liable, though he act in perfect good faith. *Bell v. Palmer*, 6 Cow. 128.

2. A letter of instructions by the consignor to their consignees of goods, expressing a hope and request that the goods will not be sold at a loss on the invoice, is not peremptory; and the goods may notwithstanding be sold at a sacrifice. *La Forge v. Kneeland*, 7 Cow. 456.

3. Consignees are bound by the instructions of the consignor, though the advances of the former on the goods exceed the net amount of sales. *Ibid.*

4. The agent of a consignor receiving advances on goods from the consignee is personally liable to refund, unless he has paid over the advances to his principal, or altered his relation in respect to him as by giving fresh credit. *Ibid.*

5. So of any agent receiving money for his principal. *Ibid.*

6. But where K., as agent of B. and A., assigned goods to L. and P. on advances from the latter; and immediately credited the advances to B. and A., to whom a balance was still due from K.; and then B. and A. consented that K. should transfer this credit to his private account against B. alone, who would still owe him a balance on private account between them, which was done; *held*, that this was equivalent to actual payment of the money; and though the goods sold for less than the advance, yet *held* that K. was not liable for the difference. *Ibid.*

7. Otherwise, if the credit had remained a simple and direct one to B. and A. *Ibid.*

CONSPIRACY.

1. A writ of conspiracy at the common law lay only in two cases; conspiracy to indict for treason, or a capital felony, the party being acquitted. *Jones v. Baker*, 7 Cow. 445.

2. In such case, two defendants at least must not only be joined in the writ, but to sustain it as to one, both must be convicted. One cannot be convicted and another acquitted, as in other actions for tort. *Ibid.*

3. In these actions, actual conspiracy need not be proved; it may be inferred from circumstances, among which are the acts of the parties in doing the injury which was the object of the conspiracy. *Ibid.*

4. In all other cases of conspiracy, the remedy is by action on the case; and one may be convicted and the other acquitted. *Ibid.*

5. I., a merchant tailor, was engaged in carrying on a profitable trade in his line of business from New York to New Orleans, the successful prosecution of which depended on a knowledge of certain things, known to so few that his gains were very large. B. conspired with I.'s foreman, in I.'s absence, to obtain the



secrets of the business; did obtain them; and was, in consequence, enabled to rival I. in his trade; and I. was otherwise injured. *Held*, that an action on the case lay against B. and the journeyman, at the suit of I., for the conspiracy; and that one of the defendants might be convicted and the other acquitted. *Ibid*.

6. In such a suit, the damage is the gist of the action, not the conspiracy. *Ibid*.

7. An indictment for conspiracy was that the defendants, intending unlawfully, by indirect means, to cheat and defraud a certain incorporated company (naming it) and divers others unknown of their effects, did fraudulently and unlawfully conspire together injuriously and unjustly, by wrongful and indirect means, to cheat and defraud the company and unknown persons of their effects; and that in execution thereof they did, by certain undue, indirect, and unlawful means, cheat and defraud the company and unknown persons of divers effects. The Court for the Trial of Impeachments and the Correction of Errors being equally divided on the question, whether this was a valid indictment, it was decided by the casting vote of the president, that it was defective; and the judgment of the Supreme Court sustaining it was reversed. *Lambert v. People*, 9 Cow. 578.

8. Where an indictment for a conspiracy does not set forth the object specifically, and show that such object is a legal crime, it should particularly set forth the means intended to be used by the conspirators, and show that those means are criminal. Otherwise it charges no crime which the law can notice. *Ibid*.

9. Where such a fraud as may be punished criminally is actually committed by several persons, in pursuance of a conspiracy between them for that purpose, the conspiracy as such is not indictable, but the fraud only. Per *Spencer, Senator*. *Ibid*.

10. Whether an indictment lies for a conspiracy to produce a mere private injury, which is not a legal crime, and would not affect the public, nor obstruct public justice? *Quære*. *Ibid*.

11. An indictment charging generally that the defendants conspired to defraud an individual, and not showing the intended means by which the fraud was to be compassed, is bad. *Ibid*.

12. Provisions in the new revised laws (pt. 4. ch. 1, tit. 6, § 8, 9, 10.) on the subject of conspiracy, with the reasons in their favour, as rendered by the revisors: by these provisions, conspiracies to commit any offence; falsely to charge another with or arrest or indict him for an offence; falsely to move or maintain a suit; to defraud another of property by criminal means, or by means which, if executed, would amount to a cheat, or obtaining goods, &c. by false pretences; or to commit any act injurious to the public health or morals, or to trade or commerce, or for the perversion or obstruction of justice, or the due administration of the laws, are misdemeanours; and as such only are indictable, and no agreement, except to commit felony on the person of another, or to commit arson or burglary, shall be deemed a conspiracy, unless some act be done beside the argument by one or more of the conspirators. *Ibid*. Note (b) at the end of the case.

13. The crime of conspiracy, to effect an unlawful act, is perfect when the agreement to do the act is concluded; no overt act is necessary to be shown. *The People v. Mather*, 4 Wend. 229.

14. All who accede to a conspiracy after its formation, and while it is being executed, become conspirators. *Ibid*.

15. The venue may be laid in the county where the agreement was entered into, or where an overt act was done by any of the conspirators in furtherance of their common design. *Ibid*.

16. A conspiracy to commit a misdemeanour is not merged in the misdemeanour, the result of the conspiracy, when committed. *Ibid*.

17. In an indictment for a conspiracy, it is not necessary to set forth the overt acts relied on as evidence of the defendant's guilt, where a legal offence is charged, *e. g.* a conspiracy to assault and false imprison a citizen. *Ibid*.

18. An indictment for conspiracy, charging the defendant to have conspired with divers persons, to the jury unknown, is good, notwithstanding that the co-conspirators or some of them are known to the jury, and their names might have been set forth. *Ibid*.

19. A fraudulent combination to commence suits against a person, with the view of extorting money from him, is an indictable offence, and the persons guilty of it may be punished for a conspiracy. *Leggett v. Postley*, 2 Paige, 599.

20. In an action upon the case, in the nature of a conspiracy, the declaration alleged a combination among the defendants, for the purpose of defrauding the plaintiffs of certain merchandise, under colour of a purchase of it by the defendant, Lawrence, that it might be converted to the benefit of Davis, and described the various acts whereby the fraud was to be perpetrated. Some of these acts were charged to have been done by all the defendants, and others by one or two of them, but all in pursuance of the original combination. Upon demurrer to the declaration, (both general and special,) it was held, that whatever is done, in pursuance of a fraudulent combination, by any of the parties concerned in it, may be averred to be the act of all. That the conspiracy is only important as it gives a character to the acts of the parties to it, and charges them with the legal consequences of such acts. *Tuppan et al. v. Powers et al.* 2 Hall, 277.

21. In all cases where fraud on the part of the defendant is averred, and damage to the plaintiff as the consequence of it, an action will lie. And where the declaration sets forth a conspiracy, the act of each defendant done in furtherance of its objects may be stated to have been done individually; and such act, in judgment of law, is the act of all; the gist of the action being the damage to the plaintiff, and not the conspiracy. *Ibid*.

CONSTABLE.

1. The amount of the allowance to constable or other person for serving *subpoenas* in criminal

cases is a matter of discretion in the board of supervisors, with which this Court will not interfere. *Ex parte Farmington*, 2 Cow. 407.

2. They may be served by any person, as in civil cases. *Ibid.*

3. It seems, that nineteen cents for service, besides mileage, would be too high. *Ibid.*

4. A constable cannot recover his fees upon an execution, where he has levied upon property, and returned that it remains on his hands for want of buyers. *Pizley v. Butts*, 2 Cow. 421.

5. To entitle him to his fees, he must levy the money, except where he is prevented by the act of the plaintiff, or by operation of law. *Ibid.*

6. In the former case he may recover his fees, though he have levied only, and not sold. *Ibid.*

7. He must levy and sell in due season. *Ibid.*

8. If no bidders attend, he should postpone the sale, and give notice to the plaintiff, who should attend and bid himself. *Ibid.*

9. And if he do not, the constable will be excused in returning that the property remains on hand for want of buyers. *Ibid.*

10. So he would be excused in making such a return, if he could not sell the property but at a great sacrifice. *Ibid.*

11. Yet, after he has made such a return, he must proceed and sell on the first opportunity. *Ibid.*

12. If he do not sell within thirty days, he loses his lien as against other executions. *Ibid.*

13. The same rules of law which govern sheriffs in the execution of process from higher Courts, govern constables in execution of a justice's process, except where some statute intervenes. *Ibid.*

14. A constable summoned, and actually attending Court, under the statute, (Sess. 42, ch. 27.) is entitled to his fees, though he do not actually serve as constable. It is enough that he is attending and ready to serve; and it is no objection to allowing him his fees, that he was a deputy sheriff, and attended Court as such. *The People v. The Supervisors of Columbia*, 4 Cow. 146.

15. An action will not lie against a constable for not serving an original execution after it has been renewed by the plaintiff. *Roman v. Liswell*, 6 Cow. 659.

16. If it is renewed on the constable's responsibility, and on good consideration, the action, if any will lie, should be *assumpsit*; not case for neglect in omitting to serve or return it. *Ibid.*

17. An execution renewed ceases to be an original one. *Ibid.*

18. If an execution be renewed, on the constable's responsibility, before it has run out, such engagement of the constable is *nudum pactum* and void. *Ibid.*

19. Where an execution was dated the 7th of March, and returnable within thirty days from the date; held, that it would not expire till after the 6th of April, and that the constable holding it had the whole of that day in which to execute and return it. *Ibid.*

Vide ACTION AGAINST HEIRS, 4, 56.

20. The security required to be given by constables may be made to the people, though it is not necessary that it should be in that form. *The People v. Holmes et al.* 2 Wend. 281.

21. Any person to whom the constable has become liable, on account of an execution delivered to him for collection, may commence a suit on the security given, without previously obtaining leave from any Court. *Ibid.*

22. A constable sued for an act done by him in his official capacity is not entitled to the protection of the statute "for the more easy pleading in certain suits," unless the act be done in obedience to a legal warrant, and within the jurisdiction of the Court or magistrate issuing the process. *Green v. Rumsey*, 2 Wend. 611.

23. A constable's bond "to each and every person" to whom the constable may officially become liable, is good; and the omission to file it within ten days after his election does not affect its validity. *Dutton v. Kelsey et al.* 2 Wend. 615.

24. An instrument in writing under seal, entered into by a constable and three sureties, whereby they "jointly and severally agree to pay to each and every person such sum or sums of money as the said constable shall become liable for on account of any execution which shall be delivered to such constable for collection," is good and valid, and complies with the requirements of an act incorporating a village, prescribing that certain officers thereof, and amongst others constables, shall, before they enter upon the duties of their respective offices, give "such security for the faithful performance of the trust reposed in them as the major part of the trustees of the village for the time being shall deem sufficient." *Fellows v. Gilman et al.* 4 Wend. 414.

25. Covenant may be sustained on such instrument by any plaintiff in an execution delivered to such constable for collection, and for the payment of which he has become liable, although such plaintiff be not a party to the instrument, nor named in it. *Ibid.*

26. A constable is not authorized, on an arrest by virtue of a warrant in a civil cause, to take security for the appearance of the defendant. *Millard v. Cunfield*, 5 Wend. 61.

27. The security required to be given by a constable, before entering on the duties of his office, may be in the form of a penal bond to the people, though it may be and it seems it is preferable it should be, in the form of a simple agreement, without any penalty to pay, &c. *The People v. Holmes*, 5 Wend. 191.

28. An action of debt in the name of the people may be maintained on such bond by any person to whom the constable has become liable, although covenant may be brought by such person on the condition of the bond in his own name. *Ibid.*

29. If a constable sues a stranger for taking goods seized by virtue of an execution, the production of the execution without the judgment is sufficient to support the action. *Spoor v. Holland*, 8 Wend. 445.

30. Debt will not lie in the name of the party aggrieved on a constable's bond, given to the

people; the action should be *covenant* on the condition in the name of the party, or *debt* in the name of the people. *Lawson v. Erwin*, 9 Wend. 233.

31. A constable who serves a *subpoena* issued by a district attorney, and containing the names of several individuals as witnesses, is entitled to mileage from the Court-house of the county to the residence of each witness. *Haley v. The Supervisors of Ulster*, 12 Wend. 237.

32. An instrument in writing, signed by a constable and others as his sureties, engaging that he shall collect and pay over all executions that are collectable, and that the signers will be accountable to all persons in whose favour any execution may come for the damages in the same, if not paid over to them according to the statute, &c., is a valid instrument within the statute; and an action may be maintained on it by a creditor who has caused an execution to be put into the hands of the constable for collection which has never been returned. *Stellinger v. Yendes et al.* 12 Wend. 306.

CONSTITUTIONAL LAW.

1. Before the Court will declare an act of the Legislature unconstitutional, a case should be presented in which there is no rational doubt. *Ex parte McCollum*, 1 Cow. 550.

2. On the 11th of April, 1823, an act passed creating the county of Wayne out of certain towns belonging to the former counties of Ontario and Seneca, with a proviso, that the justices of the peace who had already been appointed for those towns while they belonged to Ontario and Seneca, pursuant to the 7th section of the 4th article of the constitution, should, by virtue of the act, be and remain justices of the new county, for the same term and with the same powers in the towns in which they should respectively reside in Wayne as they would have had in the counties of Ontario and Seneca if the act had not passed; held, that this provision was constitutional. (*Vide* Laws, sess. 46, ch. 138, s. 3.) *Ibid.*

3. The Legislature have power to enlarge or contract the territorial jurisdiction of justices of the peace, though they have no power absolutely to deprive them of their offices. *Ibid.*

4. The power to alter their territorial jurisdiction necessarily arises from the constitutional power of creating new counties. (Art. 1, s. 7.) *Ibid.*

5. The act to suppress duelling, passed Nov. 5th, 1816, (sess. 40, ch. 1.) which declares that any person convicted of challenging another to fight a duel, &c., shall be incapable of holding or being elected to any post of profit, trust, or emolument, civil or military, under this state, is constitutional; and a conviction and judgment of disqualification under it are therefore legal and valid. *Parker v. The People*, 3 Cow. 686.

6. The provision in the constitution of the United States, that cruel and unusual punishments shall not be inflicted, is a restriction upon

the government of the United States only; and not upon the government of any state. *Ibid.*

7. The constitution of the United States does not regulate the punishment of crimes against a state. *Ibid.*

8. The state Legislature cannot establish arbitrary exclusions from office, or any general regulations requiring qualifications which the state constitution has not required. *Ibid.*

9. The power of the state Legislature in the punishment of crimes is not a special grant or limited authority, but a part of the legislative or sovereign power of the state to maintain social order, and to take life, liberty, and all the rights of both, where the sacrifice is necessary. *Ibid.*

10. The provision in the state constitution that the judgment upon impeachment shall not extend farther than a removal from office, and disqualification to hold office, is a restriction, not an authority. *Ibid.*

11. The power of the state Legislature over crimes is a power to produce the end by adequate means. *Ibid.*

12. But there are numerous regulations in the constitution which operate as restrictions upon this power. *Ibid.*

13. Examples. *Ibid.*

14. Eligibility of office is not so secured. Infliction of disqualification to hold office, as a punishment, is not incompatible with that part of the constitution which provides that each house shall be the judge of the qualifications of its own members. *Ibid.*

15. The acts of the Legislature of this state, granting to Robert R. Livingston and Robert Fulton the exclusive navigation of all the waters within its jurisdiction, with boats moved by fire or steam, for a term of years, are repugnant to that clause of the constitution of the United States which authorizes Congress to regulate commerce, so far as those acts prohibit vessels licensed, according to the laws of the United States, for carrying on the coasting trade, from navigating those waters by means of fire or steam. *N. R. Steamboat Company v. Livingston*, 3 Cow. 713.

16. The terms "coasting trade" mean commercial intercourse, carried on between different districts in different states, different districts in the same state, or different places in the same district, on the sea coast, or on a navigable river. *Ibid.*

17. The power to regulate commerce among the states, conferred by the federal constitution, extends to the coasting trade. *Ibid.*

18. What is meant by the terms "internal commerce of the state." *Ibid.*

19. The constitution of the United States should be so construed as best to promote the great objects for which it was made; avoiding the two extremes of a liberal or strict construction. *Ibid.*

20. Commercial defects in the articles of confederation considered, with the objects of the federal constitution on that head. *Ibid.*

21. The powers given to the general government are to be first satisfied. Some of these are exclusive, some concurrent; and when con-

current, the provisions of the general government are paramount. *Ibid.*

22. For certain purposes, the general government is a single consolidated one. In this character Congress executes its powers. *Ibid.*

23. Congress have no right, under their power of regulating commerce, to interfere with the ferries of the state, except so far as they are used for carrying on the coasting trade. *Ibid.*

24. Nor can they interfere with the navigation upon our canals, or inland lakes, or rivers. *Ibid.*

25. But under their taxing power, they may tax canal boats, or any other property. *Ibid.*

26. The Legislature have not the power to determine the rights of parties to land, either by themselves or commissioners, without the consent of the parties. *Jackson v. Frost*, 5 Cow. 346.

27. An objection that a law is void as being contrary to the constitution of the United States, because it seeks to divest the rights of remainder-men, cannot be successfully urged by a stranger to the remainder, as void also in relation to the particular estate. The objection can be made by the remainder-men only. *Sinclair v. Jackson*, 8 Cow. 543.

28. Acts of the Legislature authorizing railroad companies to enter upon, take possession of, and use the lands belonging to individuals, for the construction and maintenance of their roads, against the will and without the consent of the owners of the lands, are valid and constitutional. *Bloodgood v. Mohawk and Hudson Railroad Company*, 14 Wend. 51.

29. It has never been deemed necessary that the compensation which the constitution requires to be made for private property taken for public use, should be actually paid before entering upon or taking possession of the property. If legal provision for compensation is made, the spirit of the constitution is complied with, and the property which is required for public use may lawfully be entered upon, and possession thereof taken. *Ibid.*

30. It seems, also, that a law would not be deemed unconstitutional, which authorized private property to be taken for public use, although it entirely omitted to provide the mode of making compensation; and that the officers of government, or other individuals designated in the act, who should take possession of the property under such circumstances, would not be trespassers; that the owners would have a just claim for compensation, which it was to be presumed would be acknowledged by the Legislature, and paid. *Ibid.*

CONTEMPT.

1. Where a party is in contempt, the Court will not grant an application in his favour which is not a matter of right. *Johnson and others v. Binney and others*, 1 Paige, 646.

2. If he applies to the Court for a favour, it will only be granted on condition that he purges

his contempt by complying with the former order of the Court. *Ibid.*

3. Where a party was directed to deposit certain books in the master's office, with liberty to the adverse party to inspect and take extracts from such parts as related to certain partnership transactions; and in obedience to the order, the books were deposited in the master's office, with the parts thereof which did not relate to the partnership transactions sealed up, and during a temporary absence of the master, the adverse party who was inspecting the books broke open the parts which were so sealed up, and which contained the private memoranda and remarks of the party who deposited the books, in relation to his private business transactions; it was held, that this act of the adverse party was a contempt of the Court. *Dias v. Merle*, 2 Paige, 494.

4. It is the ordinary practice of the Court, when books are directed to be produced for the inspection of the opposite party, to permit those parts to be sealed up which do not relate to the subject-matter of litigation; and Courts of record have uniformly protected suitors against an unwarrantable interference of the adverse party with rights of this description, by proceeding against the offender as for a contempt. *Ibid.*

5. The revised statutes have made it the duty of the Court, in a proceeding by attachment, to enforce the civil remedies, or to protect the civil rights of parties, to impose a fine sufficient at least to indemnify the relator for the injury sustained by the contempt, and to satisfy his costs and expenses. *The People v. Spalding*, 2 Paige, 326.

6. Manner of proceeding where a defendant is brought into Court, on an attachment for a contempt. *The People, ex rel. Lovel, v. Rogers*, 2 Paige, 103.

7. Where, from the answer of the parties to the interrogatories filed, it appears that he was in contempt for refusing to obey an order to deliver over certain property to a receiver, he was ordered to be committed to close custody until he complied with the former order of the Court, and paid the costs of the proceeding. *Ibid.*

8. The costs which the party is bound to pay must be specified in the order of the Court and in the mittimus. *Ibid.*

9. Form of an order of commitment for a contempt. *Ibid.*

10. Where a party perseveres in his refusal to deliver over property to a receiver, the property may be sequestered, and his servants and agents, &c. will be prohibited from delivering it to him or applying it to his use on pain of contempt. *Ibid.*

11. A party is in contempt for not obeying an order served upon his solicitor, if knowledge of such service was brought home to him, in the same manner as if the order had been served on himself personally. *The People v. Brown*, 4 Paige, 405.

12. A party in contempt cannot apply to the Court for a favour, until he has purged the contempt by complying with the former order of the Court. *Rogers v. Patterson*, 4 Paige, 450.

13. The advice of counsel cannot protect a party in disobeying an order of the Court, or prevent the adverse party, whose remedy is impaired or impeded by such disobedience, from proceeding as for a contempt to compel a compliance with the order. *Ibid.*

14. Upon an order for the defendant to show cause why he should not be punished for an alleged contempt, if he appears and denies the contempt, the proceedings must be substantially the same as upon the return of an attachment against him. *McCordie v. Senior*, 4 Paige, 378.

15. A party who is committed as for a contempt for the nonpayment of costs or other sums of money, is entitled to the goal liberties; and unless the commitment is for costs only, he may be discharged from imprisonment under the statute, upon presenting a petition and making an assignment of his property. *The People v. Bennett*, 4 Paige, 292.

16. But where a party is committed for the nonpayment of a fine imposed upon him by the Court, for the breach of an injunction or other contempt, he must be confined by the sheriff within the walls of the prison. *Ibid.*

17. If the process of commitment does not show that the defendant was convicted of a contempt, and that the sum he was ordered to pay was a fine imposed upon him on such conviction, the sheriff cannot be punished for allowing him the benefit of the goal liberties. *Ibid.*

CORPORATIONS.

- I. Corporations generally.
- II. Religious corporations.

I. Corporations generally.

1. A corporation may bind itself by contract without its corporate seal. *Mott v. Hicks*, 1 Cow. 513.

2. It may give a promissory negotiable note, being included in the word person as used in the statute of 3 and 4 Anne. (1 R. L. 151.) *Ibid.*

3. Where the president of the Woodstock Glass Company executed a promissory note in the name of the company, for wood furnished to them to use in the manufacture of glass; *Id.*, that the company were liable. *Ibid.*

4. Corporations may be thus bound by a promissory note, without a special clause in the act of incorporation, giving them power to issue notes, such as are found in bank charters. *Ibid.*

5. A corporation, having no power by the act of incorporation to discount notes, but created for the purposes of insurance, has no right to carry on the business of discounting. *New York Fire Insurance Company v. Sturges*, 2 Cow. 665.

6. A corporation has no powers except such as are specially granted, and those that are necessary to carry into effect the powers so granted. *Ibid.*

7. The New York Fire Insurance Company was incorporated for the purposes of insurance in 1910, and in 1818 an act was passed conti-

nuing that company till 1823, for the purpose of closing and winding up their business. On the 30th of August, 1817, O. and H. owed several debts to the company, and B. owed another, for which several debts they took of B. a note made by P. and H., payable at four months from the said 30th of August. These debts were all due for premiums of insurance. *Ibid.*

8. The company made a calculation upon the note, deducting \$23.92 interest for the four months at 7 per cent., then deducted the debts, and paid the balance, which was \$20, to B. When this note became due, P. and H. offered a new note in renewal, also at four months, which the company took, deducting as before \$23.92 for the interest, and giving their check to P. and H. for the balance, and the old note was taken up. The second note was renewed in like manner for P. and H., from four months to four months, till January 11th, 1819, when the last note was given. The discount taken was the fraction of a cent more than the interest would amount to for the four months, including the three days grace. *Held*, that the company had a right to continue a debt originally lawful in this manner; that the last note was therefore valid, and that it was not usurious, though the interest was taken in advance with such a trifle beyond the interest; nor is such a transaction forbidden by the act to restrain unincorporated banking associations. (1 R. L. 234.) It cannot properly be called the business of discounting, which, it seems, was alone intended by the words "making discounts" in the restraining act. *Ibid.*

9. A debt due to an incorporated company will be presumed to have been contracted in the lawful course of business until the contrary is shown. *Ibid.*

10. A company incorporated for the purpose of insurance, and forbidden to carry on any other trade or business, also forbidden to exercise banking powers, with a clause in the act incorporating them enumerating the kind of securities upon which they may loan moneys, but not including promissory notes in such enumeration, have no power to loan moneys upon promissory notes, or on any securities other than those specially enumerated. *New York Fire Insurance Company v. Ely*, 2 Cow. 678.

11. The New York Firemen Insurance Company had no power to loan money on note, or other personal security, under their act of incorporation of 1810; nor have the same company this power under their act of incorporation of 1818. *Ibid.*

12. Notes taken by either of these companies upon a loan of their moneys are therefore void. *Ibid.*

13. Neither had power by their act of incorporation to discount notes. *Ibid.*

14. Whether if they had this power by their act of incorporation, it was taken away by the general restraining acts forbidding to associations or individuals the exercise of banking powers, &c. *Quære. Ibid.*

15. Whether, where one corporation is appointed by statute to settle the concerns of another and former corporation which is dis-

solved, the latter is prohibited by the restraining acts from employing the funds of the former in discounting notes? *Quære*. (Vid. Laws, sess. 38, ch. 116; sess. 41, ch. 10; sess. 27, ch. 117; sess. 27, ch. 110; s. 8, 9. 2, R. L. 234.) *Ibid*.

16. A corporation is a mere political institution, a creature of the Legislature, having no other powers than what are given to it by its creator, or such as are incidental or necessary to carry into effect the purposes for which it was established. *Ibid*.

17. Definition of the terms, "banking powers." *Ibid*.

18. A corporation must prove its existence under the general issue. *Bank of Utica v. Smalley*, 2 Cow. 770.

19. Whether the misnomer of a corporation who is plaintiff must be pleaded in abatement, or may be taken advantage of upon the general issue? *Quære*. *Ibid*.

20. In a suit by a corporation, the declaration need not be set forth by averment how they were incorporated. *Ibid*.

21. A corporation may make any contract to do an act at any place, if such contract be within the scope of its general powers. *Bank of Utica v. Smedes*, 3 Cow. 662.

22. A suit on a policy against an incorporated insurance company, not entitled to preference within the statute. (Sess. 48, ch. 325, s. 4.) *Anonymous*, 6 Cow. 41.

23. A foreign corporation may sue in this Court. *N. J. P. and L. Bank v. Thorp*, 6 Cow. 46.

24. And where, after suit commenced, the act of incorporation was repealed, and the property of the corporation vested in trustees, who were authorized to sue and be substituted for the corporation in suits brought, on motion, the trustees were made parties to the suit instead of the corporation. *Ibid*.

25. Notice of a motion under the act to facilitate proceedings against incorporated companies, &c. (sess. 48, ch. 325, s. 9.) which draws in question the election of directors of a company, is sufficient, if served on the directors whose election is questioned. It need not be served on the president, or the directors whose seats are not questioned. *Ex parte Holmes*, 5 Cow. 426.

26. Nor need notice be given to persons whose right to vote is in question. *Ibid*.

27. The counsel who appear in behalf of such an application, and the counsel who oppose, will be deemed by the Court *prima facie* authorized thus to appear. *Ibid*.

28. But any one named as a relator may move to have his name stricken from the proceedings, if, in truth, he did not authorize the application. *Ibid*.

29. The proceedings are, in the first instance, the same as upon an ordinary non-enumerated motion; and counter affidavits need not be served. *Ibid*.

30. One in whose name stock stands on the books of an incorporated company, as trustee, cannot vote on such stock. The right of voting belongs to his *cestui que trust*. *Ibid*.

31. A company cannot hold its own stock so

as to give its directors or trustees a right to vote upon it. *Ibid*.

32. Yet it may take its own stock in pledge, or as security for a debt due to it, where this is necessary. *Ibid*.

33. Rule setting aside an election of directors, and ordering a new election, pursuant to the statute. (Sess. 48, ch. 325, s. 9.) *Ibid*.

34. An act authorizing the trustees of a village corporation to make by-laws relative to hucksters; and to pass such prudential by-laws for the good government of the village, &c. as they may deem necessary, not inconsistent with the laws of the state or United States, (e. g. the act incorporating Rochester, sess. 40, ch. 96.) does not authorize them to pass a law, that hucksters shall take and pay for a license of the trustees, under a penalty; especially where it does not appear expressly that prudence required the by-law. *Dunham v. Trustees of Rochester*, 5 Cow. 462.

35. Such a by-law is in restraint of trade; and, as such, contrary to the general principles of the laws of the state. *Ibid*.

36. Corporations must show their power to pass by-laws; and bring themselves by proof within that power. *Ibid*.

37. A by-law in restraint of trade is, in general, void. *Ibid*.

38. By-laws must be reasonable. *Ibid*.

39. A corporation cannot, by contract, abridge their legislative power. *Cor. Pra. Church v. Mayor of New York*, 5 Cow. 538.

40. The mere circumstance that improper votes are received at a corporate election will not vitiate it. *Ex parte Murphy*, 7 Cow. 153.

41. The facts should be shown affirmatively, that a sufficient number of improper votes were received for the successful ticket to reduce it to a minority, if they had been rejected, or the election shall stand. *Ibid*.

42. The statute (sess. 39, ch. 52.) incorporating the Utica Insurance Company, confers no power on any particular number of directors to do the business, or manage the concerns or affairs of the company. The number depends on the common law. *Ex parte Wilcocks*, 7 Cow. 402.

43. Where a statute authorizes a select body of men to make by-laws, rules, and regulations, (e. g. directors of a corporation to make, &c., as to an election,) a majority of that body, at least, is necessary to constitute a quorum, (e. g. for the purpose of designating inspectors of a corporate election.) *Ibid*.

44. Words in such a statute directing that a majority of those present at a regular meeting shall be competent to do business, cannot be construed as authorizing a minority to act. A majority is necessary to constitute a regular meeting. Otherwise, where the right to do the act is in the constituent members. *Ibid*.

45. The statute (sess. 48, ch. 325, sec. 9.) authorizing the Supreme Court, on motion, to set aside a corporate election, and to make such order and give such relief as right and justice may require, does not warrant the establishing of an election which has not been legally conducted, though the objection be merely techni-

cal, and it be evident that the result is satisfactory to those who have a majority of the legal votes. *Ibid.*

46. The words "right and justice" in a statute mean legal, not arbitrary right, &c. *Ibid.*

47. The owner of stock in an incorporated company, which stands in his name on the transfer books, may vote upon it within the statute, (sess. 39, ch. 52, and sess. 48, ch. 325, sec. 9.) though such stock be at the time hypothecated by him. *Ibid.*

48. A by-law, such as is authorized by the statute, (sess. 39, ch. 52, sec. 10.) that a stockholder indebted to an incorporated company shall not transfer his stock till what he owes the company is paid, does not amount to an hypothecation. *Ibid.*

49. An hypothecation is conventional, and implies a right to convert the subject into money by sale, on default of paying the debt. *Ibid.*

50. *Semble*, the rule that the acts of officers *de facto* are valid, applies only to a third person; not where the proceeding is directed to the vacating of an election conducted by officers not duly appointed. *Ibid.*

51. Inspectors of a corporate election may be candidates at such election. *Ibid.*

52. Form of rule setting aside a corporate election and ordering a new one. *Ibid.*

53. All the integral parts of a corporation necessary to do an act must continue present till the act is consummated. Note (a), 7 Cow. 533.

54. What is meant by the integral parts of an election. *Ibid.*

55. Where a corporation has a general power to purchase real estate, but is restrained by a proviso that it shall purchase only for corporate purposes, and it buys land at sheriff's sale, the intendment is, that the purchase is within the power of the corporation, and the party contesting its capacity must show that it is within the proviso. *Ex parte The Peru Iron Company*, 7 Cow. 540.

56. A corporation for manufacturing purposes, formed under the act of the 23d day of March, 1821, (1 R. L. 245.) having ceased to act as a manufacturing company, and being without funds, and indebted, is dissolved within the intent of the act, so far as to give a remedy to creditors against the individual stockholders. *Briggs v. Penniman*, 8 Cow. 387.

57. An election of trustees, made apparently for no purpose but to keep the company in existence, will not prevent such dissolution. *Ibid.*

58. It is not necessary that a judgment of ouster or dissolution should have been pronounced in any other prosecution, before a creditor can maintain a suit against the stockholders under the statute. *Ibid.*

59. The suit is proper in equity; the necessary contribution constituting the case one of equitable jurisdiction. *Ibid.*

60. It is no defence that the creditors have paid in the full price of their stock. They are liable individually to pay as much more, if necessary, to discharge debts due at the time of the dissolution. *Ibid.*

61. But on a bill filed to compel such payment, they shall be allowed advances, for the

benefit of the company, beyond the value of their stock respectively; and this whether such advances were made before or after the dissolution. *Ibid.*

62. Where there are several creditors, and the amount of stock is not sufficient to pay all, the distribution should be rateable among them; and the stockholders may come in as creditors. But such general distribution should be on a cross bill by the creditors. Per *Woodworth, J.* *Ibid.*

63. Where the trustees, or other proper agents for that purpose, neglect to call in the debts due by the stockholders of an incorporated company for stock, so as to enable it to pay its debts, a power exists, independent of any statute provision, on bill in Chancery by a creditor, to compel such agents to enforce contribution from the stockholders according to their subscription. Per *Spencer, Senator.* *Ibid.*

64. Whether mere insolvency will dissolve a corporation created under the statute, 1 R. L. 145? *Quære.* *Ibid.*

65. An act of incorporation authorizing a company to take by purchase, means subject to the restrictions and incapacities created by other general statutes. *M'Cartee v. Orphan Asylum*, 9 Cow. 437.

66. The right to purchase is incident to a corporation. *Ibid.*

67. A note made with the intent and for the purpose of being discounted by the Utica Insurance Company, and actually discounted by the company, in the actual course of their banking operations, with a knowledge of the facts, is void; the company not having banking powers under their charter. *Utica Insurance Company v. Hunt et al.* 1 Wend. 56.

68. Whether the money lent, and for which the security was given, can be recovered in another form of action? *Quære.* *Ibid.*

69. Where some of the directors of an insurance company have been elected by a vote upon the stock held by the company, their seat will be vacated; and the directors having a majority of votes upon the outstanding stock will, on motion, be declared duly elected, where the facts are sufficiently ascertained by affidavit. *Ex parte Des doity et al.* 1 Wend. 98.

70. A corporation is sufficiently proved by the production of an exemplified copy of the act of incorporation, and evidence of user under it. *Utica Insurance Company v. Tillman*, 1 Wend. 555.

71. A by-law of a corporation may be good in part and void for the rest. *Rogers v. Jones*, 1 Wend. 237.

72. In a suit against an incorporated company on a policy of insurance, judgment cannot be entered on the return day of the first process, although the defendants neglect to appear. *Tyler v. Etina Insurance Company*, 2 Wend. 280.

73. A corporation may be proved by an exemplification of the act of incorporation and acts of user under it. *Utica Insurance Company v. Caldwell*, 3 Wend. 296.

74. A college established by the regents of the university in a particular place has not the power to found a medical school as a branch of such college, and to appoint professors to take charge of the same, in a place different from that

in which the college is situated; the founding of such a school would be the usurpation of a franchise, for which an information in the nature of a *quo warranto* may be filed. *The People v. Trustees of Geneva College*, 5 Wend. 211.

75. The regents of the university have the power to regulate the compensation of the professors in the College of Physicians and Surgeons in the city of New York; they may direct all the fees received to be paid into the treasury of the college, and a fixed salary to be paid to the professors. In the absence of agreement or regulation on the subject, each professor is entitled to the fees which he may receive from those who attend his lectures. *Hosack v. The College of Physicians and Surgeons in the City of New York*, 5 Wend. 547.

76. Certificates of indebtedness given by the treasurer and register of the college in pursuance of a resolution passed at a meeting of the trustees of the college, not being an anniversary or quarterly meeting, are not binding upon the college; but where debts thus certified were subsequently recognised in the annual reports of the trustees to the regents of the university, it was held, that such recognition was *prima facie* sufficient to entitle the holders of such certificates to recover, although it appeared that the holders were trustees of the college, and constituted a majority of the meetings at which such annual reports were prepared; there being no evidence impeaching the fairness of the transaction. *Ibid.*

77. A moneyed corporation, having authority to convey real estate, may pledge it by mortgage, as security for the payment of its debts. *Jackson v. Brown*, 5 Wend. 590.

78. A trustee, holding stock in an insurance company for the benefit of others, is entitled to vote in the choice of directors. *In the matter of Barker*, 6 Wend. 509.

79. So *hypothecated stock* may be voted upon by the pledgor in corporations created previous to 1st January, 1838. *Ibid.*

80. An *alien* stockholder cannot vote by *proxy*, where, by the terms of the act of incorporation of the company, the right so to vote is given to each stockholder being a *citizen*, &c. *Ibid.*

81. A corporation are liable for the expense of the publication of the accounts of its treasurer, where by its charter such accounts are required to be published. *Tucker v. Trustees of Rochester*, 7 Wend. 254.

82. The act incorporating the Manhattan Company in the city of New York, authorizing the employment of its surplus capital in the purchase of public or other stock, or in any other moneyed transactions or operations not inconsistent with the constitution and laws of this state or of the United States, and such corporation having been created previous to any restraining act rendering illegal banking by individuals, or by corporations not specially created for banking purposes, the Manhattan Company has the right to carry on banking business. *The People v. President, &c. of Manhattan Company*, 9 Wend. 351.

83. The restraining acts prohibiting incorporated companies not expressly authorized to

carry on banking business, do not affect this corporation; the Legislature having in the same session, viz. in 1804, in which the first restraining act was passed; expressly excepted this company from its operation, which saving clause has never been repealed, the act of 1818, containing a *proviso* that nothing therein contained shall be construed to abridge or affect any rights theretofore granted, and the provisions of the revised statutes (1 R. S. 7, 12, and 600.) not applying to pre-existing corporations unaffected by the previous restraining act. *Ibid.*

84. The implied powers of a corporation are as much beyond the control of subsequent legislation as powers expressly granted. *Ibid.*

85. A forfeiture incurred by a corporation, by noncompliance with the terms of a condition contained in its charter, may be waived by the Legislature, by subsequent legislative acts recognising the continued existence of the corporation. *Ibid.*

86. Where corporations become entitled to corporate powers by something to be done in *future*, evidence must be given of user under the charter; but such evidence is not necessary in relation to a corporation declared such by statute, and which does not require any acts to be performed to give effect to its charter. *Fire Department of New York v. Kip*, 10 Wend. 269.

87. In a suit against a corporation, the defendants are not entitled to set aside the proceedings for a variance between the writ and declaration in the cause of action, or because the venue is changed in the declaration from what it was in the Court. *Clark v. Benton Manufacturing Company*, 12 Wend. 218.

88. The directors of a corporate company, against which judgment of ouster has been pronounced, are individually responsible for the costs of the proceedings, although they had no direct agency in the defence of the suit, and the payment of such costs may be enforced by attachment. *The People v. Ballou et al.* 12 Wend. 277.

89. Moneyed corporations are not liable to be assessed to work on the public highways. *Bank of Ithaca v. King*, 12 Wend. 390.

90. Where, by the terms of the charter of a joint stock company, stockholders are liable in their individual capacities for the payment of all debts contracted by the company to the nominal amount of stock held by them respectively, a party who subscribes for a certain number of shares of the stock is liable for the debts of the company to the nominal amount of the stock subscribed by him, although he has not paid in any part of his subscription, or done any act whatever as a stockholder of the company. *Speer v. Crawford*, 14 Wend. 20.

91. The Harlem Canal Company were not confined in their purchases of land to the mere thread of the canal; and whether lawful or not to divide the excess of lands purchased by them among the stockholders, a stockholder, when sued by a creditor, cannot allege that or any other illegality in the act of the company in bar of a recovery against himself; such illegal acts do not *per se* work a forfeiture. *Ibid.*

92. The act incorporating the Mohawk and Hudson Railroad Company authorizes the com-

pany by their agents, surveyors, and engineers, to enter upon the lands of individuals for the purpose of making examinations and surveys, so as to determine the most advantageous route for the proper line or course whereon to construct their railroad or ways, previous to acquiring title to the lands required, or the assessment and payment of damages. *Bloodgood v. Mohawk and Hudson Railroad Company*, 14 Wend, 51.

93. So they may enter in like manner previous to acquiring the title to the land, or having the damages appraised and paying the same for the construction and maintenance of their railroad or ways, and the accommodations requisite and appertaining to them. The purchase of the land or the payment of the appraised damages is a condition precedent to the vesting of the fee-simple of the land required for the road, &c. in the corporation; but not to their right to enter upon for the purpose of making surveys, or to their right to take possession of and use it for the construction and maintenance of their road. *Ibid.*

94. The assessment and payment of damages being a condition subsequent to the entry, not only for the purpose of surveying but of making and constructing the road; it was held, in an action of trespass against the company, that it was not necessary for the defendants in their plea to allude to such assessment and payment. *Ibid.*

95. It was further held, if notwithstanding that the original entry was lawful, the defendants have been guilty of such delay, in taking the measures prescribed by the act to obtain title to the land, and to ascertain and pay the plaintiff's damages, as to deprive them of the benefit of such entry, and render them trespassers *ab initio*, it was incumbent on the plaintiff to have replied to the facts necessary to present that question. Whether an unreasonable delay in paying the plaintiff's damages would render the defendants trespassers *ab initio*, the Court doubted; but that the plaintiff would have an ample remedy in such a case, in some form of action, they had no question. *Ibid.*

96. The stockholders of an incorporated company are not individually responsible for damages occasioned by a bridge being out of repair, built by the company, although by the terms of the act of incorporation an action is given against them for any demand against the corporation, the act contemplating liability only for demands arising *en contractu*. *Heacock v. Sherman*, 14 Wend. 58.

97. The effect of affixing the seal of a corporation to a contract is the same as when a seal is affixed to the contract of an individual; it renders the instrument a specialty. *Clark v. Benton Manufacturing Co.*, 15 Wend. 256.

98. In an action on such note by the endorsee in his own name, the defendant may object to the recovery, notwithstanding a plea of *non est factum* was put in, and the plaintiff has fully supported every material allegation in his declaration. *Ibid.*

99. The trustees or agents of a corporation may enter into contracts under the corporate seal for the payment of money, in furtherance of the business of the corporation; it is not necessary they should subscribe their individual

names to the contracts, but their doing so will not vitiate the corporate act. *Ibid.*

100. In an action against a corporation upon a contract of its agents, the appointment of the agents should regularly be proved by the books of the corporation; but on refusal to produce the books, secondary evidence may be given; such as general reputation and the acts of the agents in the charge and management of the property and concerns of the corporation. *Ibid.*

101. In an action by the United States Bank in this state, an exemplification of the charter must be produced to prove the corporation. *United States Bank v. Searns*, 18 Wend. 314.

102. The capital stock of an insurance company may be invested in bonds and mortgages executed directly to the company or obtained by assignment, where the charter does not expressly prescribe the mode of investment, but impliedly gives the power to invest in stocks. *Mann v. Eckford's Executors*, 16 Wend. 502.

103. Securities taken by such company at a place different from that where, by necessary intendment, its proper business should be transacted, may be enforced; although it be shown that the company has an office for the transaction of business at the place where the securities are taken, if there be no proof that the business there carried on is unauthorized. *Ibid.*

104. Where, in the election of corporate officers, no particular mode of proceeding is prescribed by law, if the wishes of the corporators have been fully expressed, and the election was conducted in good faith, it will not be set aside on account of any informality in the manner of conducting the same. *Phillips and others, v. Wickham and others*, 1 Paige, 590.

105. Whether at common law, civil and corporate officers are authorized to hold over, after the expiration of the time for which they were elected, until successors are appointed? *Quære. Ibid.*

106. Where the officers of a corporation are not authorized to hold over, if the corporators, without the presence of any officers, or any act to be done on their part, possess the power to assemble and choose officers to carry into effect the objects of the incorporation, a neglect to choose officers at the proper time will not work a dissolution of the corporation, but will merely suspend the exercise of the powers of the corporation until proper officers are chosen. *Ibid.*

107. But if the corporators have not the power to fill vacancies without the presence of their officers, or something to be done by them preparatory thereto, and such officers do not attend, or neglect to do the act requisite to the validity of the appointment, or there are no such officers, then, as the powers of the corporation cannot be revived, it is virtually dissolved. *Ibid.*

108. The right of voting by proxy is not a general right, and the party who claims such right must show a special authority for that purpose. *Ibid.*

109. In a suit by or against a corporation, one of the corporators is not so far a party to the suit as to be excused from testifying against the corporation. *Ibid.*

110. Where an act of incorporation is repealed, all the property and rights of the corporation

become vested in the directors then in office, or in such persons as by law have the management of the business of the corporation, in trust for the stockholders and creditors, unless the repealing law provides for the appointment of other persons than the officers of the corporation as trustees. *M'Laren v. Pennington and others*, 1 Paige, 109.

111. The privileges and franchises granted to a private corporation are vested rights, and cannot be divested or altered except with the consent of the corporation, or by a forfeiture declared by the proper tribunal. *Ibid.*

112. Corporations cannot act as trustees in relation to any matters in which they have no interest. *In the matter of Howe*, 1 Paige, 214.

113. But where property is devised or granted to a corporation, partly for its own use and partly for the use of others, the right of the corporation to take and hold the property for its own use carries with it, as a necessary incident, the power to execute that part of the trust which relates to others. *Ibid.*

114. Under the act to provide for the dissolution of incorporated insurance companies in the city of New York, passed April 5, 1817, the Court of Chancery should exercise the same discretionary power in decreeing a dissolution as the Legislature would in case the latter were applied to by the directors of the company for a repeal of the charter. *In the case of the Niagara Insurance Company of New York*, 1 Paige, 258.

115. The Court is not bound to decree a dissolution of the corporation simply because a majority of the directors and stockholders request it to be done. *Ibid.*

116. But where the owners of a large proportion of the stock find it for their interest to withdraw their capital, it will be deemed presumptive evidence, that the interest of the stockholders generally will be promoted by a dissolution of the corporation. *Ibid.*

117. Where, by the charter of an incorporated company, the corporation has a lien upon the stock of a debtor for the payment of his debt, stock which actually belongs to such debtor, though it stands upon the books of the company in the name of a fictitious person, is subject to the lien. *Stebbins v. Phoenix Fire Insurance Company*, 3 Paige, 350.

118. If the charter or an authorized-by-law of the corporation provides that no transfer or assignment of stock shall be valid, unless made on the books of the company, an individual obtaining an assignment of stock from the apparent owner, but which assignment is not intimated on the books of the company, takes it subject to all the equitable rights of the company against the real owners thereof. *Ibid.*

119. If the officers of the company knowingly permit stock to be transferred to a mere nominal holder, and issue the scrip in his name, so as to make him the apparent owner, it seems, that a bona fide purchaser of the stock from such apparent owner, even without a transfer on the books of the company, will be entitled to relief against the lien of the company for a debt due from the real owner. *Ibid.*

120. Where a legal transfer of stock can be

made only upon the books of the company, a person who obtains an assignment of stock without such a transfer obtains only an equitable title to the stock, which cannot prevail against a prior equity. *Ibid.*

121. No suit could have been sustained against the individual stockholders of the Commercial Insurance Company of New York previous to the expiration of its charter in January, 1820, and the statute of limitations did not therefore commence running against such stockholders until that time. *Van Hook v. Whitlock*, 3 Paige, 409.

122. The act of April, 1814, authorizing the discharge of an insolvent insurance company from its debts, upon its making an assignment of all its property for the benefit of its creditors, did not authorize a discharge of the stockholders from their individual liability for the debts contracted by the corporation before the passing of the act. *Ibid.*

123. The stockholders are not liable for any debts which were barred by the statute of limitations as against the company before the expiration of its charter. *Ibid.*

124. The nature of the demand against the company makes no difference as to the length of time required to bar a suit against the stockholders, after the right of action against them had accrued by the dissolution of the corporation. *Ibid.*

125. The creditors of the company had a concurrent remedy by a suit at law, or by a bill in equity, to recover the amount due from the individual stockholders respectively, under the provisions of the act of incorporation; and in analogy to the limitations of actions at law, a suit in this Court to recover the sum due from each stockholder must be brought within the same time as is required at law. *Ibid.*

126. An act to incorporate the Utica and Schenectady Railroad Company did not create a corporation *eo instanti* it became a law; it only constituted such persons as should become stockholders, in the manner prescribed in the act, a body corporate. And in the event of an excess of subscriptions to the stock, there could be neither stockholders nor a corporation until the commissioners had apportioned the stock among the subscribers. *Walker v. Devereaux*, 4 Paige, 229.

127. The commissioners did not hold the stock, previous to its distribution, in the character of agents or trustees of the corporation; but in receiving subscriptions and in apportioning the stock, they acted as the officers or agents of the state; and if they had neglected to open books for subscription, or had not proceeded to apportion the stock as directed by the act, the Supreme Court by a *mandamus* might have compelled them to discharge those duties. *Ibid.*

128. Whether the first election of directors can be held on any other day than that originally appointed by the commissioners? *Quære. Ibid.*

129. Upon an apportionment of stock among the subscribers to a joint stock corporation, if any part of the stock is apportioned to a subscriber who is not entitled to the same, and under circumstances which amount to a fraud, the apportionment is not absolutely void; but

such subscribers will in equity be deemed to hold the stock in trust, or for the benefit of some or all of the other subscribers who did not receive stock to the extent of their subscriptions. *Ibid.*

130. *It seems*, that a subscriber for stock who voluntarily receives back his deposit from the commissioners of apportionment, thereby waives his right to question the correctness of the distribution among the subscribers for such stock. *Ibid.*

131. Where the commissioners of apportionment of a joint stock corporation are authorized, in case of an excess of subscriptions to the stock, to apportion the same among the subscribers in such manner as the commissioners shall deem most advantageous to the interests of the corporation, it is not necessary that they should give to each subscriber a part of the stock; but the whole may be apportioned to a part of the subscribers, to the exclusion of the others, if a majority of the commissioners deem such a distribution of the stock to be most advantageous to the corporation. *Ibid.*

132. Where a distribution or apportionment is to be made between or among a number of persons or a class of individuals, and no discretion is vested in those who are to execute the power of making the distribution, each individual of the whole number or class of persons named is entitled to an equal share. *Ibid.*

133. But where the designation of a class or number of persons is merely for the purpose of pointing out those from whom the selection is to be made, and the person intrusted with the power of distribution is vested with a discretionary right of distributing among the individuals of that class of persons as he shall think proper, he may allot the whole fund or property to one or more of the class, to the exclusion of the others. *Ibid.*

134. By the settled practice in this state, commissioners appointed in an act of incorporation of a joint stock company to receive subscriptions, and to apportion the stock in case of an excess of subscriptions, may themselves become subscribers, and may apportion a part of the stock to themselves. *Ibid.*

135. Where the commissioners are directed to distribute the stock of a corporation among the subscribers thereto in such manner as they shall deem most beneficial to the interests of the corporation, it is a fraud upon the commissioners and upon the law, for a person to subscribe for stock in his own name, under a secret agreement to hold it in trust for another, if stock should be apportioned to him under such subscription with the intention of deceiving and misleading the commissioners in the distribution of the stock of the company. *Ibid.*

136. Such a trust being illegal and void, the stock apportioned to the nominal subscriber would as between the parties to the fraudulent subscription be absolutely vested in him; and to reach it by a suit in Chancery for the benefit of other bona fide subscribers, the bill must be filed against the subscriber in whose name it stands. *Ibid.*

137. The usual clause in an act of incorporation declaring the stock of the company per-

sonal estate, does not change the character of the property which is held by the company in its corporate capacity. *Mohawk and Hudson Railroad Company v. Clute*, 4 Paige, 385.

138. Where all the property and effects of an incorporated manufacturing society, together with its charter, were sold by the trustees and stockholders of the company, and purchased by three copartners with their copartnership funds, who elected themselves trustees of the corporation; *held*, that the corporation was not dissolved, and that the legal title to the real and personal property was still in the corporation for the benefit of the copartners, and that the stock of the corporation was copartnership property, and distributable as such. *Wilde v. Jenkins*, 4 Paige, 481.

139. What shall be considered as notice to a corporation is not settled; but under some circumstances, *it seems*, that notice to a director ought to charge the corporation, as where the director acts as the agent of the corporation. *Fullon Bank v. Benedict*, 1 Hall, 480.

140. A president of an incorporated company cannot borrow money in the name of the company, and pledge its responsibility, unless authorized by the charter of the company, or by a resolution or by-law of the directors. *Life and Fire Insurance Company v. Mechanics' Fire Insurance Company of New York*, 7 Wend. 31.

141. A corporation authorized to lend money only on bond and mortgage cannot recover money lent by the corporation, except a bond and mortgage be taken for its repayment; every other security, as well as the contract itself, is void, and not the basis of an action. *Ibid.*

142. If the officers of a company to whom the business of making loans appropriately belongs make an illegal loan, the company is bound by their act. *Ibid.*

II. Religious societies.

143. An order of the chancellor is not necessary to warrant a sale by a religious incorporation of pews in their church; the case not being within the eleventh section of the act relative to religious societies. (3 R. L. 46.) That respects absolute sales only. *Freigh v. Platt*, 5 Cow. 494.

144. The interest in a church pew is limited and usufructuary merely. *Ibid.*

145. In an action by the trustees of a religious society regularly incorporated under the act of 1813, (3 R. L. 312, 314.) the defendant cannot show that they have forfeited their corporate rights by mis-user or non-user. The forfeiture can be taken advantage of in no other way than by a suit in behalf of the people. *Vernon Society v. Hills*, 6 Cow. 23.

146. And till it has been judicially declared in this form, individuals cannot avail themselves of it. *Ibid.*

147. A religious incorporation stands, in this respect, on the same footing with any other incorporation. *Ibid.*

148. The trustees *de facto* of a religious society, though they were irregularly elected, yet are in *colore officii*, and their proceedings are valid till they are ousted by judgment at the suit of the people. *Ibid.*

149. In a suit by a *religious corporation* founded on a conveyance, it is not necessary to aver a capacity in the corporation to take. *Reformed Dutch Church v. Veeder*, 4 Wend. 414.

150. Previous to the revised statutes, a pecuniary legacy to a corporation, payable out of the proceeds of real estate which the executors were directed to sell, was valid, although the corporation was not authorized by its charter to take real estate by devise. *Theological Seminary of Auburn v. Child*, 4 Paige, 419.

151. Whether such a legacy is valid under the provisions of the revised statutes? *Quere. Ibid.*

152. Since the revised statutes, a devise of real property in trust for a corporation is void, unless such corporation is expressly authorized by its charter, or by statute, to take by devise. *Ibid.*

153. Where there has been a body corporate *de facto* for a considerable period of time, claiming at least to be such, and holding and enjoying property as a corporation, it will be presumed that every mere formal requisite to the due creation of the corporation has been complied with. *All Saints' Church v. Lovett*, 1 Hall, 191.

154. Where a person undertakes to enter into a contract with a corporation in their corporate name, and accepts an official appointment under them, he thereby admits them to be duly constituted a body politic and corporate under such name, and cannot afterwards set up, by way of defence, that no such corporation ever existed, but is concluded by his admission. *Ibid.*

155. Where the trustees of a religious incorporation bring a suit *colore officii*, the defendant cannot object to their right of recovery, upon the ground that they are not trustees, without showing that proceedings have been instituted against them by the government, and carried on to a judgment of ouster. *Ibid.*

156. Being trustees *de facto*, all their proceedings are valid until they are ousted by a judgment at the suit of the people, and no advantage can be taken of any non-user or mis-user on the part of the corporation by any defendant in any collateral action. *Ibid.*

157. A fund created by a religious society for the instruction and education of children in the faith and doctrines of the society, as professed at the time of the creation of the fund, cannot be divested from its original object and destination; if a diversion be made or attempted, a Court of equity will interpose and correct the procedure. *Field v. Field*, 9 Wend. 394.

158. But a Court of law cannot interfere; the only inquiry at law is, whether the fund remains under the control of agents duly appointed, according to the laws and usages of the society; and accordingly evidence will not be received showing that a portion of the society, who have obtained the control of the fund, have abandoned the faith and doctrines of the society. *Ibid.*

159. Even a Court of equity does not attempt to enforce the peculiar faith or doctrines of either party, where there is a schism in a religious society, though their existence and nature may incidentally be involved in an inquiry relative to the rights of property belong-

ing to such society; all it does is to enforce the observance and execution of an ascertained trust. *Ibid.*

160. Where, according to the laws and usages of a society, their meetings for the transaction of business are opened by a presiding officer, who holds his office for a fixed term, and no meeting is considered duly organized unless opened by him, and such officer is prevented by the violence of members of the association from discharging his duty at the accustomed place of meeting, he and such of the society as think proper to accompany him may retire to some convenient place adjacent, and there open the meeting; and their acts and doings will be obligatory upon the society, although those who thus withdraw are a minority of the members of the society; it being a principle of the common law, that where a society is composed of an indefinite number of persons, a majority of those who appear at a regular meeting of the society constitute a body competent to transact business. *Ibid.*

161. Where, according to the established usages of a society, no question whatever arising at any of its meetings for consideration is decided by a majority of voices, but is determined by the presiding officer for the time being, a majority of such society have not the power to displace their presiding officer, whose term of office has not expired, and appoint another in his stead; in case of the absence of such presiding officer, or of his incompetency to perform the duties of his office, such new appointment may be made, but not otherwise. *Ibid.*

162. A member of a society having an interest in a fund belonging to it, called as a witness by a party sued for a debt owing to such fund, is competent to testify, that he, as the authorized agent of the society, received payment of the debt claimed. *Ibid.*

COSTS.

- I. (a) *When and against whom costs are recoverable*; (b) *When costs are not recoverable.*
- II. *When the plaintiff shall have full costs or not*: (a) *When the plaintiff, recovering 250 dollars, or less, shall have Common Pleas costs only*; (b) *When the plaintiff, recovering 50 dollars, or less, shall pay costs; and when the costs may be set off against the plaintiff's verdict*; (c) *When the plaintiff recovers 25 dollars, or less*; (d) *Costs in an action against an attorney.*
- III. *Costs in particular actions*: (a) *In trespass*; (b) *In actions in which the title to lands comes in question*; (c) *Certificate of the judge to entitle to costs.*
- IV. *Double and treble costs.*
- V. *Costs of a former action.*
- VI. *Costs on interlocutory proceedings.*
- VII. *Security for costs, when required, and when to be paid by the attorney for want of such security.*
- VIII. *Costs in error.*

IX. Taxation of costs: (a) What charges are taxable; (b) Notice of taxation of costs.

I. (a) When and against whom costs are recoverable.

1. In *assumpsit* and plea of the general issue, with a discharge, under the act to abolish imprisonment for debt, &c., issue and trial on both pleas, verdict for plaintiff on the first, and for defendant on the second plea, judgment was ordered for the defendant for the costs of the second plea and trying the issue thereon. *Germain v. Dakin*, 1 Cow. 207.
2. In an action for a libel brought in this Court, the plaintiff is entitled to recover full costs, though his verdict be less than \$50. *Haff v. Hutchinson*, 1 Cow. 415.
3. Where an action is commenced against several defendants jointly, and a *nolle prosequi* entered as to one, he is not entitled to costs as of course; as where one defendant pleads infancy, and a *nolle prosequi* is entered as to him upon the trial. *Ex parte Nelson*, 1 Cow. 417.
4. And where a Court of Common Pleas refused costs to a defendant under these circumstances, this Court refused to interfere by *mandamus*. *Ibid*.
5. The judgment on a report of referees upon a bond conditioned to pay money and perform covenants, though reduced by set-off to three dollars, should be for the penalty, as a security for further breaches; and the plaintiff shall have costs according to the amount of the penalty. Otherwise where the condition is for the payment of money only. *Alendorf v. Stickle*, 2 Cow. 419.
6. An assignee of a chose in action, on which a suit is prosecuted for his benefit, on judgment for the defendant, is liable for the costs. *Waring v. Baret*, 2 Cow. 460.
7. Assault and battery on *habeas corpus* from the Common Pleas. First verdict for the plaintiff \$25, new trial, with costs, to abide the event, &c. Second verdict for the defendant; held, that the defendant should recover his costs on both trials. *Curvey v. Rider*, 2 Cow. 617.
8. In the Court of Common Pleas of the city of New York, the plaintiff has costs, though he recover less than \$50, if his recovery exceed \$25; and this though the action might have been brought before a justice of the peace. *Fan Lew v. King*, 3 Cow. 375.
9. The plaintiff taking the benefit of the insolvent act pending the suit, is no cause for staying the proceedings till security for costs filed, if his assignees are within the jurisdiction of the Court. *Schoolcraft v. Lathrop*, 5 Cow. 17.
10. To bring a party into contempt for non-payment of costs, the rule should be entered expressly directing him to pay costs. *Anonymous*, 4 Cow. 357.
11. Where a cause goes off at the Circuit because the plaintiff is not ready, he cannot recover the costs of that Circuit, though he finally succeed in the cause. *Jackson v. Breese*, 6 Cow. 42.
12. In an action on a penal bond, or of debt on the penalty, in articles of agreement, the judgment is proper for the penalty in all cases, except where the sum is reduced by set-off

under the statute, (1 R. L. 515, 16.) *Harvey v. Bardwell*, 6 Cow. 57.

13. The party prevailing on the whole record is alone entitled to costs. *Williams ads. Wright*, 1 Wend. 277.

14. If there be two counts, and an issue of law be joined on one, and an issue of fact on the other, if the defendant succeed upon the demurrer, and the plaintiff upon the issue in fact, the plaintiff shall have his costs on the issue in fact, but the defendant shall not have his costs on the issue in law. *Ibid*.

15. Where an eight day notice of trial is countermanded, though six days before trial, the plaintiff will be ordered to pay such costs as the defendant has been subjected to in consequence of the notice. *Bostwick ads. Munger*, 1 Wend. 97.

15*. A person against whom proceedings have been instituted as an absconding debtor, appearing and giving the security required by statute, is not chargeable with the costs of the proceedings. *In re Schureman*, 2 Wend. 285.

16. Where proceedings in a cause are set aside on payment of costs, the party is not bound to pay the costs, unless a taxed bill is presented. *Southerland v. Sheffield*, 2 Wend. 293.

17. A plaintiff who sues the maker of a note and a guarantor of the same is entitled to full costs in each suit. *Meech v. Churchill*, 2 Wend. 630.

18. In an action of replevin, after a distress for rent, where several issues have been joined, each party shall be allowed the costs on those found in his favour. *Wright v. Williams*, 2 Wend. 633.

19. On judgment upon demurrer for the avowant or person making cognisance for rent, there should regularly be an award of a writ of inquiry, to ascertain the value of the distress. The omission, however, will be remedied by a rule *nunc pro tunc*, granted on payment of costs. *Ibid*.

20. A party resisting a *mandamus* in this Court, by requiring the relators to plead or demur, and subsequently joining in demurrer, is liable to the costs of the demurrer, on judgment being rendered in favour of the relators. *The People v. Onondaga Common Pleas*, 3 Wend. 304.

21. Where a plaintiff pays costs to a defendant for not proceeding to trial at a Circuit Court pursuant to notice, the defendant cannot be afterwards charged with the plaintiff's costs of that Circuit, though the plaintiff subsequently obtains a verdict. *Linacre v. Lush*, 3 Wend. 305.

22. In an action of false imprisonment against four defendants, where one of them is, on the trial of the cause, acquitted by the verdict, he is entitled to recover costs against the plaintiff, although he joined in pleading with one of the other defendants against whom a verdict is rendered. *Grinwald v. Sedgwick et al.* 3 Wend. 336.

23. So judgment having been rendered on demurrer in favour of the defendant who was acquitted at the trial, and of another against whom a verdict was found on the plea of not guilty, the plea put in by them going to the whole declaration having been adjudged good; it was held, that such two defendants were entitled to their full costs of the trial, as well as of the demurrer; a single bill of costs, however, being allowed to both such defendants. *Ibid*.

24. In an action of slander of title, the plaintiff is entitled to full costs, though the recover

be for less than \$50. *Goodrich v. Stewart*, 3 Wend. 439.

25. In an action for trespass on lands and carrying away timber, commenced previously, but determined subsequently to the revised laws going into effect, the plaintiff, though entitled to judgment for treble the amount found by the jury, can recover single costs only. *Smith v. Castlers*, 5 Wend. 81.

26. Where an action of debt or bond is prosecuted in this Court, and the penalty exceeds \$50, but the condition is for a sum not exceeding \$50, the plaintiff is not entitled to costs, if before judgment the defendant pays or tenders the amount actually due, according to the condition of the bond. *Wells v. Foster*, 5 Wend. 133.

27. One of several defendants may apply for costs against a plaintiff for not trying his cause pursuant to notice, on showing the assent of his co-defendants for him to apply separately, or their refusal to unite with him in the application. *Hart v. Wood*, 6 Wend. 568.

28. A party in interest in a suit, prosecuting in the name of another, will, on the application of such nominal party, or party to the record, be directed by rule of Court to pay the costs adjudged in the suit against the party to the record. *Coleward v. Oliver*, 7 Wend. 497.

29. An appellant from a justice's judgment is not entitled to costs, unless the verdict for the appellee in the Common Pleas is \$10 or more, less than the verdict or judgment before the justice, exclusive of the costs in the Justice's Court. *The People v. Herkimer Common Pleas*, 7 Wend. 609.

29*. A party relieved on payment of costs has the same time after a demand of a taxed bill to pay the costs, which he had at the time of such demand. *Gilbert v. Manchester Iron Manufacturing Company*, 7 Wend. 532.

29†. Where a defendant pays the costs of a suit to the plaintiff, although informed by a counsellor of the Court that the plaintiff is not authorized to receive the same, the attorneys for the plaintiff will be permitted to collect such costs, notwithstanding the payment. *Ten Broeck v. De Wilt*, 10 Wend. 617.

30. In a suit on a joint and several bond against several defendants, who defend separately, if the plaintiff settles the suit with one or more of the defendants without the concurrence of the others, he is liable to such others for the costs of the defence; and a rule will be granted that he pay such costs, unless he proceed to the trial of the issues joined with such defendants, or consent to judgment of discontinuance with costs. *Clark v. Wood*, 9 Wend. 435.

31. On a common law *certiorari*, the plaintiff, although successful, does not recover costs. *Mills v. New York Common Pleas*, 10 Wend. 557.

32. Although the accounts exhibited on a trial exceed \$400, still a plaintiff who recovers less than \$50 is not entitled to costs, where the evidence adduced by the defendant proves payment specifically made on a contract between him and the plaintiff, and not an account valid, as a set-off. *Matteson v. Bloomfield*, 10 Wend. 555.

33. A plaintiff recovering less than \$50 in a Court of record is not entitled to recover costs, though his claim, as established at the trial, exceed \$200, if it be reduced by payments; if reduced by set-offs, he is entitled to costs. *Mills v. New York Common Pleas*, 10 Wend. in note, 557.

34. Nor is a plaintiff entitled to costs on the ground that the demands exceed \$400, unless the demands in dispute, and established on the trial, exceed that sum; payments made are not debt demands or accounts within the meaning of the statute. *Ibid.*

35. A party, not an attorney, conducting a suit or defence *in person*, is not entitled to costs. Where, however, an order to show cause is in fact obtained by an attorney, and served; costs are recoverable, although the name of the attorney does not appear in the proceedings. *Stewart v. New York Common Pleas*, 10 Wend. 598.

36. Costs may be awarded upon the granting of a peremptory *mandamus*, although no return has been made to the alternative *mandamus*, and without the appearance of the party to be affected by the proceeding. *The People v. Onondaga Common Pleas*, 10 Wend. 597.

37. A party in interest, although not the party upon the record, is liable to costs as well those made before as after the accruing of his interest. *Jordan v. Sherwood*, 10 Wend. 622.

38. Where an appeal was prosecuted from a justice's judgment in 1829, and the cause was not tried in the Common Pleas until after the revised statutes went into effect; it was held, that the plaintiff, though successful, was not entitled to recover costs exceeding seven dollars and disbursements. *Dean et al. v. Gridley*, 11 Wend. 167.

39. Where the same cause had been carried up to this Court by writ of error, and the judgment of the Common Pleas consulting the plaintiff reversed, and a *venire de novo* awarded, with a direction that the costs of this Court should abide the event of the suit in the Common Pleas; it was held, that the plaintiff was entitled to tax a full bill of costs of this Court, notwithstanding the limitation to the amount of costs in the Common Pleas. *Ibid.*

40. A plaintiff who discontinues his suit after the defendant has retained an attorney, though before receiving notice of retainer, is bound to pay costs. *Robinson et al. v. Taylor*, 12 Wend. 191.

41. Where a *cognovit* is given after notice of executing a writ of inquiry, the plaintiff is entitled to recover no more costs than if the writ of inquiry had been executed. *Sloat et al. v. Allen*, 12 Wend. 192.

42. Where a party, in person, sues out a *certiorari*, and reverses a justice's judgment, he is not entitled to any costs besides disbursements. No allowances can be made even for services actually rendered by an attorney, unless he assumed the responsibility of acting as attorney in the case. *The People v. Steuben Common Pleas*, 12 Wend. 200.

43. Where four defendants in an action of ejectment unite in the plea of the *general issue*, and three of them are acquitted, the defendants acquitted are entitled to a full bill of costs, notwithstanding that the services rendered and expenditures incurred in their defence were also rendered and incurred for the other defendant, against whom there was a verdict. But the acquitted defendants cannot make up a separate record for their costs; they must apply to the plaintiff to have a judgment for costs in their favour incorporated with the plaintiff's record. *Caryfield et al. v. Gaylord et al.* 12 Wend. 236.

44. Where an inquest is taken, and the defendant let in to plead on payment of costs, the

judgment entered on the inquest to stand as security, the defendant must pay all the costs which have accrued from the entry of the default to the granting of the rule letting him in to defend. *Underwood v. Brower*, 12 Wend. 267.

45. Where the claim of a plaintiff, established at the trial, exceeds \$200, and the sum is reduced by set-offs, he is entitled to costs notwithstanding he recovers less than \$50. *Parker v. Radliff*, 14 Wend. 68.

46. The party in interest defending a suit in the name of another will be ordered to pay the costs of the suit. *Jackson v. Van Antwerp*, 1 Wend. 295.

(b) *When costs are not recoverable.*

47. In an action arising *ex contractu* against several defendants, some of whom succeed, and others have a verdict against them, the former are not entitled to costs. *Avery v. Curtiss*, 3 Cow. 369.

48. The plaintiff can in no case have costs in a suit originally brought in the Supreme Court, in an action of *assumpsit*, unless he recover more than \$50. *Hamlin v. Hart*, 4 Cow. 396.

49. He cannot have costs, though the accounts of both parties exceed \$400. *Ibid.*

50. To entitle him in such case to costs, he should sue in the Common Pleas. *Ibid.*

51. One who sues *en autre droit*, in good faith, though without proper grounds, may discontinue without costs. *Reeder v. Seeley*, 4 Cow. 548.

52. *E.g.* the assignee of an insolvent debtor. *Ibid.*

53. The plaintiff may, in *assumpsit*, discontinue without costs, where the defendant, after suit brought, is discharged under the insolvent act, though the latter stipulate not to avail himself of his discharge as a defence in the suit. *Honeywell v. Burns*, 8 Cow. 191.

54. Where a repleader is awarded, neither party is entitled to costs. *Otis v. Hitecock*, 6 Wend. 433.

55. Where, by an existing statute at the commencement of a suit, a penalty is imposed upon a party to a fraudulent judgment, but under such statute costs were not recoverable by either party in a suit for such penalty; and during the progress of the suit, the statute giving the penalty is repealed, but it is declared that no prosecution for a penalty pending at the time of the repeal shall be affected thereby, but that the same shall proceed in all respects as if the law giving the penalty had not been repealed; neither party is entitled to costs as against the other, although, previous to the trial of the cause, the Legislature change the law as to costs, and give costs in actions for penalties and forfeitures in the same manner as in personal actions upon contract. *Baker v. Barlett*, 9 Wend. 494.

II. *When the plaintiff shall have full costs or not:*

(a) *When the plaintiff, recovering \$200, or less, shall have Common Pleas costs only.*

56. In *assumpsit* for less than \$250, and attachment for not bringing in the defendant's body,

Common Pleas costs alone are allowable. *People v. Chapman*, 1 Cow. 214.

57. In *assumpsit*, where the recovery is less than \$250, the *nisi prius* record is to be taxed by the folio, allowing at the Common Pleas rate. *Alcott v. Phelps*, 1 Cow. 170.

58. The record and execution are to be taxed at the same sum in gross allowed by the Common Pleas bill, without any additional allowance for the greater length of continuance. *Ibid.*

59. Where services are similar in both Courts, the charges are the same. *Ibid.*

60. Where the service here is unknown in the Common Pleas, the charge is at the Common Pleas rate per folio. *Ibid.*

61. In *assumpsit*, and judgment for the plaintiff on the report of referees for less than \$250, the costs for opposing the motion to set aside the reference upon the merits, like other costs in the cause, must be taxed at the Common Pleas rate only. *Hays v. Bayley*, 4 Cow. 42.

62. They are the costs of an ordinary proceeding in the cause, and properly included in the final bill. *Ibid.*

63. In trespass for assaulting and getting the plaintiff's daughter with child, the gist of the action is the loss of service. It is not technically an action of assault and battery; and if the plaintiff recover less than \$250, he is entitled to Common Pleas costs only within the statute. (1 R. L. 344, § 4.) *Skufell v. Rowley*, 4 Cow. 58.

64. The costs of an attachment for not returning an execution, where the judgment in *assumpsit* is less than \$250, must be taxed at the rate of Common Pleas costs. *The People v. Hallett, Sheriff of Herkimer*, 4 Cow. 68.

65. In *assumpsit*, removed by *habeas corpus* from the Mayor's Court of Albany to the Supreme Court, the plaintiff is entitled to Supreme Court costs, where he recovers more than \$50, though less than \$250. *Youngs v. Van Schaick*, 5 Cow. 281.

66. Judgment for the plaintiff in an action on a penal bond is properly for the penalty, in all cases, except where the demand is reduced by a set-off within the statute, (1 R. L. 515, 16.) and if the penalty exceed \$250, the plaintiff is entitled to Supreme Court costs, though the damages recovered on an assignment of breaches be less than \$250. *Fairlie v. Lawson*, 5 Cow. 424.

67. Interest cannot be taxed as costs on recovery upon a bond, where its effect will be to compel the defendants to pay (one of them being a surety) beyond the penalty of the bond. *Ibid.*

68. In a judgment by default in the Supreme Court, where the damages are assessed by the clerk, and the recovery does not exceed \$350, the plaintiff is entitled to recover \$13.50 costs, exclusive of the fees of officers and actual disbursements, and no more. *New York State Bank v. Wood*, 10 Wend. 626.

69. The award was less than \$250, but as the action was brought for the penalty of the bond, which exceeded that sum, the plaintiff taxed his costs according to the rules of the Supreme Court. But it was held, that as the plaintiff had agreed to accept a *relicta* for less than \$250, waiving a judgment for the penalty, (which

otherwise would govern costs,) he was entitled to Common Pleas costs only. *Lowndes v. Campbell*, 1 Hall, 598.

(b) *When the plaintiff, recovering \$50, or less, shall pay costs; and when the costs may be set-off against the plaintiff's verdict.*

70. In an action of *assumpsit*, brought in this Court, if the plaintiff recover \$50 only, he is not entitled to costs, but must pay costs to the defendant. And the costs on motion will be set-off against the plaintiff's damages. *Abernathy v. Abernathy*, 2 Cow. 413.

71. In trespass for cutting under the act (1 R. L. 525.) for a wilful trespass, where the whole recovery is less than \$50 in favour of the plaintiff, he must pay costs to the defendant. *Hasbrouck v. Schoonmaker*, 9 Cow. 633.

72. In an action of trespass *de bonis commenciis* in the Supreme Court, where the plaintiff recovered less than \$50, he is not entitled to costs, although issue is joined on a plea of *liberum tenementum*, if the title did not come in question on the trial. *La Farge v. Eames et al.* 1 Wend. 99.

73. Where a party sued in trespass for taking and carrying away stones from a small lot containing three rods of land, and recovered less than \$50 damages; it was held, that he was not entitled on the pretext that title to land came in question, although the lot was unenclosed and unimproved for any purpose whatever, except that on it there were two buildings used as a blacksmith's shop and a storehouse, and the plaintiff offered to show title to the land, which was not done, because admitted by the defendant; the possession of the buildings gave the plaintiff a constructive possession of the whole lot, and rendered unnecessary the production of a paper title. *Brown v. Majors*, 7 Wend. 495.

74. A plaintiff who, in an action on the case for overflowing his lands, has a verdict, but does not recover over \$50, is not entitled to costs, although a right to overflow such lands, founded upon the alleged license of the plaintiff, came in question on the trial of the cause. To entitle a plaintiff to costs in such case, a right on the part of the defendant to the direct use or enjoyment of the plaintiff's lands must have been set up, and the injury to the plaintiff must not be merely consequential upon the particular manner in which the defendant may use or occupy his own land. *Chandler v. Duane*, 10 Wend. 563.

75. Where, after a recovery in ejectment, the plaintiff makes and files a suggestion of his claim for *mesne profits*, and the defendant pleads thereto, and a trial is had, and the plaintiff does not recover over fifty dollars, he does not recover costs, but pays costs to the defendant. *Broughton v. Wellington*, 10 Wend. 566.

(c) *When the plaintiff recovers \$25, or less.*

76. In trespass on lands in a Court of Common Pleas, &c., the plaintiff, unless he recover more than \$25, cannot have costs, but must pay costs to the defendant, though the Court certify that the trespass was wilful and malicious. *Benton v. Dale*, 1 Cow. 160. And see 164, note (a).

77. And he therefore cannot recover costs upon his verdict in such an action, removed here by *habeas corpus*, unless it exceed \$25, though the Circuit judge certify that the trespass was wilful and malicious. *Ibid.*

(d) *Costs in an action against an attorney.*

78. An attorney of this Court, through sued by bill of privilege in term time, is not subject to costs, unless the recovery against him exceed \$50. *Wood v. Gibson*, 1 Cow. 597.

79. But, on the contrary, he shall recover costs, which on motion shall be set off against the plaintiff's damages. *Ibid.*

III. *Costs in particular actions: (a) In trespass.*

80. On amending a *fiat facias* irregular on its face, and for a levy under which trespass had been brought, the party applying was ordered to pay not only the costs of the motion, but the action of trespass. *Porter v. Goodman*, 1 Cow. 413.

81. A plaintiff may discontinue without costs, if the defendant obtain an insolvent discharge after suit commenced, though the action be trespass. *Merrill ad. Arden*, 1 Wend. 91.

82. In an action of assault and battery, where one of several defendants has a verdict, he is not entitled to have his costs set off to the damages and costs recovered by the plaintiff against the other defendants. *The People v. Steuben Common Pleas*, 3 Wend. 247.

83. In trespass *quare clausum fregit* and for taking timber, where the defendant, instead of pleading a justification, gives notice thereof, the plaintiff is entitled to full costs, although the verdict be less than \$50. *Badley v. Brice*, 6 Wend. 539.

(b) *In actions in which the title to land comes in question.*

84. In trespass *quare clausum fregit*, in a Court of Common Pleas, the defendant pleaded a license to cross the plaintiff's land for the purpose of drawing wood, and this license was the subject of controversy at the trial, upon which there was conflicting evidence; there being a verdict for the plaintiff for seventy-five cents; held, that freehold or title to land did not come in question, and that the plaintiff was not entitled to costs within the 5th section of the act concerning costs. (1 R. L. 344.) *Ex parte Coburn*, 1 Cow. 568.

85. A female lessor of the plaintiff, in an action of ejectment, is not exempt from an attachment for nonpayment of the defendant's costs, where they do not exceed \$50. *Jackson v. Haines*, 2 Cow. 462.

86. The statute exempting females from imprisonment on execution does not apply to such a case. *Ibid.*

87. Judgment for plaintiff in ejectment affirmed on error, and writ of inquiry to assess the plaintiff's damages intermediate to judgment and affirmance; held, that the plaintiff is entitled to Supreme Court costs for the writ of inquiry, &c.; without regard to the amount recovered thereon. *Jackson v. Rathbone*, 3 Cow. 602.

88. Ejectment, and judgment for costs, against the plaintiff, presenting the lessor of the plaintiff with the *ca. st.*, and serving him with the con-

sent rule, and demanding the costs, is not enough to warrant an attachment; but the tax bill should be served, by showing him the original, and delivering a copy. *The People v. Housenfratts*, 3 Cow. 26.

89. Case for obstructing a stream, and flowing the plaintiff's land; plea, the general issue. The defendant, on the trial, gave evidence to show that he, and those under whom he claimed, had so obstructed the stream for twenty years. Verdict for the plaintiff \$90; *held*, that he was entitled to Supreme Court costs, as the title to the freehold was drawn in question within the statute. (1 R. L. 344, s. 4.) *Tynnclyff v. Lawyer*, 3 Cow. 382.

90. In trespass *quare clausum frēgit*, where the title to land comes in question, the plaintiff is entitled to single costs, though he recover less than \$50 damages. *Rogers v. M'Gregor*, 4 Cow. 531.

91. To warrant an attachment for not paying costs against the lessor in ejectment, on judgment for the defendant upon verdict, a *ca. sa.* against the nominal plaintiff for the costs must first be exhibited. *The People v. Merrill*, 7 Cow. 415.

92. In an action of covenant to recover the consideration money in a case of an eviction, the plaintiff is entitled to Supreme Court costs, though the recovery is for less than \$250, especially if the judge certifies that the title to land came in question. *Mumford ad. Whitley*, 1 Wend. 279.

93. In two actions of ejectment between the same parties, a stipulation was entered into that but one should be tried, and that the other should abide the event of such trial, and in the suit tried judgment was entered for the plaintiff and a bill of exceptions taken, but the judgment was afterwards affirmed by the Court above; *it was held*, that full costs in each suit ought not to be allowed for services not in fact performed, or which were wholly unnecessary. *Law et al. v. Jackson*, 2 Wend. 269.

94. The giving of interest on costs, by way of damages, in cases of tort, is always in the discretion of the Court. One of two defendants in an action of ejectment, in whose favour a verdict is rendered, is entitled to recover his costs against the plaintiff, notwithstanding the certificate of the Circuit judge that there was probable cause for making him a defendant. *Tulman v. Barnes et al.* 12 Wend. 227.

(c) *Certificate of the judge to entitle to costs.*

95. In an action of covenant by a lessee against his lessor, for breach of covenant of title in the lessor, the question of title to land cannot arise where the only plea put in is *non est factum*. *Barney v. Keith*, 6 Wend. 555.

96. Where, in such case, a judge granted a certificate that the title to land did come in question, the Court vacated it. *Ibid.*

97. The certificate of a judge is conclusive evidence to a taxing officer, but the Court possess the power to review the grounds upon which the certificate is granted. *Ibid.*

IV. Double and treble costs.

98. To entitle to treble damages and costs, in trespass under the statute, (sess. 36, ch. 56,

s. 29.) the verdict must be upon a count or counts under the statute expressly, and it is not sufficient that it be upon a count upon the statute, and a general count in the same declaration. *Benton v. Dale*, 1 Cow. 160.

99. The certificate of a judge will not be received to entitle to treble damages and costs in trespass under this statute. *Ibid.*

100. Where the plaintiff sued before a justice, and declared generally for trespass committed on lands in R., and the defendant justified by plea of title to the M. R. close, but upon which the plaintiff sued him for the same cause in the Common Pleas, which the defendant removed by *habeas corpus* to this Court, where the plaintiff declared in two counts on the trial, went not only for the trespasses in the M. R. close, but also for other trespasses, and there was a general verdict for the plaintiff; *held*, that he was entitled to double costs within the statute. *Folk v. Young*, 1 Cow. 425.

101. It is the same action as was brought in the Court below, and though there be an additional count, double costs will be allowed in the action continued from the Court below, and this Court will see that they shall not be increased by the addition of another count. *Ibid.*

102. *It seems*, that going into evidence of matters upon the trial here, *dehors* the pleadings in the Court below, whether this be done on the part of the plaintiff or defendant, will not prejudice the claim for double costs. *Ibid.*

103. To entitle to treble damages and treble costs, in trespass upon the statute, (sess. 36, ch. 56, s. 29, 1 R. L. 525, 526.) brought by a private person, the declaration need not negative the exception by alleging that the trespass was committed *without the leave or permission of the owner*. *Beckman v. Chalmers*, 1 Cow. 584.

104. It is enough that the jury find the defendant guilty, and assess the *single damages* of the plaintiff, without pursuing the precise words of the statute, *single value of the timber, &c.* *Ibid.*

105. Where a constable is sued for selling property on execution, and judgment is in his favour, he is entitled to double costs. *Wales v. Hart*, 2 Cow. 426.

106. Otherwise where he is sued jointly with another, and they plead jointly, though the judgment be in favour of both. *Ibid.*

107. Where to trespass against a sheriff for an act done by him in virtue of his office, he pleaded the general issue and two special pleas, to which the plaintiff replied, and there were demurrers to the replication, and a verdict for the sheriff on the general issue; *held*, that the demurrers could not afterwards be argued, and the defendant had his double costs. *Shaw v. Raymond*, 2 Cow. 512.

108. Statutes giving double costs to certain officers, who succeed in actions brought against them, "for or concerning any matter or thing done by virtue of their offices," (as in sess. 43, ch. 123, s. 2, relative to school trustees,) apply only to acts of malfeasance, not to those of nonfeasance; as detaining money which they may have received. *Platt v. Osborn*, 2 Cow. 527.

109. On affirmance of judgment upon a writ

of error, the plaintiff is entitled both to double costs and interest, by way of damages for delay of execution. *Anonymous*, 2 Cow. 579.

110. Interest taxed with the costs. *Ibid*.

111. The statute (1 R. L. 155; s. 1.) giving the sheriff, &c. double costs on verdict, &c. in his favour, does not apply to a proceeding upon certiorari. *Clute v. Van Slyck*, 3 Cow. 17.

112. A plaintiff recovering at the Circuit for a trespass under the statute, (1 R. L. 525, 526, s. 29.) a sum which, when trebled, amounts to less than \$50, is not entitled to recover treble costs. *Hasbrouck v. Schoonmaker*, 3 Cow. 346.

113. Double costs are not allowed of course to the defendant in error on affirming the judgment, but it should be shown that the execution was actually delayed by the writ of error; and this should be proved to the taxing officer before he is warranted in doubling the costs within the statute. (1 R. L. 346, s. 14.) *Stone v. Burl*, 3 Cow. 379.

114. In replevin (though in fact a suit against an officer for acts done in his official capacity) the defendant is not entitled to double costs under the statute. (1 R. L. 155.) *Crummer v. Huff*, 1 Wend. 81.

115. A plaintiff is not entitled to treble damages and costs in an action of trespass for cutting timber where the *narr.* contained several counts besides the count under the statute, and the verdict was general. *Mooers v. Allen*, 2 Wend. 247.

116. On an action for false imprisonment, the defendant is not entitled to double costs on interlocutory motions and rules. *Rider v. Hubbell*, et al. 4 Wend. 201.

117. Where a party is entitled to treble damages and to treble costs, he must apply to the Court for them. *Anonymous*, 4 Wend. 216.

118. The Supreme Court will award double costs to a defendant in error on an affirmance of a judgment after verdict, where from the nature of the case the Court believe that the writ of error was brought for delay, and without any reasonable ground of hope or expectation that the judgment would be reversed; but if the question presented be one of doubt or importance, as a general rule, single costs only will be given. In awarding costs in such cases, the Court will be guided by the nature of the case as presented by the record, and not by collateral and extraneous circumstances. *Cuyler et al. v. Stevens*, 5 Wend. 93.

119. Double costs awarded to an officer, in a suit against him for acts done in the discharge of his office, belong to the party, and not to the attorney who conducted the defence. *M'Farland v. Cray*, 6 Wend. 297.

120. Where an officer is sued for acts done by him, if the party in the process under which the acts are done indemnifies the officer, and assumes the defence of the suit, he and not the officer is entitled to the double costs, in case judgment passes against the plaintiff in the suit. *Ibid*.

121. Treble costs mean common costs and seventy-five per cent. added thereto. *Patchin v. Parkhurst*, 9 Wend. 443.

122. A defendant against whom an information in the nature of a *quo warranto* is filed, is not entitled to double costs, although judgment

be rendered for him. *The People v. Adams*, 9 Wend. 464.

123. A constable sued in a justice's Court for an official act, succeeding in his defence, is entitled to double costs. *Jones v. Gray*, 13 Wend. 280.

124. In actions of trespass against an officer and persons acting in his aid, where the defendants appear by the same attorney, but sever in their defence, and are successful, the officer is entitled to double costs, and each of the lay defendants to single costs for all items not allowed to the officer. *Lawrence v. Titus et al.* 1 Hall, 421.

V. Costs of a former action.

125. Where the tenant of the lessors, in an action of ejectment, defended a former ejectment brought against him, but failed, and had judgment against him for costs, and was turned out of possession upon a writ *hab. fac. possessionem*, and the same lessors afterwards brought ejectment against the lessor of the plaintiff in the first suit for the same premises and upon the same title; the Court ordered the proceedings in the second action to stay until the costs of the first were paid. *Jackson v. Edwards*, 1 Cow. 138.

126. And this will be done, although one of the lessors in the second action had not demised to the defendant in the first. *Ibid*.

127. Thus where E. brought ejectment against B., who held as tenant of others, upon which E. had judgment, and turned B. out of possession; in ejectment by C. and those others for the same premises against E., proceedings were ordered to stay till E.'s costs of the first suit should be paid. *Ibid*.

128. Where A. and B. bring ejectment, and have judgment against them for costs, though C. afterwards bring ejectment for a portion of the same premises upon the same title, yet the Court will not stay proceedings in the second suits till the costs of the first be paid. *Jackson v. Clark*, 1 Cow. 140.

129. The Court will not stay proceedings in ejectment, till the costs of a former ejectment are paid, unless it appear that the same title was or might have been tried in the former suit. *Jackson v. Stiles*, 2 Cow. 596.

130. And where W. brought ejectment against T., and G. sought to be admitted to defend as landlady of T., which was denied, because T. was the tenant of W.; on G.'s bringing ejectment against T., held, that the proceedings should not be stayed in the second ejectment till G. had paid the costs of the first. *Ibid*.

131. Proceedings stayed till the costs paid in a suit for the same cause in the Circuit Court of the United States. *Jackson v. Carpenter*, 3 Cow. 22.

132. A motion to stay proceedings in a second suit till the costs of a former suit for the same cause are paid, is in season if made at any time while the latter is in a course of litigation. *Jackson v. Miller*, 3 Cow. 57.

133. Thus the Court will hear it after verdict for the plaintiff in the second cause, subject to the opinion of the Court, and a case made and noticed for argument by the defendant. *Ibid*.

134. Where a suit was brought in the C. P.

and removed by the defendant into the Supreme Court by *habeas corpus*, and the plaintiff neglected to follow the suit here, but brought another action for the same cause in the C. P., *held*, that the Court below might stay the proceedings of the plaintiff in the second suit till the costs of the first were paid. *Stone, ex parte*, 3 Cow. 380.

135. The costs of a suit commenced by an infant through one person as a guardian must be paid, or a second suit for the same cause of action commenced by a different person as guardian, will be stayed on motion for that purpose. *Taylor v. Vandervoort*, 9 Wend. 449.

VI. Costs on interlocutory proceedings.

136. Where, after the cause is noticed for trial, the defendant obtains an order to stay proceedings, with a view to move to change the venue, and the motion is refused, he must pay the costs of preparing for trial up to the time of the order. *Budd v. Malbrun*, 1 Cow. 47.

137. Though the defendant's attorney tell the plaintiff's attorney that he has issued no *subpoenas*, and that the defendant has no witnesses to *subpoena*, this does not imply that no costs have accrued on the part of the defendant in preparing the cause for trial; and under such circumstances, though a notice of trial given by the plaintiff's attorney be countermanded by him, and he stipulate to try at the next circuit, and serve the stipulation before he receives the notice of a motion for judgment, as in case of nonsuit, yet the defendant has a right to make the motion. *Smith v. Shaw*, 1 Cow. 429.

138. The plaintiff's attorney, on stipulating, should have offered to pay the costs accrued; for though the defendant have no witnesses, yet there may be costs of a brief for trial and preparing papers for the motion. *Ibid*.

139. A rule for denying a motion carries costs of course, unless the contrary be expressed in the rule. *Jackson v. Gayer*, 2 Cow. 484.

140. An offer of costs on stipulating to try a cause should be made to the defendant's attorney, not to his counsel. *Skattuck v. Chamberlain*, 5 Cow. 14.

141. The rule that where a motion is denied, costs follow of course, unless the contrary be expressed, is merely directory to the clerk; and to subject a party to their payment, the clerk should enter the rule for costs. *Anon.* 4 Cow. 357.

142. Where a verdict is set aside, on the ground that it was against the weight of evidence, this should be on payment of costs by the party against whom the jury found. *Jackson v. Thurston*, 3 Cow. 342.

143. Where the cause is noticed for trial, and the defendant then obtains an order to stay proceedings, with a view to move for a reference, the motion will not be granted, except on the terms of paying the costs of preparing for trial to the time when the order was served. *Fish v. Wright*, 5 Cow. 269.

144. Costs are not usually given on granting an alternative or peremptory *mandamus* on motion. *People v. Supervisors of Columbia*, 5 Cow. 291.

145. On setting aside a default for want of a plea on the ground of merits, if it appear pro-

bable that the plaintiff may lose his demand by reason of the defendants being in doubtful circumstances, the Court will order the judgment to stand as security, and grant a rule that the defendant may plead and go to trial on the payment of costs. *Anonymous*, 6 Cow. 390.

146. This means not only the costs of resisting the motion, but also of the default and all subsequent proceedings. *Ibid*.

147. The statute (sess. 41, ch. 259, sec. 6.) regulating the costs in several suits on the same note, &c. applies to the general, not the interlocutory costs of the cause, *e. g.* the costs of putting off a cause at the Circuit. *Ontario Bank v. Baxter*, 6 Cow. 395.

148. A party obtaining leave to amend a pleading demurred to will be required to pay the costs of the demurrer, and of opposing motion to amend. *Keller v. Shears*, 6 Wend. 540.

149. In all interlocutory proceedings in the progress of a suit, in which the plaintiff obtains a rule for costs against the defendant, he is entitled to charge his costs at the rate allowed for services in this Court, without regard to the amount of the demand for the recovery of which the suit is brought. *Payn v. Laming*, 10 Wend. 606.

150. On judgment against a party demurring, with leave to withdraw the demurrer and plead, on payment of costs, he must seek the opposite attorney, and tender him the costs, or offer to pay on their being taxed; and this is a condition precedent to pleading. *Sands v. McCallan*, 6 Cow. 582.

151. In debt for \$250, the penalty of articles of agreement, the defendants demurred to the declaration, and had judgments against them, with leave to withdraw the demurrer, and plead on payment of costs; *held*, that these should be Supreme Court costs; as on a judgment against the defendant, the nominal damages might be added, which would carry the sum over \$250. *Hulin v. Rockwell*, 9 Cow. 652.

152. Where a party is entitled to the costs of a circuit, but neglects to apply at the next term for a rule to enforce the payment of the same, they must abide the event of the suit. *Mix v. Brisbane*, 2 Wend. 286.

153. The costs of a motion will not be allowed, though the party making it prevail, where the affidavits on which the motion is founded are loaded with impertinent matter, manifestly with a show of increasing costs against the opposite party. *Pitcher v. Clark*, 2 Wend. 631.

154. On a motion to change venue, the costs of the motion abide the event of the suit; but a party failing in a motion is not entitled to the costs of such motion, though he succeeds in the suit. *Gidney v. Spelman*, 6 Wend. 525.

155. A party is entitled to costs for appearing at a general term, and resisting a motion which should have been made at a special term. *Donaldson v. Jackson*, 9 Wend. 450.

156. A party against whom a motion is made, objecting to its being granted on the ground of short notice, is, notwithstanding, entitled to costs for appearing to resist such motion. *Ibid*.

157. Costs on a motion to consolidate suits will be granted if the motion prevails. *Bank of United States v. Strong*, 9 Wend. 451.

158. A party who attends before a Circuit judge or commissioner on the notice of his adversary, and succeeds in opposing the proceeding there had, is not entitled to a rule for costs. *Pike v. Morris*, 9 Wend. 464.

159. A party on a special motion is not entitled to costs, where the motion is granted without opposition, and costs are not asked for in the notice. *Crippen v. Ingersoll*, 10 Wend. 603.

VII. Security for costs, when required, and when to be paid by the attorney for want of such security.

160. An attorney is liable for the defendant's costs, in a suit brought by him for a non-resident plaintiff where the defendant succeeds; and this though the plaintiff be merely nominal, having assigned his demand to a resident. *Cavey v. Rider*, 2 Cow. 617.

161. Where the original plaintiff is a non-resident of this state, his attorney is liable to pay the costs of setting aside an attachment for irregularity, granted against the sheriff for not bringing in the body. *The People v. Marsh*, 3 Cow. 334.

162. The people are merely a nominal party, and the case is within the spirit of the thirteenth rule of January term, 1799. *Ibid*.

163. Where the action for mesne profits is brought in the name of the nominal plaintiff in ejectment, the Court will stay proceedings on his part, till security for costs be filed. *Jackson v. Peer*, 4 Cow. 147.

164. A cause removed to the Supreme Court from the Common Pleas, by *habeas corpus*, is within the fourteenth general rule of January term, 1799, providing that the attorney of a non-resident plaintiff shall be liable for costs to the defendant, if security be not given for costs before suit brought. *Baley v. Warden*, 8 Cow. 113.

165. Application for security for costs, if made to the Court, must be on notice to the plaintiff. *Chaplin v. Pierce*, 3 Wend. 445.

166. If made to a judge at chambers, the order will be that the plaintiff file security in twenty days, or show cause on the first day of the next term. *Ibid*.

167. An attorney is liable to costs to the amount of \$100 when he prosecutes a suit for a non-resident plaintiff, although on the retainer of a resident citizen. *Jones et al. v. Savage*, 10 Wend. 621.

VIII. Costs in error.

167*. On reversing a judgment upon error, the plaintiff is entitled to costs. *Macaulay v. Sternburgh*, 3 Cow. 368.

168. Where a judgment is reversed on error to the Common Pleas, upon a bill of exceptions taken there, costs should be taxed for the bill at the Common Pleas rate only. *Clarke v. Rathbun*, 3 Cow. 380.

169. The Court of Errors on granting a rule, that the writ of error and transcript from the Supreme Court be not received, pursuant to the first rule of the Court of Errors, has no power to award the costs of the motion. *Newman v. Van Antwerp*, 4 Cow. 711.

170. The power of this Court to give costs upon a writ of error depends upon statute, (1 R. L. 346.) which does not provide for costs on a mere *ne recipiat*. *Ibid*.

171. Costs in the Court of Errors, on a case

removed to the Supreme Court, may be taxed by a taxing officer of the Supreme Court. *Dale, Administrator, &c. ads. Roeveck*, 1 Wend. 25.

172. Where a judgment in ejectment is reversed in the Court of Errors, the Supreme Court will not grant a rule on the plaintiff to pay the costs, but the defendant must make up his record, issue execution, and obtain his costs in the usual manner. *Jackson v. Schaubert*, 2 Wend. 257.

173. Where a judgment of reversal on a writ of error obtained by default is set aside on payment of costs, no other than the costs of the term and of the subsequent proceedings can be charged. *Gomez et al. v. Green*, 4 Wend. 206.

174. On the affirmance by this Court of an order of the General Sessions, quashing an order of removal of a pauper, the defendants in error are not entitled to enter a judgment for costs of affirmance, unless this Court have directed costs to be paid to the prevailing party. *Overseers of Blooming Grove v. Overseers of Minnissink*, 10 Wend. 688.

175. Where a party obtains a verdict, and the judgment entered thereon is subsequently reversed, a *venire de novo* awarded, and the costs directed to abide the event of the suit; such party, although he obtains a verdict on the second trial, is not entitled to the costs of defending the writ of error. *The People, ex rel. Manning, v. New York Common Pleas*, 13 Wend. 649.

IX. Taxation of costs: (a) What charges are taxable.

176. After the lapse of two terms, at which the party might have applied for a retaxation of costs, the Court will not interfere, though there be exceptionable items in the bill. *M'Lean v. Forward*, 1 Cow. 49.

177. Where several defendants appear and plead by one attorney, only one retaining fee will be allowed in taxation against the plaintiff. *Morton's Executors v. Croghan*, 1 Cow. 233.

178. Otherwise where they appear by different attorneys. *Ibid*.

179. The Court will not hear a motion to retax a bill of costs, upon a point not made before the taxing officer. *Lyon v. Wilkes*, 1 Cow. 591.

180. Merely objecting before him to an item for witnesses' fees, on the ground of their non-attendance according to the charge, is not a sufficient ground upon which to move for a retaxation. *Ibid*.

181. For it will be intended that due proof of their attendance was made before him, until the contrary appear. *Ibid*.

182. Surveyors attending as witnesses are entitled to no higher compensation than ordinary witnesses, except in causes where there has been a view. *Ibid*.

183. The plaintiff, on succeeding, is entitled to have the costs of carrying down the cause to a previous circuit or sittings taxed, though it was not placed upon the calendar. But in such case, the fees for placing it upon the calendar cannot be taxed. *Ibid*.

184. A rule to bring in body, notice, and affidavit of service, &c., are properly taxable against the sheriff; and should not be taxed in

the original cause. *The People v. Chapman*, 1 Cow. 214.

185. A retaining fee is allowable in the second cause. *Ibid.*

186. A fee for the assignment of the bail bond is not taxable against the defendant in an action on the bail bond. *Dow v. Filkins*, 1 Cow. 582.

187. Unnecessary papers, copied in *hac verba* into a case, though allowed by the judge on settling the case, were disallowed in taxation. *Jackson v. Mather*, 2 Cow. 584.

188. Only one draft or *subpoena* and *subpoena* ticket allowed, though several *subpoenas* issue. *Ibid.*

189. Certified copies from the secretary's office taxed. *Ibid.*

190. So, certified copies of depositions taken *pendente lite*, under act to perpetuate the testimony of witnesses, &c. (1 R. L. 455.) *Ibid.*

191. But there must be an affidavit that these were necessary. *Ibid.*

192. Though judgment be against executors and heirs, in separate suits, for the same debt on the same bond, there will not be one taxation of costs under the statute, (1 R. L. 521, s. 14.) which applies only to cases where the defendants may be sued jointly. *Anonymous*, 2 Cow. 591.

193. Where a proceeding is in continuation of a suit carried to judgment, the costs of such proceeding follow at the same rate, with those allowed in the original suit. *Jackson v. Rathbone*, 2 Cow. 602.

194. On retaxation of costs in ejectment, and case made for argument, the following items allowed: serving *narr.* rule for *remand*; attorney's fee on argument, for each term at which noticed; do. judgment record, fol. 4, and same in *nisi prius* record; *fi. fa.* for costs; fee on serving writ of possession. *Jackson v. Gale*, 3 Cow. 24.

195. Motion and rule for argument disallowed. *Ibid.*

196. *Mandamus* to a Court of Common Pleas, commanding them to vacate a rule, is a new suit, and on the defendant's succeeding, they shall have a retaining fee taxed against the relator. *The People v. The Judges of Oneida County*, 4 Cow. 402.

197. Separate papers, for motions for judgment as in case of nonsuit, in different causes, in favour of the same nominal plaintiff, on the same demise, though against different defendants, the attorneys for the parties being the same in each, and the motions depending on the same cause, arising simultaneously, will not, in future, be taxed. *Jackson, ex dem, Ten Eyck, v. Clark*, 4 Cow. 532.

198. *Nisi prius* record taxed as costs of the circuit, though the cause was noticed, and carried down at a previous circuit. *Van Rensselaer v. Hamilton*, 4 Cow. 539.

199. Plaintiff allowed per folio for engrossing notice of special matter on the *nisi prius* record. *Ibid.*

200. But not allowed for notice of inquest after affidavit of merits filed. *Ibid.*

201. *Prima facie*, the plaintiff's attorney is right in copying the defendant's notice of special

matter into the *nisi prius* record and judgment roll, and may have this service taxed. *Wooster v. Perry*, 4 Cow. 546.

202. If it be, in truth, unnecessary, on showing this to the taxing officer, he should strike it out. *Ibid.*

203. A cause was submitted by the parties to arbitrators, who awarded costs of suits to be taxed. These were taxed *ex parte* by a commissioner. On motion for retaxation, *held*, that the cause being out of Court, they had no further control over the costs upon summary application. *Van Alstine v. Wimple*, 4 Cow. 547.

204. The statute of April 5th, 1813, (sess. 36, ch. 56, s. 6.) providing that in case of reference, "a reasonable allowance shall be made to the prevailing party for such services and expenses as may accrue upon or attend the reference of the cause," does not extend to the fees of counsel, &c., but is confined to the incidental expenses of the referees. *Gay v. Patterson*, 3 Cow. 29.

205. Motion by several different defendants, on one set of affidavits, in divers causes, at the suit of the same lessors of the plaintiff; opposed on one set of affidavits entitled in all the causes, and the motions denied with costs. *Held*, that there should be only one taxation in all; the services of the attorney and counsel for the plaintiff to be taxed as if there were only one cause, but clerk's fees to be allowed in the several causes, according to *Boyce v. Thompson*, 20 John. 274. *Jackson v. Garnsey*, 3 Cow. 385.

206. Justice's return to *certiorari* taxed on affirmance of judgment in the defendant's bill of costs. *Brainard v. Phillips*, 4 Cow. 20.

207. Where a motion to set aside a *certiorari* is denied with costs, these are not taxable as a part of the defendant's general costs upon affirmance. *Ibid.*

208. To warrant a taxation of costs for the travel of witnesses, the amount of travel should appear by affidavit; otherwise not a single day's travel can be allowed. *Shufelt v. Rowley*, 4 Cow. 58.

209. Where, after a regular default, the defendant makes an affidavit of merits, which he shows to the plaintiff's attorney, with an affidavit showing a clear right to set it aside on terms; and offers to plead and to pay all costs, &c., if the plaintiff's attorney refuse to comply with such offer; *it seems*, this Court will not allow him costs on his coming here to oppose the motion to set aside the default beyond what were offered; otherwise where there are special circumstances, leaving it doubtful whether the Court would set aside the default upon the papers shown to the attorney. *Packard v. Hill*, 4 Cow. 55.

210. Where the plaintiff recovers in the Supreme Court a sum which carries Common Pleas costs only, he is not allowed counsel fees at the Supreme rate. *Hayes v. Bayley*, 4 Cow. 143.

211. The attorney for the party who demurs is not entitled to make out and charge a copy of the demurrer book for himself. *Warner v. Shafer*, 4 Cow. 147.

212. No costs are allowed for preparati-

and attendance to oppose a motion to bring on a demurrer as frivolous, noticed, but not made. *Anonymous*, 4 Cow. 157.

213. So of all enumerated motions. *Ibid.*

214. A brief, attorney and counsel fee not allowable on a motion of course in partition, and other real actions. *Willard v. Mayor of Hudson*, 5 Cow. 28.

215. A defendant who has a verdict in the Supreme Court will recover Supreme Court costs in all actions mentioned in the first section of the statute of costs, (1 R. L. 343.) whether the cause be commenced in that Court, or come there by *habeas corpus* from the Common Pleas. *Judson v. Leach*, 7 Cow. 152.

216. A statement of testimony in a case will be allowed on taxation, though not relating to the ground of objection to the decision or charge of the judge, nor passed upon by the jury, it being inserted in good faith and not objected to, on settling the case, as unnecessary. *Curtis v. Cummings*, 7 Cow. 154.

217. So of testimony relating to points taken and overruled at bar. *Ibid.*

218. But nothing will be allowed for draft of depositions, which were inserted merely *verbatim*. *Ibid.*

219. Figures used to number the lines will be allowed in folio; one word for each figure. *Ibid.*

220. Nothing will be allowed for a bill of exceptions made with a case in the same cause; the party being compelled to elect between them, and having elected the case. *Ibid.*

221. Draft and copying depositions under a commission will be allowed; but otherwise as to the costs of orders for time to make a case. *Ibid.*

222. On taxation, counsel perusing and amending declaration allowed, and three copies of declaration. *Winchell v. Latham*, 7 Cow. 367.

223. But not *ni si prius* record, that having been paid for on putting off trial; nor a *testatum* execution, it appearing that the ordinary one would answer the purpose. *Ibid.*

224. Where the attorney and counsel are the same, only one trial fee allowed; the party to elect whether it shall be an attorney or counsel fee. *Gold v. Hotchkiss*, 7 Cow. 366.

225. Omitting to notice costs for taxation does not affect the regularity of the judgment. *Jackson v. Varick*, 7 Cow. 412.

226. The only consequence is, that the party can be compelled to retax at his own expense. *Ibid.*

227. All enumerated motions are considered on the same footing as a case for the purpose of costs. *Jackson v. Mather*, 7 Cow. 416.

228. Accordingly, the same counsel and attorney's fees are allowable for attending to argue a motion for a new trial, on the ground of newly discovered evidence, as on a case. *Ibid.*

229. The motion for a new trial by reason of newly discovered evidence is an enumerated motion. *Ibid.*

230. Where an order to stay a trial is obtained with a view to a motion, which is denied with costs, the costs of the opposite party in preparing for trial will be allowed up to the

time of the order to stay being served. *Jackson v. M'Kinney*, 7 Cow. 420.

231. Where a verdict is set aside for misdirection of the judge, or the finding of the jury against the law of the case, the costs should abide the event of the suit. *La Forge v. Kneeland*, 7 Cow. 456.

232. An order for the examination of a witness *de bene esse*, cannot be taxed if the witness be not examined. Otherwise if he be examined. *Jewell v. Jewell*, 8 Cow. 109.

233. Where a cause is not duly noticed for trial, neither party is entitled to charge for preparing for trial. *Crummer v. Huff*, 1 Wend. 24.

234. The service of a *subpoena* cannot be charged in each of several causes, in which the witnesses were required, if the *subpoena* issued only in one of them. But the officer taking an affidavit entitled in several cases may charge his fee for each. A witness residing in the place where the Court is held cannot receive travel fees. *Jackson v. Hoagland et al.* 1 Wend. 69.

235. Where a party is entitled only to Common Pleas costs, he cannot charge the defendant with Supreme Court costs, for services incidental to a case made by him for a new trial. *Plumb ads. Lywan*, 1 Wend. 74.

236. Where an eight days notice of a trial is countermanded six days before the day for which it is noticed, the defendant is not entitled to charge attorney's and counsel's fees prepared for trial. *Green v. Green*, 1 Wend. 102.

237. A party cannot charge for entering a bill of exceptions on the record. *Ibid.*

238. Attorney's and counsel's fees, attending at term to hear the decision of the Court on pronouncing judgment on a case made, are not proper charges. *Ibid.*

239. Where a rule for costs to a party for attending to oppose has been ordered by the Court, he must see to the entry of his rule, or his costs will not be subsequently allowed. *Levensbury ads. Rathbone*, 1 Wend. 283.

240. Where a motion in several causes is resisted on one set of papers, there can be but one bill of costs taxed. Where a rule for costs is granted against a party, and the same demanded by virtue of a power of attorney, a copy of the power need not be delivered, nor is it necessary to deliver a certified copy of the rule. The costs of the attachment should be taxed, with the costs of resisting the motion, in anticipation, though they cannot be demanded unless the services are performed. Where an attorney is retained, another attorney cannot act for the party without being regularly substituted; otherwise the acts of such second attorney will be disregarded by the Court. *Jerome ads. Beersam*, 1 Wend. 293.

241. Where there are more than four witnesses *subpoenaed*, a party may charge for the engrossing and seal of as many more *subpoenas* as are used, allowing one *subpoena* for every four witnesses. *Erwin v. Martin*, 2 Wend. 250.

242. No fee is taxable for the service of a paper, unless it requires an answer. *Ibid.*

243. Where a party submits a bill of costs to a taxing officer for taxation, he cannot withdraw

the bill, and have it taxed by another officer. *Hall v. Sherwood*, 2 Wend. 253.

244. Where an affidavit in opposition to a motion is evidently spun out to increase the costs, the Court will direct a deduction to be made in the taxation. *Legg v. Kinney*, 2 Wend. 255.

245. An attorney's fee on trial or argument may be charged, although the attorney does not in fact attend for such trial or argument. *Wilson v. White*, 2 Wend. 265.

246. A charge cannot be taxed for a brief and fee on a motion, which was intended, though not actually made. *Ibid.*

247. Where a declaration contained ten counts, two for malicious prosecution, and eight in slander, and there was no proof in support of the first two counts, the Court directed that in the taxation of costs, no allowance should be made for those counts, and that but four counts in slander (two with and two without a colloquium) should be tried. *Irwin v. Deyo*, 2 Wend. 285.

248. So where forty witnesses attended in support of the plaintiff's general character, it was ordered that witness's fees should be taxed but for ten of them. *Ibid.*

249. No fee is allowable to a commissioner for any order staying proceedings. *Williams v. King*, 3 Wend. 311.

250. A plaintiff is entitled to charge for engrossing on the nisi prius roll a notice of special matter subjoined to the defendant's plea; but not for engrossing the same on the judgment roll. *Platt v. Wathorath*, 3 Wend. 311.

251. On a reference, where Common Pleas costs only are recoverable, an attorney's fee only is taxable for each attendance, and no allowance whatever is made to counsel. *Child v. Hunter*, 5 Wend. 103.

252. The fees of a witness cannot be charged, who, though regularly subpoenaed, did not arrive at the circuit until after the trial. *Booth v. Smith*, 5 Wend. 107.

253. On a motion for judgment as in case of nonsuit, the defendant's papers containing thirty-nine folios, the clerk was directed to allow him only four folios in the taxation of his costs. *Ingham v. Graves*, 6 Wend. 536.

254. Counsel fee, attending prepared either to try cause or argue case, is a proper charge when the cause is noticed by either party. *Bank of Niagara v. Austin*, 6 Wend. 548.

255. Attorney's fee, attending prepared to argue a case, is not a proper charge where the case is not argued, except when the attendance is pursuant to notice from the opposite party. *Ibid.*

256. A foreign witness, subpoenaed at the place of trial, is not entitled to travelling fees. *Ibid.*

257. Where a cause is called at the circuit, and the trial put off by the defendant, and he subsequently obtains a verdict, he is not entitled to more than the allowance of one day's fees to witnesses. *Titus v. Bullen*, 6 Wend. 562.

258. Where the trial of a cause is put off by a defendant on payment of costs; a plaintiff cannot tax in his bill, as costs to be paid under such order, the expenses of obtaining, suing out, and returning a commission to take the tes-

timony of foreign witnesses. *Bank of St. Albans v. Knickerbacker*, 7 Wend. 532.

259. Where, to a declaration containing three special counts, and also the common money counts, the defendant demurred specially to the special counts, and pleaded to issue on the common counts, and the plaintiff carried down his cause to trial on the issues of fact, and obtained a verdict, and afterwards the demurrer was decided in favour of the defendant; it was held, that the demurrer being special, and decided in favour of the defendant for defects of form in the counts demurred to, he was not entitled to costs upon such judgment in his favour. *Osborne v. Lawrence*, 9 Wend. 446.

260. It seems, had the counts demurred to been held bad in substance, that the defendant would have had his costs. *Ibid.*

261. It seems, also, that had the demurrer embraced the whole cause of action, the defendant would have been entitled to judgment in his favour, and to the costs of the demurrer, and the plaintiff would not have been entitled to the costs of the issues of fact. *Ibid.*

262. A party brought into Court on a rule to show cause, which he resists, is entitled to charge a retaining fee as part of his costs. *Burt v. Crosby*, 9 Wend. 466.

263. The costs of a precept, if the sum demanded does not exceed \$250, can be taxed only at the Common Pleas rate of costs. *Ibid.*

264. Prospective costs may be taxed, subject to deduction on payment. *Ibid.*

265. An attorney's and counsel fee of two dollars is taxable on a motion for precept. *Ibid.*

266. Expenses incurred by a party, in proceedings to procure attachment against his witnesses, are not taxable in the general costs against his adversary. *Rosekrans v. McIntyre*, 9 Wend. 471.

267. Where a plaintiff in this Court is entitled to only Common Pleas costs, he may, besides charging an attorney's fee on trial, charge the same sum for a counsel fee where counsel is actually employed; and such counsel fee may be charged as often as the cause is noticed for trial, but in such case only one attorney's fee can be charged. *Campbell v. Cook*, 9 Wend. 492.

268. A plaintiff is not bound to accept a *relicta* and *cognovit*, with a condition annexed that judgment shall not be entered thereon, until the term after the circuit at which the cause is noticed to be tried. *Leavitt v. Woods*, 10 Wend. 558.

269. Only one fee of \$1.25 to counsel for perusing and amending pleas is taxable, although several special pleas, presenting distinct matters of defence, be interposed. *Trustees of Rochester v. Symonds*, 10 Wend. 563.

270. The costs and expenses allowed to a defendant who is discharged from arrest on a warrant issued under the act to punish fraudulent debtors, are taxable costs according to the fee bill, and no other. *Potter v. Richards*, 10 Wend. 607.

271. In a case of reference, money paid for room rent, fire, and candles, on the hearing of the cause, is a proper item for taxation; the allowance in this case was one dollar per day. *Bailey v. Handford*, 10 Wend. 622.

272. Where an ejectment suit was commenced against eleven defendants, who were permitted by the Court to enter into separate consent rules and to plead separately, in an action by the attorneys for the plaintiff against their client for the recovery of their bill of costs, (the parties in the ejectment suit having settled, each agreeing to pay his own costs;) it was held, that the attorneys were not entitled to charge their clients with eleven retaining fees, but must be content with one; that they could charge their fees in but one cause; that they were not entitled to charge for draft of declaration against each defendant, but only for the draft against the casual ejector; that admissions of service of declarations were not taxable, being an unnecessary proceeding in ejectment, according to the old form of proceeding that but one notice of trial could be charged, all the suits being defended by the same attorney; and that circuit rolls were chargeable after issue joined. *Kellogg et al. v. Potter*, 11 Wend. 170.

273. As between attorney and client, the expense of a copy of the opinion of the Court delivered on an interlocutory motion is a proper item of charge; and in counting folios, unless the excess over one hundred words in any pleading or paper exceed half a folio, there ought to be no charge made. *Ibid.*

274. Where a count in a declaration in slander is made unnecessarily voluminous, by laying the words to have been spoken in a great variety of modes of expression, the count on taxation will be reduced to reasonable limits. *Cole v. Green*, 12 Wend. 248.

275. The prevailing party in an appeal from an order of filiation, to whom costs are awarded, is entitled only to taxable costs. *Superintendent of the Port of Ontario v. Moore*, 13 Wend. 273.

276. Attorney's and counsel fees prepared for trial are not taxable where a cause is settled after notice of trial and previous to the circuit. *Conkling et al. v. Bloodgood et al.* 12 Wend. 279.

277. Where a plaintiff, in a case in which there are several issues, obtains judgment upon the whole record, and the substantial cause of action is the same in each issue, he is entitled to costs on those issues which are found for him, and is not liable to the defendant for the costs of an issue found in his favour. *The People v. Feeter*, 13 Wend. 480.

278. Where a party against whom a judgment is rendered before a justice sues out a *certiorari*, to which a return is made, and subsequently a second return, purporting to be an amended return, is made, but setting forth all the proceedings before the justice, and the party suing out the *certiorari* finally succeeds on a writ of error, he is not entitled in the taxation of costs to an allowance for more than one return. *Wells v. Brown et al.* 13 Wend. 374.

279. Preliminary proofs in an insurance cause are not to be taxed in the plaintiff's bill of costs. *Barlow v. The Eagle Fire Insurance Company*, 1 Hall, 153.

280. A party cannot be charged for drafting as many *subpoenas* as he has witnesses; but must prepare one draft, and from that engross the others. *Ibid.*

281. In an action against the sheriff for nonfeasance, wherein he is acquitted, single costs only are to be allowed to the officer on taxing a bill in his favour. *Warner v. Lownds*, 1 Hall, 224.

(b) Notice of taxation of costs.

282. A notice of taxing costs is not such a proceeding as the Court will set aside. *Moran v. Bates*, 4 Cow. 22.

283. If a stranger to a suit enter into an agreement to pay the taxable costs in the cause, he is entitled to notice of the amount at which they were taxed, before an action can be brought against him; but it is not necessary that he should be served with a copy of the taxed bill, or that payment should be demanded from him. *Stafford v. Stevens*, 2 Wend. 158.

284. Where a party taxes his costs without notice to the opposite side, on motion a retaxation will be ordered, with costs of the motion and retaxation. *Jackson v. Hantley*, 2 Wend. 244.

285. Where a party is relieved from an inquest, or the like, on payment of costs, if he offers to pay the costs on a taxed bill, and there is time after such offer to prepare a bill and give the usual notice of taxation, and have the costs taxed before the expiration of the twenty days, notice must accordingly be given; if there be not time for full notice, short notice may be given, or the party offering to pay may be required to go forthwith before a taxing officer; the costs, in any event, must be paid within the twenty days. *Hoadley et al. v. Cuyler*, 10 Wend. 593.

COUNTY CHARGES.

1. A town collector cannot pay moneys due from the county, and charge it in account with the latter. *Boyce v. Russell*, 2 Cow. 444.

2. An account for moneys expended in support of a pauper, in a county having a county poor-house, need not be audited by town auditors. *The People v. The Supervisors of Washington*, 1 Wend. 75.

COUNTY TREASURER.

1. Payment to the state by a county treasurer of the amount due to him from a collector will not come to the benefit of the latter, but an action may be still maintained on his bond. *Jansen v. Ostlander*, 1 Cow. 676.

2. A bond given by a treasurer of a county, that he "shall well, truly, and faithfully execute and perform the duties of treasurer of said county according to law," is good, although not in the form prescribed by statute. *Alleghany County v. Van Campen*, 3 Wend. 48.

3. To a breach assigned that a treasurer of a county had wrongfully and fraudulently embezzled the public money, and converted it to his own use; a plea that the treasurer had not been requested by the supervisors, or by any

person authorized to make such request, to pay over the money, is not good; a defendant in such case having no right to require that a demand should be made previous to suit. *Ibid.*

4. A plea that a treasurer was not requested before suit brought to pay over the moneys in his hands, in answer to a breach that he refused to pay, although particularly requested so to do, is bad if it concludes with a verification. *Ibid.*

5. The addition to such plea, that the treasurer had not been called upon to account, is bad also for duplicity. *Ibid.*

6. The same strictness is not applied to public officers, acting as agents in the settlement of the accounts of a subordinate agent, as is applied to individuals; a mistake in a settlement between them will be allowed to be rectified, which would not be allowed as between individuals. *Supervisors of Chenango v. Birdsall*, 4 Wend. 453.

7. A party to the record in an action of debt, if objected to, cannot be sworn as a witness. *Ibid.*

COURT OF COMMON PLEAS.

1. A Court of Common Pleas has a right in their discretion to set aside the report of referees, upon the ground that it is founded on the testimony of a witness who in their opinion was not credible. *Ex parte Bassett*, 2 Cow. 458.

2. So of the verdict of a jury. *Ibid.*

3. And this Court will not interfere to regulate such discretion by *mandamus*. *Ibid.*

4. Although they may think the Common Pleas erred, unless it be in a plain case admitting of no doubt, so that there is no room for discretion. *Ibid.*

5. Where an inferior jurisdiction, having discretion, has proceeded to exercise it, this Court will not control it. *Ibid.*

6. A judge of the Common Pleas, counsellor, &c., may consent to a new trial, without having been present at the trial. *Ex parte Ward*, 5 Cow. 20.

7. A Court of Common Pleas have not the power to inquire into the regularity and fairness of judgments rendered by justices, and certified into the clerk's office by transcript. *The People v. The Judges of Washington*, 1 Wend. 79.

8. The Courts of Common Pleas of this state never had jurisdiction of writs of right. *The People v. New York Common Pleas*, 4 Wend. 315.

9. The Common Pleas of Niagara have power to grant licenses to keep ferries on the Niagara river, although the jurisdiction of the state extends only to the centre of the river; consequently, to maintain a ferry upon that river for transporting across the same persons or goods for hire or profit, unless authorized in the manner prescribed by law, will subject the offender to punishment as for a misdemeanour. *The People v. Babcock*, 11 Wend. 586.

10. Where a suit is brought against two joint debtors in a Justice's Court, and only one is

brought into Court, in whose favour judgment is rendered, and the plaintiff sues out a *certiorari*, and both defendants appear in the Common Pleas, and the judgment is there reversed, both defendants are liable to the costs of the *certiorari*. *Eddy v. O'Hara*, 14 Wend. 221.

11. On a *certiorari* brought for the reversal of a justice's judgment, the defendant below may object in the Common Pleas to defects in the plaintiff's proof, although the defendant did not point out the same, nor move for a nonsuit in the Justice's Court. *Cook v. Ferral's Administrators*, 13 Wend. 285.

COURTS, CIRCUIT, OF THE UNITED STATES.

1. The Circuit Court of the United States alone has jurisdiction of suits to recover damages for the infringement of patent rights. *Burrall v. Jewett*, 2 Paige, 134.

2. The act of the 15th of February, 1819, extended the jurisdiction of the Circuit Courts of the United States to suits both at law and in equity arising under the patent laws; but it does not render the jurisdiction of those Courts exclusive in such cases. *Ibid.*

3. A Circuit Court of the United States is a Court of general jurisdiction; and when parties are litigating in that Court, it is not to be presumed that they are there irregularly, though an averment that they were citizens of different states would be sufficient, if it were necessary to state enough to give the Court jurisdiction in the case. The inquiry whether the proceedings in that Court were according to its course and practice should be made in that Court only. *Griswold v. Sedgwick*, 1 Wend. 126.

4. On presenting a petition for the removal of a cause into the Circuit Court of the United States, a bond, in the sum of \$1000 dollars, is good security within the meaning of the act, though the sum demanded be \$14,000, when the defendant has not been held to bail in the state Court. *Blanchard v. Dwight*, 12 Wend. 192.

5. A cross bill in the same Court, or an injunction bill to stay the proceedings in a suit pending, or to obtain relief against a judgment recovered in the same Circuit or District Court of the United States, between the same parties or their representatives, is not an original suit or proceeding within the meaning of that provision of the judiciary act of the United States which prohibits the bringing of a civil suit before a Circuit or a District Court by original process against an inhabitant of the United States in any other district than that of which he is an inhabitant, or in which he is found at the time of serving the writ. *Bates v. Delaman*, 5 Paige, 299.

6. Where the Circuit Court of the United States has jurisdiction of a cause, the Court of Chancery of a state will not inquire into the regularity of its proceedings as to mere matters of practice in a new suit founded upon the decree of such Circuit Court. *Ibid.*

7. Where a citizen of New York brought a suit at law in the Circuit Court of the United

States for the district of Vermont, upon two promissory notes given for a part of the consideration money on the purchase of land; and the defendant thereupon filed a bill in equity in the same Court, not only as a defence to the suit upon the notes, but also to set aside the sale, and to have the purchase money, which he had already paid, refunded, and to have another note delivered up, and procured the *subpoena* to be served on the attorney of the plaintiff in the suit at law, who was then out of the jurisdiction of the Court, and refused to appear to the suit in equity; and who had also withdrawn the suit upon the notes as soon as the *subpoena* had been served on his attorney; and the complainant in the equity suit proceeded to take his bill as confessed against the defendant therein, for want of appearance upon such substituted service, and thereupon obtained a decree for the delivering up and cancelling of the notes, and also for the repayment of the purchase money which had been paid on the sale; *held*, that the Circuit Court had no jurisdiction over the person of the defendant in the equity suit so as to authorize such Court to make a personal decree against him for the repayment of the purchase money received on the sale of the land, or for the delivering up of the third note upon which no suit had been commenced by him in the Circuit Court. *Ibid.*

COURT OF ERRORS.

1. A Circuit judge will not be allowed to act as counsel in the Court of Errors. *Seymour v. Ellison*, 2 Cow. 13.

2. A writ of error to the Supreme Court will not lie upon a judgment by default. *Colden v. Knickerbacker*, 2 Cow. 31.

3. And if brought, the proper course is neither to affirm nor reverse the judgment below; but dismiss the writ of error. *Ibid.*

4. In error to the Supreme Court, upon the coming in of the usual return containing the judgment roll only. *Ibid.*

5. The plaintiff in error alleged diminution, viz. that there yet remained in the Court below a *capias*, return filing rule to plead for default, interlocutory judgment for reference to the clerk to assess damages, for report thereon, and for final judgment, a declaration and common bail piece, &c. *Ibid.*

6. And prayed and had a *certiorari* to the Court below, upon which transcripts of all these proceedings were certified. *Ibid.*

7. Form of alleging diminution and the *certiorari* in such case. *Ibid.*

8. Upon the return to the *certiorari*, the plaintiff in error objected not only error in the roll, but certain irregularities in the proceedings below, viz. that the defendant below (plaintiff in error) did not appear in the Court below; that his name in the *capias* and the subsequent proceedings was different; that there was a material variance between the declaration and roll; that common bail was irregularly filed; that the *capias* was returnable at a late day in term, and yet the declaration was entitled generally, &c. And error in the roll was also insisted on, viz.

that the declaration contained a count upon a promissory note, with the common money counts; and yet the clerk assessed damages generally, whereas he should have assessed upon the count on the note only; whereupon twelve of the Court were for dismissing the writ of error, and, therefore, did not consider whether the above matters could be alleged for error or not. *Ibid.*

9. But eight of the Court were opposed to dismissing the writ of error, yet they were of opinion that none of the above matters were sufficient cause for reversion of the judgment; and therefore, it should be affirmed. *Ibid.*

10. *Semble*, therefore, that these and the like omissions and mistakes not appearing upon the roll, are matters of irregularity, not error; and are the proper subjects of redress by motion in the Court below. *Ibid.*

11. And *semble*, that it is not erroneous or irregular for the clerk to assess general damages on a judgment by default upon a declaration containing a count upon a promissory note and the common money counts. *Ibid.*

12. But vide *Burr v. Waterman and Wells*, 2 Cow. 36, note (f) contra.

13. In the Court of Errors, a stipulation between the attorneys, solicitors, or counsel in a cause is binding, though not reduced to writing. *Chamberlain v. Fitch*, 2 Cow. 243.

14. Default obtained in violation of such an order set aside with costs. *Ibid.*

15. An irregular order, reversing the decree of the chancellor, in consequence of which the papers in the cause are remitted to the Court of Chancery, set aside, and the register of that Court ordered to return them to this Court, that the same may proceed. *Ibid.*

16. But the order here being to reverse an order in the Court of Chancery, dissolving an injunction to stay proceedings on a judgment and execution at law, upon which the money had been collected and paid over to the attorneys for the plaintiff there, (the respondent here;) the rule setting aside the default was so modified as not to take effect till these attorneys stipulated, that in the event of a reversal of the chancellor's order, the money so collected and paid to them should be placed at the disposal of the Court below. *Ibid.*

17. Form of the rule for this purpose. *Ibid.*

18. Rule, on dismissing an appeal upon the record call of the cause, that the appellant pay the respondent \$100 dollars besides the taxable costs; the Court being of opinion that the appellant had conducted vexatiously. *Murray v. Mumford*, 2 Cow. 400.

19. The power of the Court to allow beyond the taxable costs considered. *Ibid.*

20. The question considered whether this Court can, on affirmance of a decree of the Court of Chancery, upon appeal, order the appellant to pay the respondent a sum beyond the taxable costs. *Eaton v. Tullnadgē*, 2 Cow. 402.

21. Additional sum refused under the circumstances of the case. *Ibid.*

22. The decision of the Court for the Correction of Errors is binding till its doctrine be altered by the Legislature. Per *Colden*, Senator. *Macbie v. Cairns*, 5 Cow. 547.

23. But *Savage, C. J.*, seems to question the decision of that Court in *Murray v. Riggs*, 15 John. 571. *Ibid.*

24. Till writ of error be returned, the Court of Errors are not in possession of the cause, so as to render any judgment. *Newman v. Van Antwerp*, 4 Cow. 711.

25. The president of the senate may vote and act generally as a member of the Court of Errors. *Anonymous*, 8 Cow. 761.

26. It cannot be alleged for error, in the Court for the Correction of Errors, that in a cause where there were two issues joined, the jury had passed upon only one of them, if it appears that the question has not been brought before the Supreme Court on a motion in arrest of judgment or otherwise. The Court for the Correction of Errors is strictly an Appellate Court for the re-examination and correction of erroneous decisions actually made by other tribunals, upon questions distinctly presented to the Court below, and none other will be considered. *Campbell v. Stokes*, 2 Wend. 137.

27. An oath is not necessary to be administered to senators on taking their seats as members of the Court of Errors. 2 Wend. 209.

28. The lieutenant-governor, acting as president of the senate, has an equal right with the other members of the Court for the Correction of Errors to express his opinion, and vote in the decision of every question before the Court. 2 Wend. 215.

29. All costs awarded by this Court (the Court of Errors) shall, in cases of appeal, be taxed in the Court of Chancery, and in writs of error in the Supreme Court, in the usual manner of taxing costs in such Courts, and when thus taxed, shall be inserted in the judgment of this Court sent down to said Courts respectively; for which costs the Supreme Court, in cases of writs of error, shall award execution according to the course of that Court; and the payment of all costs awarded by this Court in cases upon appeals shall be enforced by the Court of Chancery, according to the practice of that Court. *Reg. Gen. April 7th, 1839*, 2 Wend. 239.

30. A member of the Court for the Correction of Errors may, by virtue of the constitution of the state, and notwithstanding the provisions of the revised statutes, decide or take part in the decision of a cause determined by him when sitting as a Circuit judge. 6 Wend. 158.

31. The Court for the Correction of Errors look at the pleadings as they appear on the record, and not as set forth in the bill of exceptions. *Tuttle v. Jackson*, 6 Wend. 213.

32. In the Court for the Correction of Errors a judgment of affirmance or reversal is effective, if at least ten members concur in the decision, provided that nineteen members are present when the decision is made, although the remaining nine members do not vote in the decision of the question, and have not even heard the argument of the cause. *McFarland v. Crary*, 6 Wend. 297.

33. The Court for the Correction of Errors has no jurisdiction to reverse a judgment of the Supreme Court for error in fact, unless the question has been first examined and decided upon

a writ of error *coram vobis* in that Court. *Davis v. Packard*, 6 Wend. 327.

34. The power given to that Court by the revised statutes to award an issue, when necessary to determine a question of fact, does not give the Court jurisdiction over cases not before cognisable in that Court. It only enables them to administer justice more conveniently, when a question of fact is presented on a plea of a release of errors, or other matter arising subsequent to the judgment in the Court below. *Ibid.*

35. This Court reviews the proceedings of all subordinate tribunals as to their jurisdiction, and all questions of law arising before them. *Tullman v. Bigelow*, 10 Wend. 420.

36. The Court of Errors will review all questions of law arising upon the facts of a case, but not upon the evidence of such facts; and it seems, that a party who wishes to review the decisions of the Supreme Court upon a motion to set aside a report upon questions of law arising upon the facts of the case, must obtain a statement of the facts upon which the decision is founded, to be drawn up under the direction of the Supreme Court, and placed upon the record in the form of a special or supplementary report of referees in the nature of a special verdict, or bill of exceptions. *Feeter v. Heath*, 11 Wend. 477.

37. Before suing out a *certiorari* to remove a cause from the Common Pleas into this Court, the defendant must cause his appearance to be entered; simply giving notice of a retainer is not enough. *Ex parte Isaacs et al.* 12 Wend. 193.

38. On a *certiorari* to the Municipal Court of Brooklyn, this Court, being required to proceed and give judgment according as the very right of the case may appear, will look into the evidence to see whether there is any foundation for the judgment; but where there is evidence on both sides, a judgment will not be reversed, although, upon reviewing it, this Court come to a different conclusion from that arrived at by the finding upon which the judgment was rendered. *Stryker v. Bergen*, 15 Wend. 490.

39. It seems, that the same rule should govern in a *certiorari* to the Marine Court of the city of New York. In both these cases the rule being different from that which prevails in this Court on writs of error to the Common Pleas, where the action was originally commenced before a justice of the peace. *Ibid.*

COURTS OF GENERAL SESSIONS.

1. The clerks of Oyer and Terminer and General Sessions of the peace are not entitled to compensation for their services rendered to the public, except in the city of New York. *Mallory v. Supervisors of Cortland*, 2 Cow. 531.

2. Clerk of Oyer and Terminer and General Sessions is entitled to compensation for engrossing and entering the minutes of these Courts *Doubleday v. Supervisors of Broome*, 2 Cow. 533.

3. Which the supervisors should audit. *Ibid.*

4. Where services are rendered for the benefit of the county, and no specific mode of compensation is provided, they should be audited

by the supervisors as a part of the contingent charges of the county. *Ibid.*

5. The fourth section of the act declaring the powers and duties of justices of the peace, (2 R. L. 507, 8.) and creating a Special Session for the trial of petit larceny without a jury, is not contrary to any provision in the constitution of the United States or of this state. *Murphy v. The People*, 2 Cow. 815.

6. A Court of General Sessions may return or remit an indictment to the Oyer and Terminer holden in the same county, which was originally found in and remitted from the Oyer and Terminer. *The People v. Gay*, 10 Wend. 609.

7. *It seems*, also, that a recognisance taken in the Oyer and Terminer for the appearance of a party at the next General Sessions, may be respited from the Sessions to the Oyer and Terminer. *Ibid.*

8. A Court of General Sessions has power to set aside a verdict for irregularity. *Gay v. Monroe General Sessions*, 12 Wend. 272.

COURTS OF OYER AND TERMINER.

1. A Court of Oyer and Terminer cannot be adjourned by a Circuit judge, or otherwise, by reason that a number of the county judges, sufficient to make a quorum, are not present at the day appointed for holding it. *The People v. Bradwell*, 2 Cow. 445.

2. And where a quorum did not appear till the third day of the circuit, and then opened the Oyer and Terminer, and convicted a criminal; *held*, that the proceeding was *coram non iudice*. *Ibid.*

3. But the Court on *certiorari* ordered a rule to set aside the proceedings, so as to prevent any advantage by a plea of *autrefois* convict. *Ibid.*

4. Whether in this state a Court of Oyer and Terminer, having sentenced a malefactor, upon conviction before them, to capital punishment, have power after they have adjourned, on being afterwards, upon further examination, convinced of his innocence, to suspend his execution, or grant a reprieve till the case can be laid before the pardoning power? *Quere. Miller's case*. 9 Cow. 730.

5. By the common law, the judges may relieve even after adjournment; and the only question is, whether the power be wanting here either from the frame and principle of our government, or is impliedly denied or withheld by the constitution. But *vid.* 2 R. S. 658. *Ibid.*

6. This question examined upon the constitution upon principle and authority, in a correspondence between Clinton, governor, and Edwards, Circuit judge, president of the Oyer and Terminer of the city of New York, in a case (stated) wherein that Court had relieved the capital execution of a prisoner after sentence. *Ibid.*

7. Courts of Oyer and Terminer have authority to grant new trials on the merits. *The People v. Stone*, 5 Wend. 39.

COURTS OF SPECIAL SESSIONS.

1. Form of *mittimus* or execution on conviction for felony. *Matter of Sweetman*, 1 Cow. 144.

2. Whether this should state that the crime was committed within the county. *Ibid.*

3. Where a Special Session found S. guilty of petit larceny, and sentenced him to imprisonment for thirty days, and imposed a fine of \$15; and also adjudged that unless the fine should be paid, he should be imprisoned four months; *held*, that the sentence was good for thirty days, but void for the four months. *Ibid.*

4. A Special Session, under the act, (sess. 36, c. 104, s. 4.) cannot imprison more than thirty days for nonpayment of a fine. *Ibid.*

5. Whether they may sentence to a term of imprisonment not exceeding six months, and then to thirty days imprisonment besides, for nonpayment of a fine? *Quere. Ibid.*

6. Their power to imprison for not paying a fine depends upon the statute. (Sess. 36, c. 81, s. 1, R. L. 348.) *Ibid.*

7. Their conviction and *mittimus* is equivalent to a judgment and execution. *Ibid.* note (a).

8. History of the Court of Special Sessions in New York. *Ibid.* note (c).

9. A Court of Special Sessions have the power, and it is their duty, to issue a second venire for a jury to try a defendant in a criminal case, if the first jury are discharged because they cannot agree upon a verdict. *Vanderwerker v. The People*, 5 Wend. 530.

10. Continuing a cause over from Saturday to Monday is not keeping the Court open on the Sabbath, within the meaning of the statute. *Ibid.*

11. Stating an offence to have been committed in the town of S—, without adding the county in which the same is situate, is sufficient to give the justices jurisdiction; the Court taking judicial cognizance of the towns created by law. *Ibid.*

12. Though the facts of a case be returned to the Supreme Court, they will not look into them to see whether or not the jury erred. *Ibid.*

13. The proceedings of a Court of Special Sessions will not be reversed for the errors of the magistrate before whom the complaint was made. *Ibid.*

14. A Court of Special Sessions before whom a conviction is had may proceed, and cause their judgment to be executed, notwithstanding notice of an intention to remove the conviction, and the entering into a recognisance by the defendant, if a *certiorari* is not sued out. *The People v. Yates General Sessions*, 5 Wend. 110.

COURT, SUPREME.

1. The Supreme Court have not jurisdiction to order a relaxation of costs taxed by the chief justice, as judge of the Court of Errors. *Jackson v. Height*, 5 Cow. 443.

12. The Supreme Court will not give an opinion advisory to another Court after that Court has rendered judgment. *Ex parte Barker*, 7 Cow. 143.

17. Otherwise if judgment be suspended for the purpose of obtaining the opinion of the Supreme Court. *Ibid.*

14. A bill of exceptions is inapplicable to a criminal cause; questions of evidence are therefore brought from criminal Courts before the Supreme Court by consent; judgment being suspended. Such suspension is of course where there is doubt. *Ibid.*

2. The Supreme Court will not pass upon disputed items in a bill of costs until after taxation, though the bill is presented to the

Court by submission of the parties. *Swift v. Kelly*, 2 Wend. 623.

3. A Supreme Court commissioner has power to make an order for security for costs, and has the right to modify or revoke it. *More v. Meritt*, 9 Wend. 482.

4. On an application to modify or revoke regularly, notice should be given to the party obtaining the order; it rests, however, in the discretion of the officer whether or not notice shall be given. Where, according to the ordinary course of proceedings, cause cannot well be shown, notice seems to be unnecessary. *Ibid.*

5. The Supreme Court of New York has jurisdiction of an action on an instrument taken by a collector of the customs of the United States, for the delivery on demand of certain property seized or forfeited to the United States; the fact of forfeiture and the regularity of the seizure being admitted by the instrument. *Sally v. Cleveland et al.* 10 Wend. 156.

6. The Supreme Court has not the power to reverse the judgment of a Court of Common Pleas, reversing the judgment of a Justice's Court on the merits. *Columbia Turnpike Road v. Haywood*, 10 Wend. 422.

7. The Supreme Court have jurisdiction over the proceedings in relation to streets as a Court, and quasi commissioners, except in reviewing the proceedings of the commissioners of estimate and assessment; when once the report is confirmed by this Court, the order of the Court cannot be opened and reviewed. *In the matter of Canal Street, New York*, 11 Wend. 154.

8. In all cases where a bill of exceptions is taken, demurrer to evidence put in, case made, or notice given of a motion for a new trial on newly discovered evidence, the cause must be heard and decided by the Circuit judge previously to its being brought into the Supreme Court, whether there is or is not an order to stay proceedings, unless the Circuit judge shall have directed that the bill of exceptions, or the like, shall be carried immediately to the Supreme Court. *Hicks v. Chamberlain*, 12 Wend. 254.

9. Where a *certiorari* issues to a justice direct from the Supreme Court, the plaintiff, although successful, does not recover costs. *Smith v. Luce*, 14 Wend. 237.

10. The power to review and correct the errors, abuses, and mistakes of public officers, and of inferior or subordinate jurisdictions, belongs exclusively to the Supreme Court. *Whitney v. The Mayor, Aldermen, &c. of the city of New York*, 1 Paige, 548.

11. Illegality in the proceedings upon assessments, for the purpose of regulating and improving streets in the city of New York, may be corrected by a *certiorari* to the Supreme Court. *Ibid.*

COURTS OF JUSTICES OF THE PEACE.

I. *Jurisdiction*: (a) *In respect of the action, and the sum demanded, and herein of the nature of the Court*; (b) *In respect to the parties to the action.*

II. *Process, and by whom it may be served.*
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III. *Appearance*: (a) *Who may appear and advocate the cause*; (b) *Appearance of an infant.*

IV. *Declaration, when good.*

V. *Plea and issue.*

VI. *Plea of title.*

VII. *Plea of a former action.*

VIII. *Set-off.*

IX. *Adjournment*: (a) *When an adjournment may be granted, on what security, and for what time*; (b) *When an improper adjournment amounts to a discontinuance, and what is a waiver of the irregularity.*

X. *Trial in a Justice's Court.*

XI. *Trial by jury*: (a) *Venire, and when irregularities in the venire are cured*; (b) *Challenge*; (c) *Proceedings of the jury after they have retired, and until their verdict is recorded*; (d) *Verdict.*

XII. *Judgment*: (a) *Judgment after issue joined*; (b) *Judgment by confession*; (c) *What is evidence of the existence of a judgment in a Justice's Court.*

XIII. *Costs.*

XIV. *Execution.*

XV. *Attachment*: (a) *Against a concealed debtor*; (b) *Against a non-resident debtor*; (c) *When security must be entered.*

XVI. *Appeals to the Court of Common Pleas.*

I. *Jurisdiction*: (a) *In respect of the action, and the sum demanded, and herein of the nature of the Court.*

1. Though the process in a Justice's Court be for \$25 only, and the declaration be more, it does not oust the justice of his jurisdiction, nor is it a material variance. *Dennison v. Collins*, 1 Cow. 111.

2. Where the justice is absent at the adjourned day, the cause is discontinued; but the parties may confer jurisdiction by consent, and appearing and going to trial on another day. *Stoddard v. Holmes*, 1 Cow. 245.

3. Yet in trespass, such consent of one defendant will not give jurisdiction as to the other. *Ibid.*

4. And on trial by consent, under these circumstances, the declarations of the defendant who was not a party to the arrangement are not admissible as evidence against the other. *Ibid.*

5. In an action of trespass in a Justice's Court, a plea of a *right of way* puts in question the title to lands, and deprives a justice of jurisdiction; and the consent of parties that the suit shall proceed notwithstanding such plea, does not restore the jurisdiction. *Striker v. Mott*, 6 Wend. 465.

6. A justice has jurisdiction of an action of covenant, on the condition of a bond, the penalty of which exceeds \$50, where the damages claimed do not exceed that sum. *Broomer v. Laine*, 10 Wend. 525.

7. The statute giving exclusive jurisdiction to the Municipal Court of Brooklyn to hear, try, and determine all actions cognisable before a justice within the limits of the village, did not preclude the justices of the county to try a transitory action of which they had jurisdiction,

although it rose within the bounds of the village, provided the place of trial was not within such bounds. *Blatchley v. Moser*, 15 Wend. 215.

8. A Justice's Court is not a Court of record. *Scott v. Rushman*, 1 Cow. 212.

(b) *In respect to the parties to the action.*

9. To give a justice jurisdiction under a warrant upon the fifty dollar act, (secs. 47, ch. 238.) the defendant must be personally arrested, and brought into Court before the justice. *Colvin v. Lathier*, 9 Cow. 61.

10. If not, a judgment rendered thereon, though upon a return, regular on its face, of the defendant as in custody, and made by his consent, will be *coram non judice* and void; and all persons acting under it will be wrong doers. *Ibid.*

11. In case of a summons, the officer's return of service by reading gives the justice jurisdiction of the person. *Ibid.*

12. Where a Court proceeds erroneously, the remedy is by a *certiorari* or writ of error; but where there is no jurisdiction, all is absolutely void, and all concerned in enforcing the judgment are trespassers. *Ibid.*

13. A suit in a Justice's Court must be brought in the town, or next adjoining town, wherein either the plaintiff or the defendant to the record resides; the fact that the *cause in action* belongs to an assignee, a non-resident of the county, but *not a party to the record*, does not justify a departure from the requirements of the statute. *Hardy v. Rowe*, 7 Wend. 452.

14. Where a warrant under the justice's act issues in favour of a non-resident plaintiff, the action may be brought before any justice of the county, and need not be brought before a justice of the town where the defendant resides, or of the next adjoining town. *Hunter v. Burtis et al.* 10 Wend. 368.

15. In a suit against a non-resident defendant, the action must be brought before a justice of the town in which the defendant may be at the time of the commencement of the suit; but it is not necessary that a non-resident plaintiff should be personally in the county at the time of the application for process. *Ibid.*

16. A justice of the peace is not authorized to issue a warrant against an inhabitant having a family, or against a freeholder, unless the applicant state in the affidavit upon which he applies for such process, facts and circumstances showing the grounds of the application; the mere allegation, that he believes there will be danger of losing his debt unless a warrant issues, will not be sufficient. *Loder v. Phelps*, 13 Wend. 46.

II. *Process, and by whom it may be served.*

17. The plaintiff in a Justice's Court may serve his own summons, either where he is himself a constable or specially deputed for the purpose. *Tuttle v. Hunt*, 2 Cow. 436.

18. The return of a summons in a Justice's Court, personally served, and stating the time when, is sufficient. *Legg v. Stillman*, 2 Cow. 418.

19. In Justice's Courts, in cases where summons is the regular process, a warrant without oath is void; the justice has no jurisdiction over

the person of the defendant; and all parties concerned in the arrest under such process are trespassers. *Gold et al. ad. Bissell*, 1 Wend. 210.

20. After service of a summons by copy, if the plaintiff omit any further proceeding for twelve months, it will be irregular to issue a warrant founded on such summons. *Ibid.*

21. A party in a Justice's Court is not accountable for the issuing of process, unless he directs or sanctions it. *Ibid.*

22. Under the justice's act of 1824, the oath of the party applying for a warrant is proof within the meaning of the statute, whereon the necessity and propriety of issuing a warrant may be determined. *Bissell v. Hills*, 3 Wend. 389.

23. A justice of the peace may issue process, and make it returnable at any place in the county in which he is an officer. *Schroepell v. Taylor*, 10 Wend. 196.

24. *Mense* process in a Justice's Court is amendable in the name of one of the plaintiffs: thus, as in this case, a summons at the suit of several plaintiffs may be amended after the return of the same, by altering the Christian name of one of the plaintiffs from Joseph to Jasper. *Brace et al. v. Benson*, 10 Wend. 213.

25. Where an illegal arrest is made, the attorney who appears to advocate the cause is not responsible, unless he officiously interposed in directing the arrest. *Hunter v. Burtis*, 10 Wend. 368.

26. A summons in a Justice's Court, returnable in the forenoon of the 8th day of a month, is well served in the afternoon of the second day of the same month. *Columbia T. R. v. Hugwood*, 10 Wend. 493.

27. A justice may refuse to enter a judgment of nonsuit against a plaintiff who fails to appear on the return of the process, within one hour after the same is returnable, where reasonable cause exists for such refusal. *Barber and Grego v. Parker and Cook*, 11 Wend. 51.

28. Where a suit is brought in a Justice's Court in the names of two plaintiffs, an affidavit that one of the plaintiffs is a non-resident of the county, is not sufficient to authorize the issuing of a warrant. *Linnell et al. v. Sutherland*, 11 Wend. 568.

29. A warrant issued under the justice's act is not spent if the justice, on the defendant being brought before him, after calling the parties, declares himself unable to try the cause, and directs them to go before another justice. *Arnold v. Steves*, 10 Wend. 514.

30. Previous to the revised statutes, the constable had a right to detain the defendant for a reasonable time, while making a *bona fide* effort to find a justice to hear the cause; the period now is fixed at twelve hours. *Ibid.*

31. In a suit before a justice against joint debtors, a non-resident plaintiff is entitled to proceed by warrant, although one of the defendants is a non-resident of the county in which the process issues; and on one of the defendants being brought into Court, the justice may render judgment against both. *Dearborn v. Kent*, 14 Wend. 189.

32. It is competent to a justice to amend an attachment issued by him, by inserting after the return of the process the amount of the debt

sworn to by the applicant. *Near v. Van Alstyne*, 14 Wend. 230.

III. Appearance: (a) *Who may appear and advocate the cause.*

33. A voluntary appearance of A. for B., a defendant, without process, there being no proof of his authority so to appear, is void. *Stoddard v. Holmes*, 1 Cow. 245.

34. So where the cause has been discontinued. *Ibid.*

35. A parol authority to appear in a Justice's Court is sufficient; but should in general be clearly proved. *Paul v. Groat*, 1 Cow. 113. *S. P. Tullock v. Cunningham*, 256.

36. Though where a father offers himself to appear for his son, the defendant, slight proof is sufficient. *Ibid.*

37. The attorney may himself be a witness to prove such a power. *Ibid.*

38. A parol warrant of attorney to appear in a Justice's Court is sufficient, and may be proved by the attorney himself. *Pisley v. Bulls*, 2 Cow. 421.

39. A justice has no right to admit an attorney to appear upon his own knowledge of his authority. *Beaver v. Van Every*, 2 Cow. 499.

40. A constable appearing on the trial of a cause as the attorney of a plaintiff, and proving the demand declared on, is a violation of the statute prohibiting a constable from appearing and advocating for either party at the trial, although at the time there was no appearance by the defendant, nor any one in his behalf. *Ford v. Smith*, 11 Wend. 73.

41. A power of attorney to appear and prosecute a suit in a Justice's Court, executed by the party on the record, authorizes the appearance, although such party is but a nominal plaintiff, and not the party in interest. *Culver v. Barney*, 14 Wend. 161.

42. In a Justice's Court, it is not necessary that the attorney for the plaintiff should produce a written authority to prosecute the suit. *Blatchley v. Moser*, 15 Wend. 215.

43. A justice of the peace is not bound to require proof of the authority of a person who claims to appear as attorney for one of the parties in a cause prosecuted before him, if the other party does not object to such appearance; if a party does not object to the appearance of his adversary by attorney, he will be deemed to have admitted his authority to appear. *Ackerman v. Finch*, 15 Wend. 652.

(b) *Appearance of an infant.*

44. A justice may appoint a guardian *ad litem* for an infant; and if the infant does not nominate a guardian, the justice may appoint such person as he shall think proper on the motion of the plaintiff; but this must be a real, not a fictitious person. *Bullard v. Spoor*, 2 Cow. 430.

IV. Declaration, when good.

45. A declaration in general *indebitatus assumpsit* in a Justice's Court is good on general demurrer, though it contain neither time nor place, nor any request to pay. *Keyser v. Shafer*, 2 Cow. 437.

46. Where the plaintiffs in a Justice's Court

declared on a special contract; *held*, that they could not recover upon evidence applicable to the general counts only, such evidence being objected to. *Deserport v. Wheeler*, 7 Cow. 231.

47. A declaration in a Justice's Court, where the plaintiff declares on a book account generally, and at the same time exhibits a written account of items, is good; and on appeal, evidence should be received that the account thus exhibited was returned by the justice, and filed with his return, although not attached thereto. *Stolp v. Van Cortlandt*, 3 Wend. 492.

47*. A declaration in a Justice's Court, if objected to before the justice, must be good in form as well as substance; and if upon demurrer he adjudges it good, when in fact it was defective in form or substance, his judgment will be reversed. *Stone v. Case*, 13 Wend. 283.

V. Pleas and issue.

48. In debt, on a justice's judgment, it is no defence that the plaintiff told the constable, who held an execution upon the judgment, to sell the defendant's carriage for as much as he could get; and that if it did not bring the amount of the judgment, to have it bid in for him, and he would take it in satisfaction for the judgment, which was accordingly done. *Tullock v. Cunningham*, 1 Cow. 266.

49. The plaintiff may recover the balance. *Ibid.*

50. Such a proceeding, it seems, would justify the constable in returning the execution satisfied. *Ibid.*

51. The defendant in a Justice's Court, though he omit to appear at the return of a summons, may yet plead at an adjourned day, on paying the cost of the adjournment and subsequent proceedings. *Louther v. Crummit*, 3 Cow. 87.

52. An amendment is allowable in a Justice's Court by adding a plea after issue joined upon terms. *Colvin v. Curwin*, 15 Wend. 557.

53. If, on the return of a summons in a Justice's Court, there is no appearance, but the cause is adjourned to a future day, on such adjourned day the party to the suit may interpose a plea. *Riley v. Seymour*, 1 Wend. 143.

54. A plea of privilege in a Justice's Court by an attorney, will, after an appeal, be construed without regard to established forms or technical rules, and all necessary averments will be presumed. *Van Alstyne v. Dearborn*, 2 Wend. 586.

55. Privilege may be plead in a suit before a justice, though commenced by summons. *Ibid.*
56. A demurrer may be interposed to pleadings in a Justice's Court, in which case the pleadings must be tested by the same rules which govern in other Courts. *Van Hoesen v. Van Alstyne*, 3 Wend. 75.

57. Where the essential rights of the parties depend upon the pleadings exhibited in a Justice's Court, the Court will be governed by them, notwithstanding the latitude allowed in reference to such pleadings. *Hardy v. Rowe*, 7 Wend. 453.

58. After the decision of a demurrer against a defendant, a justice may refuse to give leave to plead; the exercise of his discretion, however, in this particular, is subject to review by certiorari. *Sloan v. Case*, 10 Wend. 370.

59. A demurrer is not an issuable plea within the meaning of the 21st general rule of the Supreme Court. *Marsh v. Burney*, 10 Wend. 539.

60. The same nicety and precision is not

required in pleadings joined in a Justice's Court which are required in a Court of record; and evidence will be received under pleadings joined in the former, which would not be admissible under pleadings joined in the latter. *Musier v. Trumpbour*, 5 Wend. 274.

VI. Plea of title.

61. A plea of title may be put in, in a Justice's Court, in any action wherein the title to land in any wise comes in question; and if the plaintiff commence a suit in the Common Pleas for the same cause of action, and succeed in it, he is entitled to double costs; though the defendant there puts in a different plea, and the plaintiff went to trial on such plea. *The People v. Onondaga Common Pleas*, 3 Wend. 263.

62. A plea of title put in in a Justice's Court, and a compliance with the requirements of the statute in such cases, does not oust the justice of jurisdiction, in an action of debt for a penalty for not removing an obstruction in a highway. *Fleet v. Younge*, 7 Wend. 291.

63. It is the justice's duty to decide whether such plea, when put in, is appropriate to the action prosecuted before him. *Ibid*.

64. Where an action of trespass is removed from a Justice's Court in consequence of the interposition of a plea of title, the defendant cannot add in the Superior Court the plea of *not guilty*, though he alleges that the *locus in quo*, as verbally described in the Justice's Court, (the declaration being general there,) was different from that specially described in the *narr.* in the Common Pleas. The proper course is for the plaintiff to ask leave to amend his former declaration by an insertion of a description of the premises; if the description be incorrect, the defendant may move to set it aside, otherwise he must be confined to the plea of title. *Tuthill v. Clark*, 12 Wend. 207.

VII. Set-off.

65. A plaintiff may before trial set off his demand prosecuted in the Supreme Court against a demand of the defendant, prosecuted by him against the plaintiff in a Justice's Court; and if after a verdict against him in the Justice's Court, the plaintiff here appeals to the Common Pleas, and obtains judgment of nonsuit or discontinuance, his demand here is revived as a subsisting demand, and the judgment of the Common Pleas may be replied in answer to the judgment in the Justice's Court pleaded in bar of the plaintiff's right of recovery. *Lightbody v. Potter*, 10 Wend. 534.

66. Where a defendant had specified that his demand was for grain, hides, and boarding, and on the same day after the adjournment informed the plaintiff's attorney that he had also an account for a stove sold, and the justice on the trial refused to receive evidence of the sale of the stove; it was held, that he had erred, and the judgment rendered by him for the plaintiff was reversed. *Harrington v. Ensign*, 11 Wend. 554.

67. In a Justice's Court, a defendant who claims to be entitled to a set-off is not bound to furnish a formal bill of particulars; but must specify the nature of his claim with reasonable certainty. *Ibid*.

VIII. Plea of a former action.

68. It is a good plea in *assumpsit*, that the defendant had first brought *assumpsit* against the plaintiff before a justice; but if both suits are brought at the same time, the process first served shall take preference. *Thomson v. Chase*, 1 Cow. 115.

69. If commenced on the same day, they shall be deemed to have been commenced at the same time; for the Court will not distinguish between the fractions of a day. *Ibid*.

IX. *Adjournment*: (a) *When an adjournment may be granted, on what security, and for what time.*

70. In an action against the surety for an adjournment, under the fourth section of the twenty-five dollar act, the original judgment is the measure of damages. *Stewart v. M'Guin*, 1 Cow. 99.

71. To bring the security within the fifth section of the act, the adjournment must be on oath. *Ibid*.

72. The cause being adjourned under the fourth section, upon giving security, the defendant appeared at the adjourned day, and on verdict against him, his bail immediately tendered him to the justice, who called for a constable to take charge of him, but finding none, said he had nothing to do with the defendant; held, that the bail was discharged, though, on entering judgment and issuing execution, the principal was not to be found. *Cornell v. Reynolds*, 1 Cow. 241.

73. It seems, that a verdict by which the jury found that the prisoner was not delivered up, and that the bail was still holden for debt and costs, is a good verdict in substance. *Ibid*.

74. Where on adjournment the defendant gives security to appear and stand trial, or surrender himself in execution, in case judgment shall go against him, it is the duty of the plaintiff to take out execution as soon as he can legally do so, or the surety is discharged. *Ross v. Pulver*, 1 Cow. 246.

75. This should be forthwith on judgment if the defendant is a single man, and not a freeholder; or if a man of a family or a freeholder, within thirty days after the judgment, exclusive of the day of judgment. *Ibid*.

76. And even where there is no alternative in the undertaking of the surety, but it is absolute to pay, it seems he would be discharged; if the plaintiff do not take his principal in execution as soon as he can, after a request by the surety that this be done; if the surety be injured by the delay. *Ibid*.

77. Where the plaintiff proceeds as a non-resident, security for an adjournment need not be given by the defendant; but if in fact given, whether the surety is liable on his undertaking? *Quære. Ibid*.

78. The security for an adjournment, under the fifth section of the twenty-five dollar act, is not satisfied by the mere appearance of the defendant at the adjourned day, but the debt must be paid, or the body rendered in execution. *Charles v. Hyatt*, 1 Cow. 253.

79. Whereas appearance alone satisfies the

terms of the security, under the fourth section. *Ibid.*

80. The justice may without consent of parties adjourn to a convenient place, different from that at which the process is returnable, it having been returned, and both parties appearing there. *Morrell v. Near*, 1 Cow. 112.

81. And if the parties accompany the justice without objection, it is equivalent to a consent to the adjournment. *Ibid.*

82. A justice may, on the plaintiff's request, adjourn seven days exclusive from the return day of a summons, when the sixth is Sunday. *Speidall v. Fush*, 1 Cow. 234.

83. The twelve days adjournment upon a warrant are not satisfied by an adjournment short of that period; but the justice may adjourn from time to time, at shorter periods than twelve days, till that time is reached by an aggregate of the several adjournments. *Richardson v. Brown*, 1 Cow. 255.

84. Though the cause have been twice adjourned by consent, and the last adjournment be under the defendant's stipulation that he will not delay the cause further, but will absolutely come to trial on the said adjournment day, yet the justice is bound to adjourn again on the defendant's giving security, and showing on oath the absence of material testimony, &c., with due diligence used to obtain it. *Smith v. Fenton*, 2 Cow. 425.

85. The defendant is entitled to one adjournment of course, on making oath and giving security; and on showing cause, he may have a still further adjournment, provided the three months have not expired. *Ibid.*

86. Where a cause before a justice was adjourned for more than twelve days, and an engagement in writing was entered into by a surety that he would pay the damages and costs which might be adjudged against the defendant, if he did not personally appear on the day of adjournment, such engagement was held valid, although it omitted the alternative that the defendant should render himself in execution; and on the neglect of the defendant to appear, the surety was adjudged responsible for the judgment which was rendered in the cause, notwithstanding the execution against the defendant was returned in less than ninety days, and that it was shown that the defendant had obtained an insolvent's discharge, exempting his body from imprisonment within ninety days after the issuing of the execution. *Fonday v. Cuyler*, 1 Wend. 464.

87. Where a cause in a Justice's Court is adjourned until one o'clock, P. M. of a day certain, and the justice is detained in the discharge of other official duties until after five o'clock of the same day, he may after that hour proceed and try the cause, although the defendant has departed from the place of trial. *Hunt v. Wickwire*, 10 Wend. 102.

88. An adjournment of a cause in a Justice's Court must be regularly made, or the cause is out of Court. An adjournment by agreement of parties in the absence of the justice is not enough, although subsequently entered by him on his docket; if the defendant does not appear at such specified time, and judgment is rendered

against him, it will be reversed. *Kimball v. Mack*, 10 Wend. 497.

(b) *When an improper adjournment amounts to a discontinuance, and what is a waiver of the irregularity.*

89. A writing entered in the justice's docket on the return of a warrant issued upon oath, and on the defendant's request to adjourn, whereby one acknowledges himself bail for an adjournment, "agreeably to the law," though the adjournment be for more than twelve days, is a valid security within the fourth section of the twenty-five dollar act. *Steward v. M'Guin*, 1 Cow. 99.

90. The statute prescribes no particular form for such a security. *Ibid.*

91. Charging the principal in execution does not in such a case discharge the surety; otherwise had it been under the fifth section of the twenty-five dollar act. *Ibid.*

92. An agreement that a cause should be adjourned three days, and that then, if S. do not attend as a witness, the justice may adjourn for such reasonable time as he may deem necessary to procure the attendance of the witness, is a valid and binding agreement, and cannot be revoked without the consent of both parties. *Richardson v. Brown*, 1 Cow. 255.

93. If such agreement does not provide that security shall be given, the justice may adjourn without security, this being waived by the silence of the parties. *Ibid.*

IX. Trial in a Justice's Court.

94. Admitting evidence of a plaintiff's declaration in his own favour, if objected to, is fatal on error, though the Court below direct the jury to disregard it. *Tuttle v. Hunt*, 2 Cow. 436.

95. Where the pendency of a suit commenced by summons is pleaded in a Justice's Court, in bar to a suit commenced by warrant against a defendant about to abscond, the fact of the defendant being about to abscond should be replied; and whether such replication be put in or not, the plaintiff is bound to prove the fact on the trial by evidence other than the affidavit on which the warrant was obtained. *Kinney v. Green*, 10 Wend. 523.

96. A justice at the trial has a right to nonsuit the plaintiff if, in his judgment, he fails upon his own showing to make out his case, either on the ground of the incompetency or the insufficiency of his evidence; and a judgment of nonsuit in such a case is no bar to another action for the same cause. *Elwell v. M'Queen*, 10 Wend. 519.

97. But if the cause be submitted to the justice after hearing proof, and he takes time to make up his judgment, it is not then in the power of the justice to nonsuit the plaintiff; his determination is equivalent to the verdict of a jury and a judgment thereon, and though he may call his judgment a judgment of nonsuit, and enter it accordingly, it will be deemed in law a judgment for the defendant, and will be a bar to a subsequent action. *Ibid.*

98. Where, upon the return of a summons in a Justice's Court, after waiting an hour and

twenty minutes, the plaintiff exhibited his declaration, and proceeded to the proof of his demand by examining two witnesses; and then (an hour and a half after the time specified in the summons for appearance) the defendant appeared and asked leave to plead, offering to pay all costs, and the justice refused to give such leave, and only permitting him to cross-examine the plaintiff's witnesses; *it was held*; that the justice had erred, and a judgment of the Common Pleas reversing the justice's judgment was affirmed by this Court. *Pickert v. Dexter*, 12 Wend. 150.

XI. Trial by jury; (a) Venire, and where irregularities in the venire are cured.

99. An assistant justice of the city of New York is bound to issue a *venire*, if demanded, on the same day on which the first order for an adjournment is made, after issue, and before proceeding to inquire into the merits of the cause. *Bayless v. Crany*, 1 Cow. 86.

100. Proceeding to inquire into the merits means the investigation of the merits by an examination of witnesses or other testimony. *Ibid.*

101. Where the justice tells the plaintiff to go on to trial, after both parties have avowed themselves ready, and on being asked, the defendant admits part of the plaintiff's account, and a witness for the plaintiff is partly sworn, it is too late to call for a *venire*. *Gales v. Barnes*, 1 Cow. 235.

102. In an action under the fifty dollar act, it is too late for the defendant to demand a jury of twelve men, after a jury of six has been demanded by the plaintiff, and a *venire* issued. *Bullard v. Spoor*, 2 Cow. 430.

(b) Challenge.

103. The justice may on his own motion challenge and set aside a juror for intoxication. *Ibid.*

104. If neither party object, this silence concedes the fact of intoxication. *Ibid.*

(c) Proceedings of the jury after they have retired, and until their verdict is recorded.

105. A judgment will not be set aside because a jury drinks spirituous liquors during a suspension of proceedings in the cause, but only for doing this while they are sitting as a jury. *Dennison v. Collins*, 1 Cow. 111.

106. In this case it did not appear that the liquors were furnished by one party more than the other, nor that the jury drank to excess. *Ibid.*

107. It is error for the justice to hold any intercourse with the jury at their room, without the consent of the parties, as going into the room and hearing certain questions asked him, though he do not answer them; or sending a paper to the jury, though his return do not state what it was. *Benson v. Clarke*, 1 Cow. 236.

108. To reverse a justice's judgment, on the ground that a constable was not sworn to attend a jury, it must expressly appear from the return that the jury left Court; no intendment will be indulged in support of such objection. *Halch v. Mann*, 9 Wend. 262.

109. After a cause tried in a Justice's Court

has been submitted to the jury, and they have retired to consider of their verdict, it is not irregular in the justice, at the request of the jury, to give them further instructions upon the law of the case, if the parties be present, or have the opportunity of being so. *Rogers v. Moulthrop*, 13 Wend. 274.

(d) Verdict.

110. In *assumpsit* a verdict for ten dollars with interest from such a day held good. *Page v. Cady*, 1 Cow. 116.

111. The Court may compute the interest, and render judgment for both that and the principal. *Ibid.*

112. Though a party having a justification will lose his defence by joining in a plea with another not entitled to justify, still a verdict cannot be rendered against him, unless he is proved guilty under the plea of the general issue. *Gold v. Bissell*, 1 Wend. 210.

113. Where a plaintiff neglects to appear when a verdict is brought in, the justice may enter a judgment of discontinuance. *Relvea v. Ramsay*, 2 Wend. 602.

114. A judgment rendered by a justice on a verdict received in the absence of the plaintiff is not void, but voidable only, and its validity is not inquirable into collaterally. *Ibid.*

115. Where a verdict is found for the defendant, and the justice returns that in pursuance of the statute he entered judgment for him, it will be intended that such judgment included costs. *Stricker v. Mott*, 6 Wend. 465.

116. The verdict being for the defendant, the costs follow as a matter of course. *Ibid.*

XI. Judgment: (a) Judgment after issue joined.

117. Where the defendant made affidavit that the justice was a material witness, and moved for a nonsuit, and the plaintiff offered that the statement of the justice might be received as legal evidence, to which the defendant refused to accede, and the justice nonsuited the plaintiff with costs, the judgment was reversed. *Vanderveer v. Stanton*, 1 Cow. 64.

118. On inquest by default, the issue will be deemed well joined, though no *similiter* be added to the plea of the general issue; if &c. be added to the words "and of this he puts himself upon the country." In such a case, &c. shall be construed to mean a *similiter*. *Escret v. De Graff*, 1 Cow. 213.

119. Where a juror was, without the knowledge of justice or parties, absent while a witness was under examination; but as soon as this was discovered, the examination was suspended, and on his return soon after, the parties proceeded without objection, and re-examined the witness, so that the juror heard all the evidence; *held*, that the judgment ought not for this reason to be reversed. *Eastman v. Tuttle*, 1 Cow. 248.

120. A justice of the peace having regularly heard a cause, *ex parte*, in the defendant's absence, cannot, though both parties be present, open the matter, and proceed to a rehearing without the plaintiff's consent. *People v. Lynde*, 8 Cow. 122.

121. He is bound to enter judgment accord

ing to the proof, and give the plaintiff a transcript, if it be a case requiring a transcript; and if he refuses, a *mandamus* will lie commanding him to do so. *Ibid.*

(b) *Judgment by confession.*

122. The act (sess. 41, ch. 94, s. 6 and 7.) empowering a justice of the peace to render judgment on confession to \$100, and prescribing the manner in which this shall be done, and declaring the judgment void unless its provisions are complied with, did not require a particular of the items, oath, &c., except where the judgment exceeded \$50, (exclusive of costs.) But see the statute, (sess. 47, ch. 238, s. 12 and 13.) which now requires this where the judgment exceeds \$25, (exclusive of costs.) *Griffin v. Mitchell*, 2 Cow. 548.

123. Omitting a particular of the items, oath, &c., renders the judgment void as to creditors only; but it is valid and binding upon the defendant. *Ibid.*

124. A judgment confessed before a justice for \$50 or less is good, without the oath and specification required by the seventh section of the fifty dollar act. *Snyder v. Warren*, 2 Cow. 518.

125. The confession of a judgment on the authority of a defendant, as upon a warrant, where he is not in fact arrested and brought before the Court, is void. *Colvin v. Luther*, 9 Cow. 61.

126. The 13th section of the fifty dollar act (sess. 47, ch. 238.) applies solely to voluntary judgments by confession without process. *Ibid.*

127. By that section, if the confession of judgment be not in writing with the proper affidavit and particular, the judgment is void as to creditors; and a purchaser of chattels under the defective judgment, with notice of the defect, is not a *bona fide* purchaser within that section, and is liable to a valid levy and sale of the same chattels upon a subsequent execution at the suit of another creditor. *Ibid.*

128. A specification under a justice's judgment, rendered on confession, stating the indebtedness to be "for two promissory notes which were given on a balance of settlement," is not a compliance with the statute in such cases. *Case v. Redfield*, 7 Wend. 398.

129. A plaintiff in a judgment void for want of a sufficient specification, becoming a purchaser under an execution issued on such judgment, is not entitled to be considered as a *bona fide* purchaser. *Ibid.*

130. A judgment in a Justice's Court cannot legally be entered on confession, unless the defendant is brought in by summons, or voluntarily appears in Court and confesses judgment; authority given to the justice at an accidental meeting in the street to enter judgment is not sufficient. *Tenny v. Filer*, 8 Wend. 569.

(c) *What is evidence of the existence of a judgment in a Justice's Court.*

131. The certificate of a justice is not admissible to prove his proceedings till after judgment in the cause. But it is then evidence of the judgment, and of the proceedings which led to it. *Thomson v. Chase*, 1 Cow. 115.

132. On appeal from a Justice's Court, a

Court of Common Pleas cannot restrain the appellant from proceeding in the cause, until security for costs is given, on the ground that he is a non-resident. *People v. Judges of Washington County*, 1 Cow. 576.

133. Nor can they order that, until security for costs is given, the appellee shall be entitled to an affirmance of his judgment *ex parte*. *Ibid.*

134. The security made necessary by the statute, (sess. 41, ch. 94, s. 17.) is all that can be required. *Ibid.*

135. Form of entry of judgment in a justice's docket. *Smith v. Mumford*, 9 Cow. 26.

136. An action lies on a justice's judgment immediately on its rendition, though execution be stayed by the statute. *Ibid.*

137. The transcript of a justice's judgment to be filed with and entered by the clerk of the county, pursuant to the ninth section of statute, (sess. 47, ch. 238.) need not show the proceedings before the justice with respect to the regularity of the judgment, or give jurisdiction. *Jackson v. Jones*, 9 Cow. 182.

138. The transcript being duly entered is, *per se*, a lien on the lands of the judgment debtor; and proving the transcript, filing an entry, is sufficient in deducing a title by sheriff's sale under a *fieri facias*; the justice or any other proof of the judgment before him need not be produced. *Ibid.*

139. A short form of entering a judgment in a justice's Court, for the purpose of being transcribed and docketed, so as to bind lands. *Jackson v. Tuttle*, 9 Cow. 223.

140. The transcript exemplified is *prima facie* evidence of the regular rendition of the judgment, without any other proof; and also that the justice had jurisdiction. *Ibid.*

141. A transcript of a justice's judgment is good, although it does not on its face show that the justice had jurisdiction. *Tuttle v. Jackson*, 6 Wend. 213. *Jackson v. Rowland*, 6 Wend. 666.

142. A transcript, although in bad English, will be held good if intelligible in the essential parts. *Jackson v. Browner*, 7 Wend. 388.

143. The justice before whom a suit is commenced may prove the pleadings exhibited before him, without producing his docket or a transcript. *Brotherton v. Wright*, 15 Wend. 237.

144. Upon a plea of former recovery, a justice is bound to consider the plea proved, when the cause has been tried before himself, and judgment rendered by him, although not formally entered upon his docket. *Colvin v. Corwin*, 15 Wend. 557.

XII. *Costs.*

145. If the costs of an adjournment procured by the defendant be included in a judgment for the plaintiff, it is error. *Dennison v. Collins*, 1 Cow. 111.

146. A bond given by a plaintiff in a judgment in the Justice's Court of the city of New York, after the suing out of a *certiorari*, to restore the damages for which the judgment was obtained, with the interest and costs, does not render the obligor liable on his bond to the payment of the costs of reversal, in case the judgment be reversed. *Griffin v. Mortimer*, 8 Wend. 536.

147. A plaintiff in the Common Pleas is not entitled to double costs, but, on the contrary, is liable to pay costs to the defendant, where the recovery is less than a sum sufficient to carry costs in the Common Pleas in an action of trespass *quare clausum fregit*, originally commenced in a Justice's Court, but removed by plea of title into the Common Pleas, in which Court the plaintiff, after a plea of *liberam tenementum*, new assigns, and the defendant pleads not guilty to such new assignment. *The People v. The Hensselaer Common Pleas*, 2 Wend. 647.

XIII. Execution.

148. A discharge of the debtor from arrest on execution extinguishes the judgment, though the discharge be after judgment against the bail; he is also discharged. *Lathrop v. Briggs*, 8 Cow. 171.

149. A justice's execution may be renewed without a formal return of *nulla bona*, and it may be renewed after the return day, from time to time, at the option of the plaintiff. *Vigier v. Ward*, 1 Wend. 551.

150. The six months allowed for the renewal of an execution by a justice of the peace, after his removal from office, are calendar months. *Parsons v. Chamberlin*, 4 Wend. 512.

151. The expiration of the time for which a justice is appointed is considered a removal within the meaning of the act, in respect to the renewal of executions. *Ibid.*

152. A variance between the judgment and the execution issued thereon in a Justice's Court will not deprive a party of a justification under such judgment and execution, where the variance happens by mistake. *Borland et al. v. Stewart*, 4 Wend. 568.

153. Such mistake may be shown by the justice. *Ibid.*

154. A slight variance, as to the amount recovered before a justice, between the judgment and the execution issued thereon, will not affect the right of a purchaser of property sold by virtue of such execution. *Jackson v. Page*, 4 Wend. 586.

155. A county clerk is authorized to renew an execution issued by him, or to issue a further execution. *Ibid.*

156. The fact of a constable applying to a justice for the renewal of an execution is *prima facie* evidence that it was delivered to him in season to levy and collect the amount of such execution. *Wilson v. Gale*, 4 Wend. 623.

157. It is the duty of a constable to whom an execution is delivered, in all cases, to search for property before he takes the body of the defendant; and if it be shown that the defendant has property in his open and visible possession, which was subject to the execution, and might with reasonable diligence have been found by the officer, he is liable to an action for the arrest. *Holliester v. Johnson*, 4 Wend. 639.

158. If the defendant declares that he has no property, the arrest may be made immediately. *Ibid.*

159. A renewal of an execution need not be signed by a justice; any memorandum in the handwriting of the justice, upon any part of the execution, clearly showing intention of renew-

ing it, accompanied by redelivery to the constable, is sufficient. *Preston v. Lewis*, 6 Wend. 663.

160. Case lies against a constable for not levying an execution of the goods and chattels of a defendant when directed so to do, and instead thereof committing the defendant to prison. Debt is not the only remedy. *Platt v. Sherry*, 7 Wend. 236.

161. A plaintiff in an execution is not bound to tender a bond of indemnity until after a jury has passed upon the question of property. *Ibid.*

162. A constable, who levies on property by virtue of a justice's execution, may sell the same after the expiration of his term of office; and such was the law previous to the act of 1830. *Alderman v. Shaw*, 7 Wend. 220.

163. A sale is good, had under an execution issued by a county clerk on a transcript of a justice's judgment, although made after the return day. *Jackson v. Browner*, 7 Wend. 388.

164. A justice's execution, which should be made returnable in ninety days, is void if made returnable in thirty days, and a creditor as well as the defendant in the execution may take the objection. *Farr v. Smith*, 9 Wend. 338.

165. Debt lies against a constable and his sureties for the mere neglect to return an execution; it is not necessary to show moneys collected by him, to sustain the action. *Sloan et al. v. Case*, 10 Wend. 370.

166. The renewal of a justice's execution must be signed by the justice, or the constable who executes the process is a trespasser; though it be shown that the renewal is in the handwriting of the justice, and that he made an entry of the fact in his docket, the officer will not be protected. *Barhydt v. Falk*, 12 Wend. 145.

167. It is the duty of a constable to search for property to satisfy an execution, before he takes the body of the defendant; but in an action against him for an illegal arrest, the *onus probandi* lies on the plaintiff, who must show that he had property clearly subject to the execution; and that the constable had due notice thereof: without such proof, the law will presume that the officer did his duty. *Ibid.*

168. An action against a constable for not returning an execution may be brought in a different county from that of which he was an officer. *Hopkins v. Haywood*, 13 Wend. 265.

169. A justice's execution issues both against the goods and person of the defendant, in cases where he is subject to imprisonment. *Taylor v. Fuller et al.* 3 Wend. 403.

170. A justice's execution, regular upon its face, is sufficient to protect the officer executing the process, whether the magistrate had or had not jurisdiction of the case in which the process issued. *Coon v. Conyden*, 12 Wend. 496.

XIV. Attachment: (a) Against a concealed debtor.

171. Affidavits of a plaintiff, that from reports and information, he believed that his debtor kept out of a county to avoid paying his debts, and of his witnesses, that they had been informed that he had departed, and as his creditors said, for the purpose of defrauding them,

are not sufficient to authorize issuing of an attachment by the justice. *Tallman v. Bigelow*, 10 Wend. 420.

172. An attachment against the property of a person who temporarily resided in a county where the process issued, was held good on a bill of exceptions, although his usual place of residence was shown to be in another county; it appearing that the attachment issued on due proof and the proper bond being given, and it being stated that there was no evidence that the person against whom trover was brought, for the property taken under the attachment, knew the defendant in the attachment, or where he resided, or that he had a family. *Schroepel v. T aylor*, 10 Wend. 196.

173. A receipt taken by a constable for the delivery of property seized by him under a justice's attachment, is a valid instrument. *Harvey v. Lane*, 12 Wend. 563.

174. It is, however, a good defense to the receiptor, that the property has been taken from his possession by the rightful owner. *Ibid.*

175. An attachment issued by a justice against a debtor keeping himself concealed to avoid the service of process, is not supported by an affidavit that he keeps himself concealed to avoid the service of a warrant issued under the fourth section of the act to abolish imprisonment, &c., unless it affirmatively appear that he was charged only with an intent to commit a fraud, or with fraudulently contracting the debt; unless it so appear, as the process may be criminal, it consequently is not shown that he concealed himself to avoid the service of civil process. *Lynde v. Montgomery*, 15 Wend. 461.

(b) *Against a non-resident debtor.*

176. The summons or attachment authorized by the 33d section of the act to abolish imprisonment, &c., may issue from a Justice's Court, without any affidavit whatever, against a defendant residing out of the county in which process is asked. *Clark v. Luce*, 15 Wend. 479.

177. A summons under section 32 of the act to abolish imprisonment, &c., may be sued out by a justice against a non-resident defendant, without proof of indebtedness or the giving of security. *Ackerman v. Finch*, 15 Wend. 662.

(c) *When security must be entered.*

178. In cases where security is required before the issuing of process, the error cannot be remedied by giving the security after the process is issued. *Ibid.*

XV. *Appeals to the Court of Common Pleas.*

179. It seems, that an appeal from a final decree brings up an interlocutory order suppressing certain depositions which may bear upon the final decree. *Wilson v. Troup*, 2 Cow. 195.

180. An appeal from a justice's judgment, though after a transcript filed and execution issued, supersedes the execution. *Sholls v. Judges of Yates County*, 2 Cow. 506.

181. This is the process of the Common Pleas, and they may make a rule setting it aside. *Ibid.*

182. On appeal, a bond should be given and

costs paid by the appellant within four days, as required by the fifty dollar act, or the appeal will be ineffectual. *Ibid.*

183. But these facts need not appear from the justice's return. *Ibid.*

184. It will be intended, on the return being filed, that the appellant proceeded regularly before the justice. *Ibid.*

185. The appellee has no right to object to a hearing of the appeal, on the ground that the justice had not endorsed his approbation upon the bond, or omitted to file it within the time required by the act. *Ibid.*

186. This approbation may be inferred from the act of filing the bond. *Ibid.*

187. It is erroneous for a Court of Common Pleas to proceed as a Court of Error, on appeal from a justice, and try the cause without jury, even though both parties elect this form of trial. *Cowen v. Bush*, 3 Cow. 343.

188. Though, on appeal, pursuant to the statute, (secs. 47, ch. 238, s. 36, 37.) the justice do not file his return till after the first day of the term of the Common Pleas next after the appeal, they ought not to quash the return, but proceed thereon when the return comes in. *Kellogg, ex parte*, 3 Cow. 372.

189. The fact, that the costs were paid to the justice, need not be endorsed on the appeal bond. *Ibid.*

190. The notice of appeal served on the justice, pursuant to the act, (secs. 47, ch. 238, s. 36.) did not state that the party appealed to the Court of Common Pleas of, &c., but the appeal bond recited that the appeal was to that Court; and the justice made a return, held, regular. *Clarke, ex parte*, 3 Cow. 379.

191. It seems, the party cannot object that the notice of appeal is defective, but this lies with the justice only. If he deem himself sufficiently informed, and return accordingly, it is enough. *Ibid.*

192. Form of bond, on appeal by plaintiff, from a judgment against him for costs only, before a justice, under the statute. (Secs. 47, ch. 238, s. 36.) *Ex parte Harrison*, 4 Cow. 61.

193. It need not be conditioned to pay the judgment below, or surrender, &c. *Ibid.*

194. So if plaintiff appeal on account of the judgment in his favour being too small. *Ibid.*

195. So if defendant appeal for the smallness of the judgment in his favour. *Ibid.*

196. Otherwise, if a party appeal from a judgment against him for both damages and costs. *Ibid.*

197. How the bond should be in such case. *Ibid.*

198. Bond is, in all cases, to be in the penalty of double the judgment, whether for costs only, or damages and costs. *Ibid.*

199. An appeal to the Court of Common Pleas, from a Justice's Court, cannot be received, unless the forms of proceeding for that purpose, required by the 36th section of the fifty dollar act, (secs. 47, ch. 238.) be strictly complied with. *Ex parte Chrysalyn*, 4 Cow. 80.

200. Thus, if the clause in the appeal bond, required by the act relative to paying the judgment in the Justice's Court, with interest, &c., be omitted, the appeal cannot be received, nor

have the Common Pleas power to amend the bond. *Ibid.*

201. After they are duly possessed of the cause, they may, however, amend as in ordinary cases. *Ibid.*

202. On appeal from a Justice's Court, the bond required by the statute may be executed by attorney. *Ex parte Van Haesen*, 4 Cow. 506.

203. And, to a motion to quash the appeal for want of a proper bond, the exhibition and proof of the power before the Court of Common Pleas, and filing it, is a sufficient answer. That Court may then order the power to be filed with the clerk. *Ibid.*

204. Where the defendant in a Justice's Court pleaded in abatement, upon which issue was taken, but the justice denied an adjournment to the defendant, for the purpose of obtaining evidence to prove his plea; whereupon he pleaded the general issue, and went to trial on the merits, upon which judgment was against him, and then brought a *certiorari* to correct the error of refusing to adjourn, and an appeal to the Common Pleas upon the merits; *held*, that the appeal only would lie; and the *certiorari* was quashed. *Baldwin v. Goodyear*, 4 Cow. 536.

205. If the Court of Common Pleas, at any stage of a proceeding upon appeal from a Justice's Court, become satisfied that the statute (sess. 47, ch. 236, s. 36.) was not complied with in bringing the appeal, they may refuse to proceed; as where, on the trial, they are satisfied that the appeal bond was executed without authority. *Ex parte Shekhar*, 4 Cow. 540.

206. In this and the like cases, they are without jurisdiction. *Ibid.*

207. Under the act, (sess. 47, ch. 236, s. 36, 38.) an appeal lies in all cases, whether the judgment of the justice be upon an issue of law or fact. *Ex parte Haywood*, 5 Cow. 19.

208. The appellee in the Common Pleas cannot object that the appeal bond is in the penalty of more than double the judgment before the justice. *Ex parte Eastbrooks*, 5 Cow. 27.

209. Though a Common Pleas cannot entertain jurisdiction of a cause on appeal, if the bond be defective, yet on quashing the appeal for that cause, the parties being before them, they have jurisdiction of the person, and may award the costs of the motion. *Ex parte Davis and Sewle*, 5 Cow. 33.

210. On appeal to the Common Pleas from the judgment of a justice, the party need not execute the appeal bond. *The People v. Judges of Dutchess*, 5 Cow. 34. *Ex parte Holbrook*, 5 Cow. 35. S. P.

211. It is sufficient if executed by competent sureties. *Ibid.*

212. Under the former statute, (sess. 41, ch. 94, s. 17, 18, 19.) allowing and regulating proceedings upon appeal to the Common Pleas from a Justice's Court; whether a witness sworn in a Court below, without objection to his competency, on the ground of interest, could be excluded in the Common Pleas on that ground? *Quære. Dunlop v. Patterson*, 5 Cow. 243.

213. A witness not sworn in the Court below was inadmissible to prove such interest in the Common Pleas. *Ibid.*

214. Under the act, (sess. 47, ch. 236, s. 36, 38.) an appeal lies in all cases, whether the judgment of the justice be upon an issue of law or fact. *The People v. Judges of Columbia*, 5 Cow. 285.

215. An appeal bond must be in the penalty of double the damages and costs recovered before the justice, or it is void. *Ex parte Corwin*, 5 Cow. 291.

216. An appeal bond must recite the precise amount of the judgment before the justice. *Ex parte Weed*, 5 Cow. 286.

217. On appeal to the Common Pleas and verdict for the defendant, the Court may award double costs, within the statute for the more easy pleading in certain suits. (1 R. L. 155.) *Ex parte Dermismu*, 5 Cow. 416.

218. On appeal under the later act, (sess. 41, ch. 94.) it was not error for the Common Pleas to try without a jury, when none was demanded by either party. *Flower v. Allen*, 5 Cow. 654.

219. That discretion exists in those cases only where the appellee recovers less in the Common Pleas than in the Justice's Court, but still more than \$25. *Ibid.*

220. An appeal lies from the judgment of a justice in favour of the plaintiff, where an issue is joined, though the defendant do not appear, and take no part in the trial. *Ex parte Stafford*, 6 Cow. 44.

221. An appeal bond executed in blank, and delivered to an agent to fill up and make perfect, cannot be altered by him after he has filled the blanks, and delivered the bond to the justice. *Ex parte Decker*, 6 Cow. 59.

222. Whether a parol power to fill the blanks and perfect the bond is valid? *Quære. Ibid.*

223. To warrant an appeal from a Justice's Court, the costs must be actually paid. *Ex parte La Farge*, 6 Cow. 61.

224. An appeal bond must recite the amount of the judgment before the justice. *Ex parte Alford*, 6 Cow. 595.

225. If not, the Common Pleas should dismiss the appeal for want of jurisdiction. *Ibid.*

226. Where an appeal is dismissed by the Common Pleas on motion, upon the ground that they were never possessed of the cause, and had no jurisdiction of it, they should award no costs beyond those of the motion; not the general costs of the cause. *Ex parte Benson*, 6 Cow. 592.

227. S. P. *Ex parte Mallard*, 6 Cow. 593.

228. Where an appeal cause was noticed for trial several times in the Common Pleas, and was finally dismissed on the motion of the appellee, after the trial had proceeded for some time, upon the ground that the appeal bond was defective; *held*, that the Court ought not, even if they had the power, to have awarded to the appellee any costs beyond those of the motion. *Ibid.*

229. An appeal bond should be conditioned that if the appeal be not prosecuted with due diligence, the appellant shall pay the costs of the appeal. *Ibid.*

230. It is not in the power of the justice to waive the payment by charging them in account against the party. *Ibid.*

231. Proceedings ordered to be stayed in an action against the surety in a bond given on appeal from a Justice's Court, on his paying the amount of the penalty into Court with costs. *Oskiel v. De Graw*, 6 Cow. 63.

232. To entitle a party to appeal from the decision of a justice under the fifty dollar act, he must pay not only the seventy-five cents for making and filing the return, but the costs to the justice; paying the seventy-five cents to the justice, and the costs to the opposite party, will not satisfy the words of the act, which are to be taken strictly against the party seeking to appeal. *Ex parte Stephens*, 6 Cow. 69.

233. The plaintiff in a Justice's Court recovered \$10; and on appeal his recovery was reduced to \$5 12½; *held*, that he was entitled to \$7 costs, with disbursements; and that the Common Pleas had no discretion to reduce the costs. *Ex parte Lampman*, 6 Cow. 400.

234. Form of a judgment record in the Common Pleas, on appeal from a Justice's Court. *Jennings v. Webster*, 7 Cow. 256.

235. Though the *placita* omit to state that the Court was held before the judges, and be of a term subsequent to the coming in of the return, and the cause be tried at a subsequent term, and there be no continuances to that time, yet these defects are all cured by the statute of amendments and *jeofails*. *Ibid.*

236. Where an appeal is quashed or dismissed by the Common Pleas for want of jurisdiction, they have no power to award any costs beyond those of the motion. *The People v. Judges of Madison County*, 7 Cow. 423.

237. Not having jurisdiction of the cause, it fails as to general costs. *Ibid.*

238. On appeal from a Justice's Court, the appeal bond must be executed by the party or one of the parties appealing. *Ex parte Brooks*, 7 Cow. 423.

239. Executing by the surety alone is not sufficient. *Ibid.*

240. Where the appeal bond is defective, the Common Pleas may quash the appeal at any time even after trial, and after a motion for a new trial is denied. *Ex parte Brown*, 7 Cow. 468.

241. A trial in a Justice's Court as to some of several defendants puts the whole to the remedy by appeal, though some do not appear. *Moody v. Gleason*, 7 Cow. 493.

242. So where some, being infants, appear by attorney. And in neither case, therefore, will a *certiorari* lie. *Ibid.*

243. The Common Pleas may appoint guardians for infants on appeal, though none were appointed in the Justice's Court. *Ibid.*

244. An appeal bond is valid, though the name of the surety be not mentioned in the body. *Ex parte Fulton*, 7 Cow. 484.

245. One executing a bond is bound by it, though he be not named in the body of it. *Ibid.*

246. An appeal bond and notice of appeal may be delivered to the agent of the justice, and the costs on appeal may be paid to his agent. *The People v. Judges of Dutchess*, 7 Cow. 487.

247. Approval of the surety on appeal need not be endorsed by a justice within any particular time. He may approve in fact of the surety before the bond is executed, and endorse his approbation after the ten days allowed for appeal. *Ibid.*

248. On appeal from a judgment rendered before a justice in favour of *H. g. t.* the overseers of the poor; *held*, that the appeal bond must run to *H.* alone, not to him and the overseers. *Ex parte Hawks*, 7 Cow. 493.

249. Though there be an issue and trial before a justice as to only part of the defendants, yet the remedy is by appeal by all. *The People v. The Judges of Onondaga*, 7 Cow. 492.

250. And the Common Pleas on appeal should continue the cause, and assess damages against those who did not plead before the justice, though the defendants who pleaded to issue be acquitted in the Common Pleas for want of evidence. *Ibid.*

251. If, after trial begun, the Court quash the appeal for this cause, it is a mis-trial, which they should set aside, and then proceed to a trial *de novo*. *Ibid.*

252. On appeal from a justice's judgment, the appellant is not bound to pay his own costs, nor any more than the costs recovered by the opposite party, and included in the judgment. *Ex parte Beadleston*, 7 Cow. 507.

253. An appellee plaintiff in a Justice's Court, though residing out of the county where the appeal is pending, is not within the general rules of a Court of Common Pleas, providing that judgment may be given against a non-resident plaintiff, on his neglect to give the defendant security for costs. *Ex parte Thomas*, 8 Cow. 110.

254. A bond executed in blank as to a material part, with parol authority to an agent to fill up the blank and deliver it, is valid. *Ex parte Kerwin*, 8 Cow. 118.

255. *E. g.* an appeal bond, with a blank for the amount of the judgment. *Ibid.*

256. An appeal bond may be executed by the real as well as the nominal party; *e. g.* the assignee of a note not negotiable, who sues in the name of the assignor, against whom judgment is given by the justice. *Ex parte Lassell*, 8 Cow. 119.

257. Where a judgment was against two before a justice, but qualified as to one, because he had been discharged under the body act, and the other alone appealed; *held*, that the appeal bond need not provide for the surrender of the insolvent's body in execution. *People v. Onondaga Common Pleas*, 8 Cow. 120.

258. The plaintiff appellee or appellant in a Court of Common Pleas may submit to a non-suit, or be nonsuited by the Court, as in other cases. *People v. Tompkins Common Pleas*, 8 Cow. 131.

259. The appellee cannot object that the appeal bond is better for him than the statute requires; as if it omit the usual clause providing for the surrender of the bodies of the appellants. *Ex parte Hurlburt*, 8 Cow. 138.

260. Where the penalty of an appeal bond is not in double the amount of the damages and costs of the judgment rendered by the justice,

the appeal is void, the Common Pleas acquire no jurisdiction, and the defect is not cured; though the parties appear and proceed to trial without raising the objection, and the Court in fact hear, try, and give judgment, and though the judgment be against the party succeeding before the justice, who pays it; yet it is not to be regarded as of any effect whatever, and an action will yet lie upon the original judgment before the justice. *Latham v. Edgerton*, 9 Cow. 237.

261. The parties in a Justice's Court agreed, on the suggestion of the justice, to waive their pleadings, and go into their cause on the merits; on judgment being given, one of the parties appealed, and the justice returned the agreement. *Held*, that no objection could have been taken to the form of the pleadings before the justice, and that the agreement extended also to the cause in the Common Pleas on appeal; and that no objection to the form of the pleadings could be taken there. *Stephens v. Baird*, 9 Cow. 274.

262. An appeal may be prosecuted by the bail for the limits, in the name of the sheriff, on a judgment against him for an escape. An appeal bond executed by the party to be affected by the judgment is a compliance with the statute requiring the bond to be executed by the party in the suit. *The People v. The Judges of the Monroe Common Pleas*, 1 Wend. 19.

263. An appeal bond will be construed according to the intent of the parties, collected from its general scope and tenor. *The People v. The Judges of Oneida Common Pleas*, 1 Wend. 28.

264. An appeal bond by administrators, conditioned to pay such judgment as might be rendered against the intestate, is bad. *The People v. The Judges of Monroe Common Pleas*, 1 Wend. 29.

265. In an appeal cause, a defendant may plead in the Common Pleas an insolvent's discharge, by a plea of *puis: derrein continuance*. *The People v. The Judges of Ontario*, 1 Wend. 80.

266. An appeal bond reciting the judgment as rendered before A. B., justice of the peace, is good, without adding the county of which he is a justice. *Anonymous*, 1 Wend. 85.

267. One of two defendants may appeal to the Common Pleas, and a bond describing him as impleaded with the other defendant is good. *The People v. The Judges of Yates*, 1 Wend. 90.

268. If a party desire to avail himself of any irregularities in an appeal bond, he must set it out specially and at large. *Allison v. Wilkin*, 1 Wend. 153.

269. Wherever there is a recovery in favour of the appellee in the Common Pleas, the condition in an appeal bond is absolute to pay the amount of such recovery, provided an execution has been first issued on the judgment, and the same or any part thereof be returned unsatisfied. A *feri facias* is such an execution as is intended. The clause in the condition of the bond, that "the appellant will surrender his body in execution," applies only to the case of the appeal not being prosecuted with due diligence, where the appellant is bound to pay or surrender. *Ibid*.

270. In an appeal bond against two defendants in an action of trespass, it is not necessary

to provide for a recovery against either. *The People v. Saratoga Common Pleas*, 1 Wend. 281.

271. On appeal, all the costs of the suit must be paid to the justice; the party appellant has no right to retain a portion of them as belonging to himself. *Ibid*.

272. Where a plaintiff is nonsuited in an appeal cause, the defendant is entitled to recover only \$7 costs, exclusive of disbursements. *The People v. Onondaga Common Pleas*, 1 Wend. 290.

273. A Court of Common Pleas cannot allow a justice to amend his judgment, so as to make it conform to an appeal bond. *The People v. Tioga Common Pleas*, 1 Wend. 291.

274. In an appeal bond, the further condition required by the statute may be introduced as an alternative, and the bond will be held good. *The People v. Herkimer Common Pleas*, 1 Wend. 310.

275. For any error that intervenes in a suit before a justice after issue joined, the remedy is by appeal, and not by *certiorari*. *The People v. Schoharie Common Pleas*, 1 Wend. 315.

276. Where a cause on an appeal is submitted to arbitrators, and in the submission it is agreed, "that the appeal shall be, and is thereby discontinued," and the arbitrators, not being able to agree, make no award, the original judgment obtained before the justice remains in force, so that an action of debt can be brought upon it. *Miller v. Van Anken*, 1 Wend. 516.

277. In an action on an appeal bond, which is joint, and not joint and several, the plaintiff cannot recover from the obligees a greater amount than the penalty, though he may have obtained judgment in the original action in the Common Pleas for a much larger sum. *Petty v. Sleight et al.* 1 Wend. 518.

278. But if the declaration claim a greater sum than the penalty of the bond, it is not cause of demurrer. *Ibid*.

279. The declaration need not contain an averment, that an execution had been issued on the judgment in the appeal cause, if the condition of the bond contains no clause that the appellant would surrender his body in execution of the judgment. *Ibid*.

280. The plaintiff will not be affected by a defect in an appeal bond, if he can frame a good declaration upon that which he has received from the defendant. *Ibid*.

281. An appeal does not lie from a justice after the trial of a case on a collateral point; the remedy of the party is a *certiorari*. *The People v. Schoharie Common Pleas*, 2 Wend. 260.

282. The costs on an appeal from a justice's judgment are limited to \$7, besides disbursements, where the recovery does not exceed \$25, and they are given to the prevailing party, whether defendant or plaintiff. *The People v. Orange Common Pleas*, 2 Wend. 390.

283. An appeal bond is good without stating the day of the rendering of the judgment before the justice. *The People v. Orleans Common Pleas*, 2 Wend. 392.

284. In an appeal bond, the amount of the costs need not be stated in the recital of the judgment. *The People v. Chataugue Common Pleas*, 2 Wend. 618.

285. A mis-recital of the day of the rendition of a justice's judgment in an appeal bond is fatal. *The People v. Monroe Common Pleas*, 3 Wend. 426.

286. An appellant who reduces the recovery against him before the justice \$10, or more, is entitled to the costs of the appeal, though the appeal was entered previous to the revised statutes going into effect. *The People v. Herkimer Common Pleas*, 4 Wend. 210.

287. Notice given in a suit before a justice, to produce in evidence on the trial of a cause a written document, is good and operative in the Common Pleas, if such suit be subsequently removed into such Court by appeal. *Wilson v. Gale*, 4 Wend. 523.

288. Although a plaintiff sues in a Justice's Court, where he cannot recover over \$50, he may notwithstanding recover beyond that amount in the Common Pleas, if the defendant appeals from the judgment before the justice. *Jackson v. Covert's Administrators*, 5 Wend. 139.

289. It is not necessary that an officer, taking an affidavit or allowing an appeal from a justice's judgment, should add to his signature the title of his office. *The People v. Rensselaer Common Pleas*, 6 Wend. 543.

290. Papers required to be served on a justice on making an appeal may be served, in his absence, on a member of his family of suitable age. *The People v. Ulster Common Pleas*, 7 Wend. 492.

291. An appeal may be allowed by a commissioner, although he do not reside in the county where the judgment is rendered. *The People v. Rensselaer Common Pleas*, 7 Wend. 533.

292. The security given by a non-resident plaintiff, on obtaining a warrant from a justice of the peace, extends to the final determination of the cause, when carried up by appeal to the Court of Common Pleas; so that the surety is liable for the costs of the appeal, if adjudged against the plaintiff. *Traver v. Nichols*, 7 Wend. 434.

293. The rule of law, that showing title to any lands in a town under a plea of *liberum tenementum*, where the declaration is general, will support the plea, does not entitle the defendant to a verdict, who, under the *proviso* in the justice's act, attempts to show that the plaintiff had not possession of a title to a *locus in quo*, by proving title to lands generally in third persons in the same town. *Ellice v. Boyer*, 8 Wend. 503.

294. To enable a defendant to avail himself of the benefit of that *proviso*, he should object before the justice to the generality of the description of the premises. *Ibid.*

295. Where a plea of title is interposed before a justice, the plaintiff may *new assign*, notwithstanding the provision that on the trial in the Common Pleas he shall declare on the same cause of action. *Ibid.*

296. A plaintiff, whose proceedings before a justice are suspended by a plea of title, may, under the act of 1813, issue a *capias* at any time during the next term of Common Pleas, after the putting in of the plea before the justice; and such issuing of process is a compliance with the condition upon which the liability of the cognitors depends; the words "before

the next Court of Common Pleas" in the statute directing the tribunal in which the subsequent proceedings are to be had, and not prescribing the time of the issuing of the process. *Harris v. Underwood*, 10 Wend. 668.

297. It is enough in such case that the *capias* be in an action of trespass; it need not contain an *ac etiam* clause, particularly specifying the cause of action, or referring to the suit before the justice; and it seems, that proof *aliunde* connecting the two suits is not necessary. *Ibid.*

298. The acknowledging of bail, and the filing of a bail piece, unaccompanied with notice of such proceeding, is not a compliance with the obligation of the defendants to put in special bail. *Ibid.*

299. In an action for debt on such recognisance, it is not necessary to assign breaches or assess damages; the plaintiff, if he recovers, is entitled to the penalty specified in the recognisance. *Ibid.*

300. On appeal from a justice's judgment, a defendant is not permitted to make formal objections to the declaration of which he might have availed himself by demurrer in the Court below. *Dean v. Gridley*, 10 Wend. 254.

301. An action on the case will not lie against a justice of the peace, who by negligence or carelessness gives erroneous information as to the amount of a judgment rendered by him, to a party about to prosecute an appeal, by means whereof the appeal is lost. *Wickware v. Bryan*, 11 Wend. 545.

302. An appellee, the obligee of an appeal bond executed previous to the revised statutes, in whose favour judgment is rendered upon the appeal, is not bound, for the purpose of enforcing his claim against the surety, to issue execution upon such judgment within thirty days after its rendition; such provision being applicable only to bonds executed subsequent to the revised statutes going into operation. *Hamilton v. Averill et al.* 11 Wend. 692.

303. Where an appeal from a justice's judgment is duly made within the time limited by statute, and notice thereof is served on the justice, a constable who has received from the defendant in the execution the amount thereof, on the presentation to him of the certificate of the appeal, is authorized to return the money to the defendant. *Seymour et al. v. Daseomb*, 12 Wend. 584.

304. Where a plea of title is interposed in an action of *quare clavum fregit* in a Justice's Court, and the plaintiff proceeds in the Common Pleas, and the defendant there pleads the general issue, and accompanies such plea with a notice of title in himself and also title in others, the Common Pleas may disregard the pleadings before them, so far as to limit the defence to the plea of title; and, if the defendant fails to show title in himself, to direct a verdict for the plaintiff. *Brotherton v. Wright*, 15 Wend. 237.

305. It is sufficient that the declarations in the two Courts be substantially alike. *Ibid.*

306. A plaintiff in a case thus removed to the Common Pleas by a plea of title, is entitled to full costs. *Ibid.*

307. A return by a justice on an appeal, that

the plaintiff declared on a promissory note purporting to have been drawn by the defendant *in hæc verba*, setting out the note, is equivalent to giving a copy of the note with the signature of the defendant attached thereto. *Mappa v. Pease*, 15 Wend. 669.

308. It is not necessary that a note upon which judgment is rendered should be filed with the justice's return. *Ibid.*

309. But where a paper is omitted to be filed, which should properly be filed with the return, the Common Pleas ought to permit it to be filed on the trial of the cause. *Ibid.*

310. So the Common Pleas should disregard a variance between the pleadings in the Court below and the evidence offered, when it is manifest that no one will be prejudiced. *Ibid.*

311. A party in a Justice's Court has a right to appeal from a judgment rendered on an *ex parte* hearing after issue joined. *The People v. Madison Common Pleas*, 2 Wend. 628.

312. It is no cause for quashing an appeal that a justice takes less costs than he is entitled to receive, when the party appealing is willing and offers to pay all that can be required of him, and in fact pays all that is demanded. *The People v. Genesee Common Pleas*, 4 Wend. 202.

313. A party is not entitled to the allowance on an appeal, unless the *affidavit* upon which the allowance is asked is made within ten days after the rendition of the justice's judgment. *The People v. Hayden*, 4 Wend. 203.

314. An appellant is entitled to amend an appeal bond where there is a variance between the amount of the judgment specified in the bond and the judgment actually rendered, although the appeal was prosecuted previous to the revised statutes going into effect. *The People v. Herkimer Common Pleas*, 4 Wend. 206.

315. On an appeal from a justice's judgment, in an action of trespass *quare clausum fregit*, the defendant is not at liberty to show title in himself where the plea put in by him before the justice is the general issue. *Dewey v. Bordwell*, 9 Wend. 65.

COVENANT.

- I. What constitutes a covenant.
- II. How a covenant is to be construed.
- III. Performance of a covenant.
- IV. Breach of covenant.
- V. Covenants in a deed: (a) Implied covenants; (b) Measure of damages in an action for breach of covenant in a deed.
- VI. Action of covenant.

I. What constitutes a covenant.

1. No precise or formal terms are necessary to constitute a covenant. The inquiry always is, what was the intention of the parties? *Bull v. Fillett*, 5 Cow. 170.

II. How a covenant is to be construed.

2. An executor assigns a judgment in favour of his testator, and covenants as executor that so much is due upon it; *held*, that the covenant is personal, and binds him in his own right. *Marvin v. Stone*, 2 Cow. 781.

3. In construing a covenant, it must be considered with the context, and must be performed according to the intention of the parties, as derived from both. *Ibid.*

4. W. assigned a bond and mortgage, payable by instalments, with interest annually, to T., and covenanted that if T. should not be able to procure and enforce payment at the times and in the manner therein specified by due process of law, W. would be accountable to him for what should remain due. The first instalment became due March 1st, 1814; but T. did not sue the mortgage until after the next May term, when certain interest had been in arrear for several years. The suit was pursued to judgment, and a *fi. fa.* and an *alias fi. fa.* returned *nulla bona*, &c., and in the mean time, T. foreclosed the mortgage, which still left a balance unpaid, including an interest in arrear; and from the evidence it appeared probable that the mortgagor had been unable to pay his balance before and ever since the instalment became due; in an action by T. against W.; *held*, that T. should not recover the interest in arrear for several years, this being forfeited by delay, but that he might recover the residue; suffering a term to elapse after it fell due not being an unreasonable delay as to this, under all the circumstances of the case. *Thomas v. Woods*, 4 Cow. 173.

5. An indenture of apprenticeship between a ward and his guardian and the master, declaring the duties of the apprentice in the usual form, and concluding thus: "for the true performance of all and singular the said covenants and agreements, the said master, apprentice, and guardian have hereunto interchangeably set their hands and seals," &c., binds the guardian to see that the apprentice fulfils all his duties to his master. *Bull v. Fillett*, 5 Cow. 170.

6. Where one covenants not to do a thing which it is lawful for him to do, and an act of the Legislature comes after, and compels him to do it; then the act repeals the covenant, and *vice versa*; but where a man covenants to do a thing which was unlawful at the time of the covenant, and afterwards a statute makes it lawful, it does not repeal the covenant. *Presbyterian Church v. City of New York*, 5 Cow. 538.

7. Where the defendant covenanted with the plaintiff to pay certain money to T. on a certain day; and the plaintiff covenanted that on the defendant's so paying, he, the plaintiff, would give up and discharge a certain bond and mortgage; *held*, that the payment was a condition precedent to the performance on the part of the plaintiff, who might sue for the nonpayment without showing a performance, or offer to perform, on his part; nor could the defendant plead the want of such performance or offer to perform. *Northrup v. Northrup*, 6 Cow. 296.

8. A., by indenture demised a building lot in the city of New York, with a dwelling house and shop thereon, to W. for twenty-one years, at a rent of \$165. W. covenanted that he, his executors, &c., or assigns, would at the end of the term surrender the demised lot, with all such buildings and improvements as might be then remaining thereon, A. paying for such

of the buildings and improvements as might be erected and made thereon, by W., his executors, &c., or assigns. The parties agreed that W., his executors, &c., or assigns, at his and their proper costs and charges, during the term might take down the dwelling house, and erect such other buildings as he, his executors, &c., or assigns might think proper; and that all such buildings and improvements as should be so erected and made, and remaining on the demised lot at the end of the term, should be valued, (in a manner specified,) and A. should pay W., his executors, &c., or assigns, the amount of the valuation, not exceeding \$1500. *Held*, that this was neither a building nor repairing lease; that the covenant to pay extended to a new building, to be erected at the option of the tenant; but that though the old house was not torn down, and a new one erected, yet the lessor was liable to pay for such additions to and alterations of the old house as amounted to improvements; not, however, for ordinary repairs, such as new roofing the old house or rebuilding the chimney. *Lametti v. Anderson*, 6 Cow. 302.

9. The term being passed, by *mesne* assignments, to L., though the improvements were not made by him, but mainly by the lessee before assignment; in an action by the executors of L. on the covenant, to pay for the improvements; *held*, that this covenant ran with the term, which, having passed to L. by assignment before the covenant was broken, carried the covenant to L., who or whose executors might maintain an action upon it in his or their own names. *Ibid*.

10. A covenant in restraint of trade, generally, throughout the state, is void. Otherwise, of a covenant not to trade in a particular place, and for a particular time. *Nobles v. Bates*, 7 Cow. 307.

11. N. and B. dissolved their partnership in business; and their articles of dissolution declared one object of the dissolution to be, that N. should relinquish the business; that B. should pay him \$3000 in various instalments, the last being \$750; and that if N. should set up the business within twenty miles of their former place of business, he should forfeit that instalment. N. having carried on the business within the twenty miles; *held*, that this was a bar to an action on the covenant for the \$750. *Ibid*.

12. *Held*, also, that the covenant to relinquish the \$750 was in nature of stipulated damages, and not a penalty; and, therefore, evidence showing that B. was not injured by N.'s trade was inadmissible. *Ibid*.

13. Where O., by an instrument under seal, assigned certain contracts for the payment of money, and covenanted that the sum set opposite to each contract in a schedule annexed to the assignment was justly and truly due, and should be well and truly paid; *it was held*, that O. was to be considered as a guarantor of the amount due on the contracts, and that to maintain a suit against him on his covenant, it was necessary to aver a previous demand of payment from the contractors. *Mechanic Fire Insurance Company v. Ogden*, 1 Wend. 137.

14. Covenants are to be construed according

to their spirit and intent; and where, from the subject-matter of the covenant, it is the evident intent of the parties, that they should be taken distributively, they may be so taken, although there be no express words of severalty. *Ludlow v. M'Crea*, 1 Wend. 228.

15. Where there are mutual covenants, and the defendant has received the principal part of the consideration for the engagements on his part, the covenants of the parties will be construed to be independent, and the plaintiff will be allowed to maintain an action for the breach of the defendant's covenants, although he has failed in part in performance on his side. *Tompkins v. Elhol*, 5 Wend. 496.

16. Where a party agreed, on the payment by another of certain sums of money to a third person, to assign certain certificates of sale of land; *it was held*, that the covenants were independent, and that in a suit by the party bound to assign, a general averment in the declaration of readiness on his part to perform was sufficient. *Slocum v. Despard*, 8 Wend. 615.

17. Where A. sold a newspaper establishment to B., and covenanted with him that while he continued the publisher or proprietor of a paper in the place where the establishment was situated, that he (A.) would not publish, or aid, or be accessory to the printing or publishing of a paper in the same place, and bound himself in the sum of \$3000 as liquidated damages; and in the same instrument B. covenanted to pay A. the sum of \$3500, in consideration of the conveyance of the establishment; *it was held*, in an action by B. against A. for a breach of the above covenant, that the covenants of the parties were dependent, and that to entitle the plaintiff to sustain his action, he was bound to aver performance of the covenant on his part. *Dakin et al. v. Williams et al.* 11 Wend. 67.

18. Courts lean against construing covenants to be independent, unless such is the obvious intent of the parties. *Per Nelson, J. Ibid*.

19. A covenant to assign and transfer property will be construed a conveyance *in present*, where, from the provisions of the instrument in which the covenant is contained, it is manifest that it was the intent of the parties that it should so operate. *Emery et al. v. Hitchcock et al.* 12 Wend. 156.

20. A covenant on the part of a lessee to plant a certain number of apple trees on the demised premises, and to replace those that decay or are destroyed, so as always to preserve the given number during the term, is a continuing covenant; and the receipt of rent after a breach of the covenant does not prevent the landlord from re-entering, if, subsequently to the payment of rent, there is a failure in performance on the part of the tenant. *Bleeker v. Smith*, 13 Wend. 530.

21. So the receipt of rent does not operate as a waiver unless the rent received accrued subsequently to the act which works the forfeiture. *Ibid*.

22. Where one party bound himself to labour for another for three years, and the other party agreed to provide him with a suitable dwelling house, and to pay him a certain sum per month every three months during the term; *it was held*,

in an action for the negligent doing of the work, that the covenant to provide the house was a distinct and independent covenant, the nonperformance of which might be compensated in damages. *Betts v. Perrine*, 14 Wend. 219.

23. Where a covenant was contained in a lease on the part of the lessee, to pay all taxes and assessments which might be imposed on the premises by authority derived from the United States, the state of New York, or from the corporation of the city of New York, and an improvement was made by the corporation of New York in the opening of La Fayette Place, which took a part of the leasehold premises; *it was held*, that the lessee was chargeable with the amount of the assessment of the lessor upon the premises. *Astor v. Miller*, 2 Paige, 68.

24. Where a covenant running with the land is divisible in its nature, if the entire interest in different parcels of the land passes by assignment to separate individuals, the covenant will attach upon each parcel *pro tanto*. *Ibid.*

25. And the assignee of each part will be answerable for his proportion of any charge upon the land which was a common burden upon the whole, and will be exclusively liable for the breach of any covenant which related to that part alone. *Ibid.*

26. A covenant in a deed of land, not to erect a building on a common or public square owned by the grantor in front of the premises conveyed, is a covenant running with the land, and passes to a subsequent grantee of the premises without any special assignment of the covenant. *Trustees of Watertown v. Cowen*, 4 Paige, 510.

27. The plaintiffs entered into a covenant with the defendants, whereby they stipulated to build and finish the Masonic Hall, in the city of New York, within a certain period, under a penalty of \$30, as liquidated damages, for each and every day the work should remain unfinished after the stipulated time. *Held*, that by the true construction of the covenant, the building was not to be finished *absolutely* within any stipulated period; but if not completed by the time fixed, the plaintiffs were liable, for each day's delay, to the amount of the liquidated damages. *Farnham and Pollard v. Ross et al.* 2 Hall, 167.

28. The plaintiffs completed the building within the specified time, with the exception of the front doors, and a certain stairway. These would have been completed also, but for the defendants themselves, who made certain alterations on their plan of the stairs, and delayed the finishing of the doors. In an action upon the covenant for the contract price of the work; *it was held*, that this proof supported the averment of performance on the part of the plaintiffs, and that the defendants could not interpose, as a defence, a delay occasioned by their own acts. As the plaintiffs would, but for the defendants, have completed the building within the specified time, their conduct was tantamount to an averment of performance on their part, and a refusal by the defendants, *which are held* to be equivalent to an actual performance. *Ibid.*

29. In an action of covenant, it appeared that one Pepper hired a house of the plaintiff, and that the defendant agreed to become his surety for the payment of the rent. P. executed a

covenant under seal for the payment of the rent, and the defendant, on the same paper, executed an agreement also, under seal, to be his surety, but there was no witness to the signature of either. Pepper took the paper containing both agreements for the purpose of delivering them to the plaintiff, who, upon inspection, objected to the form of the execution of the covenant by P., because there was no witness to his signature. P., therefore, *erased* his signature, and wrote his name anew, in the presence of a witness, who signed it, and the paper was then delivered by P. to the plaintiff. The defendant was not present at this transaction, nor did he know any thing of it; but being sued upon his guaranty, he contended that the erasure of the signature of P., under the circumstances of the case, discharged him as surety. *Held*, that the signing and sealing of the covenant anew by P. was to be considered as an original execution and delivery of it; that the defendant, by signing the guaranty on the covenant itself, and intrusting it to P., thereby gave him authority to complete the delivery of both instruments; that there was no alteration in the terms of the contract whereby the surety could be prejudiced, and that he was, therefore, bound by it. *Dusenberry v. O'Shields*, 2 Hall, 379.

III. Performance of a covenant.

30. One covenants to pay a debt, if it cannot be collected of another by due process of law; it is a compliance with the conditions, if the covenantee exert reasonable diligence to collect, under all the circumstances of the case; and if he suffer a term to elapse after the debts fall due without suit, it being apparent that the covenantor has sustained no injury by the delay, he is liable. Nor is it necessary to issue a *ca. sa.* against the principal debtor, if it be apparent that it would be of no avail. *Thomas v. Woods*, 4 Cow. 173.

31. It is enough that the covenantor have notice of the failure to collect after due process of law. There is no need of a demand or request. *Ibid.*

32. Otherwise, *it seems*, if the covenant be to pay on request expressly. *Ibid.*

33. In an action on such a covenant, averring notice, the defendant must deny this by plea, or it will be taken as admitted upon the record. *Ibid.*

34. A parol enlargement of the time set in a sealed instrument for the performance of covenants, is good; but where there is such an enlargement, and the performance of covenants by a party within the time set is a condition precedent to his recovery under a covenant contained in the instrument against the other party, the remedy is upon the agreement enlarging the time of performance, and not upon the covenant itself. *Langworthy et al. v. Smith et al.* 2 Wend. 587.

35. A covenant, to cause land to be conveyed by a good and sufficient warrantee deed, is not complied with by the mere giving of a deed, with warranty, where the grantor has no title to the land, or where his title is imperfect. *Erson v. Kirtland*, 4 Paige, 628.

36. To constitute a good and sufficient deed

of land, within the meaning of such a covenant, the conveyance must be good and sufficient to convey a valid title to the premises described in the covenant. *Ibid.*

IV. Breach of covenant.

37. Where S. and D., two of H.'s executors, as such, assigned a judgment to M. in favour of H. against E., who was also executor, and S. and D. covenanted, as executors, that there was due and unpaid upon the judgment to the assignors at the time of the assignment \$698; *held*, that the covenant was broken *eo instante* that it was made; for H. having appointed E. his executor, and he having accepted the trust, this extinguished the judgment, and so there was nothing due or unpaid thereon within the meaning of the covenant; for the covenant meant, 1. that it was due; 2. that it was due to the assignors as executors; 3. due at the time; 4. due upon the judgment. *Marvin v. Stone*, 2 Cow. 781.

38. The corporation of the city of New York conveyed lands for the purposes of a church and cemetery, with a covenant for quiet enjoyment; and afterwards, pursuant to a power granted by the Legislature, passed a by-law prohibiting the use of these lands as a cemetery; *held*, that this was not a breach of the covenant, which entitled to damages, but it was a repeal of the covenant. *Corporation Presbyterian Church in New York v. Mayor, &c. of New York*, 5 Cow. 538.

39. A covenant, by a party holding a bond and mortgage against another, that for five years he will not seek, have, or receive any other indemnity or satisfaction than what may be derived from the mortgaged premises, is broken by the commencement of a suit on the bond within the limited time. *Hustons v. Winans*, 5 Wend. 163.

V. Covenants in a deed. (a) Implied covenants.

40. If an estate for years be granted by an indenture of lease, the words "grant and demise" import covenants of warranty and for quiet enjoyment, and such covenants may be stated in the declaration, although not contained in the lease in express terms. *Barney et al. v. Keith*, 4 Wend. 502.

41. The doctrine of the common law that certain words in the conveyance of real estate, of themselves, import and make a covenant in law, as *dedi, concessi, demisi, &c.*, is abrogated by the revised statutes, by which it is enacted, that no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not; and *it was accordingly held* in this case, which was an action by a tenant against a landlord for an ouster, and in which the plaintiff had declared on an implied covenant for quiet enjoyment, that he was not entitled to sustain his action. *Kinney v. Watts*, 14 Wend. 38.

42. But had there been an express covenant, the Court *held*, that the tenant, not having paid any purchase money on obtaining his lease, would have been entitled to recover only nominal damages, although he had expended a large sum of money in improvements for the beneficial use of the premises during the term; that the remedy of the party was by an action on the

case, although in this case the Court intimated that from the peculiar provisions of the lease, the plaintiff was remediless. *Ibid.*

(b) Measure of damages in an action for breach of covenant in a deed.

43. In an action for the breach of a covenant of quiet enjoyment, where the plaintiff is evicted from one-third of the premises conveyed, by a recovery against him by a tenant in dower, the measure of damages is the present value of an annuity equal to the interest on one-third of the consideration money received by the defendant, for the time that the tenant in dower has a probable expectation of life. *Wager v. Schuyler*, 1 Wend. 553.

44. The measure of damages for the breach of a covenant of seisin in a deed is not the consideration money and interest of the land of which the party is dispossessed, but the annual value thereof, or the interest of the consideration money paid for the land, together with the costs recovered against the grantee, and the taxable costs and counsel fees paid by him in the defence of his possession. *Rickert v. Snyder*, 9 Wend. 416.

45. Such costs of defence and counsel fees are recoverable although not specially stated in the declaration; the general claim of damages is sufficient to warrant the proof of such costs having been incurred. *Ibid.*

VI. Action of covenant.

46. In an action upon a covenant in a deed against encumbrances, the grantee is entitled to recover only the consideration of the purchase of the portion lost, the interest, and costs, and not the enhanced value of the land in consequence of improvement. *Dimmick v. Lockwood*, 10 Wend. 142.

47. The damages in an action of covenant are to be estimated as they occurred at the time the covenant was broken. *Ibid.*

48. Where fraud is shown in conveying an encumbered property as free of all encumbrances, the grantor is liable, in an action on the case, to the full extent of the loss of the grantee. *Ibid.*

49. In articles for sale of land, by which the vendee covenants to pay, and the vendor covenants to convey on payment, and the vendee agrees, that if he fails in his covenants, the contract shall be void; on action by the vendor for the money, no part having been paid; *held*, that the action lay, the contract being void only at the election of the vendor. *Canfield v. Westcott*, 5 Cow. 270.

50. So if the contract contain a general proviso, that if the vendee do not perform, it shall be void; it is voidable only, at the election of the vendor. *Ibid.* Note (a) at the end of *Canfield v. Westcott*, *Muncius v. Sergeant*, 5 Cow. 271, and *Church v. Ayers*, 5 Cow. 272.

51. A covenant to pay one money which belongs to another, and so appears on the face of the covenant, may be sued in the name of the covenantee; and it does not lie with the covenantor to object that the suit is not sanctioned by the *causâ que trust*. *Wolfe v. Washburn*, 6 Cow. 261.

52. Whether a declaration on a deed with

profert and oyer can be supported by showing a deed lost after declaration filed, and not produced at the trial? *Quære. Jansen v. Ball*, 6 Cow. 628.

53. The lost deed may be received as evidence at the trial, and, if there be no surprise, and the execution of the deed is not contested, the plaintiff may afterwards amend his declaration, so as to make it conform to the case. *Ibid.*

54. An instrument purporting to be an assignment of a judgment, when, in truth, there is no judgment, and by which instrument the party covenants that the judgment as described is due and unpaid, will subject him to an action for a breach of covenant. *Ibid.*

55. The fact that there was no such judgment, if it be described as one in the Supreme Court, may be shown by a witness who has examined the dockets and transcripts of dockets in any one of the clerk's offices of that Court, and failed to find the docket of the judgment described. *Ibid.*

56. The measure of damages in an action on such a covenant is the value of the property owned by the judgment debtor, and which might have been taken in execution intermediate the time of assignment and the commencement of the suit, with interest from the time when the money might have been raised by a sale. *Ibid.*

57. The Supreme Court, on a motion for a new trial, will look into the evidence, and see whether, according to this rule, the damages are too high; and if so, they will grant a new trial, unless, within a time to be fixed by them, the plaintiff remit so much as shall reduce them to the true sum. *Ibid.*

58. Where the seals of an agreement were torn off by one with whom it had been left for safe keeping by both parties; *held*, that this did not destroy the deed, but an action of covenant would still lie upon it. *Reed v. Overbaugh*, 6 Cow. 746.

59. In covenant by a lessor against one as assignee of the lessee, general evidence will support the action; as that the defendant is in possession or has paid rent, or claims and offers to assign as his own, or that he bargained with the lessee, and paid a consideration, and went into possession, &c., or any other acts from which an assignment may be enforced. *Armstrong v. Wheeler*, 9 Cow. 88.

60. This may be rebutted; as by showing that the defendant is an under tenant of the lessee. *Ibid.*

61. And if he is charged as assignee of the whole, but is in truth assignee of only part, this is a variance. *Ibid.*

62. But where evidence enough is given, on a declaration against him as sole assignee, to charge him *prima facie* as assignee, as that he bargained with the lessee, and paid a consideration, and has been in possession for several years, though part of the time in common with another, but claimed the sole title, this is not rebutted merely by showing an actual assignment from the lessee to the one with whom he (the defendant) possessed in common. *Ibid.*

63. Where the payment of money is a condition precedent to the performance of a covenant

to convey land, a waiver of the condition cannot be given in evidence in support of a declaration for breach of the covenant averring performance of the condition precedent. *Baldwin v. Munn*, 2 Wend. 399.

64. In an action of covenant brought by a landlord for rent, the defendant cannot set off damages, that he may be entitled to recover against the landlord on a covenant contained in the same indenture on which the action is brought. *Tuttle v. Tompkins*, 2 Wend. 407.

65. In an action of covenant for not conveying a lot of land which the covenantor had agreed to convey, when and as soon as the covenantor paid a certain note, an offer of payment and a demand of a deed must be averred, though the covenantor may have conveyed the property to a third person. *Sage v. Hanney*, 2 Wend. 532.

66. Although seisin be alleged in a declaration in covenant for rent, the plaintiff is not bound to prove it, nor to show that the defendant was in possession, where it is in evidence that he claimed to be the assignee of the lease, and actually paid rent. *Lush v. Drute*, 4 Wend. 313.

67. A covenant *not to sue* the obligor of a bond for a *limited time* cannot be pleaded in bar to an action on the bond; the remedy of the party is on the covenant. *Winans v. Huston*, 6 Wend. 471.

68. An action of covenant will not lie for breach of the covenant of *quiet enjoyment*, although the covenantor has been prosecuted in *trespass* by a third person claiming title, and a *recovery* had against him, unless the plaintiff in the action avers and proves that such third person, *before or at the date* of the covenant, *had lawful title*, and by virtue thereof *entered and ousted* the plaintiff. *Webb v. Alexander*, 7 Wend. 281.

69. It is no defence at law, that a covenant on which the defendant is sought to be charged was obtained by false and fraudulent representations; fraud as to the execution, but not as to the consideration, of a covenant may be shown. *Slacum v. Despard*, 8 Wend. 615.

70. The covenant of warranty applies as well to the possession as to the title; where, therefore, a grantee is turned out of possession by a stranger having a right of possession for an unexpired term in the premises conveyed, the covenant of warranty is broken, and an action lies upon such covenant, and not upon the covenant of seisin against the covenantor. *Rickett v. Snyder*, 9 Wend. 416.

71. A covenant of warranty runs with the land, and enures to the benefit of the assignee of the covenantor, who may bring an action for the breach of it, in his own name, against the original covenantor. *Sugdam v. Jones*, 10 Wend. 180.

72. An assignee of such a covenant is not affected by any equities existing between the original parties; thus where premises were conveyed subject to a mortgage, and it was agreed at the time of the conveyance that the grantee should assume the payment of the mortgage, and pay to the grantor only the difference between the amount thereof and the sum agreed on as the consideration of the conveyance, and that

the covenants of warranty and for quiet enjoyment should not be considered to extend to the mortgage; *it was held*, that such agreement could not be set up in bar to an action brought by the assignee of the covenantee who was evicted under the mortgage. *Ibid.*

73. Such defence, *it seems*, would not have been good, even in an action by the grantee, as it would be attempting to show by parol that the real contract was different from that expressed in the deed; and as a covenant under seal before breach cannot be discharged by a parol agreement, to entitle the party to such a defence, he must show fraud, and even then it is questionable whether he can avail himself of it in law. *Ibid.*

74. Constructive notice of the existence of an encumbrance derived from the registry of a mortgage does not affect the right of the assignee to recover; and *it seems* that actual notice would not vary the case. *Ibid.*

75. In a simple contract, a promise made for the benefit of a third person is valid, and may be enforced by the promisee by action, if he has an interest in the subject-matter of the promise; but where the contract is under seal and *inter partes*, no one but a party to the instrument can maintain an action for the breach of it. Thus where a contract was entered into between A. and B., by which A. agreed to sell, and that his principal should convey certain lands, and B. agreed to purchase and to pay the purchase money to C., a third person; *it was held*, that an action for the breach of the covenant did not lie by C. against B. *Spencer v. Field*, 10 Wend. 87.

76. Where a creditor signed a composition deed, and released his debtor from all demands, and subsequently brought an action against him for breach of covenant, in discharging a judgment which he had previous to the composition assigned to his creditor, and it appeared that the cause of action accrued previous to the release; *it was held*, that the release was a bar to the action, although the sum set opposite the name of the creditor in the composition deed was for a demand wholly distinct and different from that for which the suit was brought. *Russell v. Rogers*, 10 Wend. 473.

77. A creditor, who signs and inserts an amount as due to him in a composition deed, cannot subsequently maintain an action against his debtor for a demand existing at the time of the composition, but not then taken into account, although the deed of assignment specifies that the property conveyed by the debtor is to be divided among the creditors in proportion to their several demands. *Ibid.*

78. Whether the plaintiff in this case would have been entitled to sustain his action, had it been averred that, at the time of signing the composition deed, he was ignorant of the fraud committed by his debtor? *Quære. Ibid.*

79. In an action on a contract for the sale of lands, by a vendor against a vendee, by which the latter covenants to pay to the former a sum certain in three annual instalments, upon the payment whereof he is to receive a deed of land, the plaintiff, if he waits to bring his suit

until all the instalments have fallen due, must aver in his declaration an actual tender of a deed or offer to execute the same. An averment, that he was ready and willing to make, execute, and deliver a deed, is insufficient. *Johnson v. Wygant*, 11 Wend. 48.

80. In dependent covenants, neither party can recover against the other without averring a tender of performance on his part; a mere readiness to perform is not sufficient. *Ibid.*

81. A landlord cannot maintain an action of covenant for arrears of rent against a party occupying demised premises, charging him as assignee, when, in fact, such party never had an assignment of the lease. He must seek his remedy in another mode. *Quackenboss v. Clarke*, 12 Wend. 555.

82. An action of covenant for breach of the covenants of seisin and quiet enjoyment will not lie for the eviction of a grantee from lands taken possession of by him under his deed, when the premises granted are described as a specific lot in a certain tract or patent, and the lands lost are not embraced in such description. *Tymason v. Bates*, 14 Wend. 671.

83. A covenant made by J. W., as agent for J. L., will support an action in the name of the former, although he has no interest in the subject of it; and the declaration may allege the damage to have been sustained by J. W. *Wheelwright v. Beers*, 2 Hall, 391.

84. A covenant of warranty runs with the land. It is intended for the benefit of, and accordingly an action may be sustained upon it by, the assignee of the covenantee or his heirs. *Withy v. Mumford*, 5 Cow. 137. *Garlock v. Closs*, 5 Cow. 143, note (a).

85. A grants to B., who grants to C., both grants being with warranty; then C. is evicted by a title paramount to A.'s title; *held*, that C. may bring covenant directly against A., or he may sue B.; who, on paying, &c., may sue A.; and so of any successive number of warrantors. *Ibid.*

86. A warranty of lands in a deed in fee is the subject of a personal action of covenant against the executors of the warrantor; and the grantee is not confined to his voucher or *warrantia chartæ*, as, *it seems*, he was anciently. *Thwmsend v. Morris*, 6 Cow. 123.

87. It is sufficient, in declaring upon this covenant, to aver generally, that the grantee was evicted of a part of the whole of the granted premises by lawful right and title of a stranger; without setting forth the title or manner of eviction more particularly, especially on general demurrer. *Ibid.*

88. The damages for an eviction of two tenants in common, to whom lands are granted with warranty, are personal, and an action will lie for them by the survivor. *Ibid.*

89. Where a tenant covenants to keep the premises in repair during the term, and, at the expiration thereof, yield them up in like condition, and he permits them to go to decay, and omits to make necessary repairs, the landlord may bring his action forthwith, and is not bound to wait until the expiration of the term. If the

covenant was merely to leave the premises in good repair, it would be otherwise. *Schieffelin v. Carpenter*, 15 Wend. 400.

CUSTOM.

1. Custom and usage of trade; what is a good custom or usage; manner of proving them; for what purpose they are evidence; held, not to sanction a penal offence. Authorities to these points collated. *Griffin arguendo. Bank of Ulster v. Wager*, 2 Cow. 712.

2. A custom of merchants must be a mercantile usage, so well known and established as to form a part of the law merchant; otherwise, it is not sufficient as a custom. *Buck v. Grimshaw*, 1 Edw. 140.

DAMAGES.

- I. How damages are to be assessed.
- II. Liquidated damages.

I. How damages are to be assessed.

1. Debt on bond to perform covenants, issue, and verdict for plaintiff, but no assignment of breaches nor assessment of damages by the jury; the plaintiff may afterwards assign breaches, and have his damages assessed upon a writ of inquiry, under the statute. (Sess. 36, ch. 56, s. 7, 1 R. L. 518.) *Rogers v. Coleman*, 3 Cow. 62.

2. In *assumpsit* on a note payable in specific articles, the measure of damages is the highest market price of those articles at any time between the note falling due and the time of trial. *West v. Wentworth*, 3 Cow. 82.

3. So, in trover, the damages are measured by the highest price intermediate the time of conversion and trial. *Ibid.*

4. Where the general money counts are joined with one on a promissory note in the same declaration, it is erroneous for the clerk to assess the damages without first entering a *nolle prosequi* as to the money counts. *Beard v. Van Winkle*, 3 Cow. 335.

5. In such a case, the defendant cannot compel the plaintiff to enter a *nolle prosequi*; and it is at his option to assess damages by a jury, though his claim be founded on the note alone. *Ibid.*

6. Nominal damages are not given in a judgment by default in debt. *The People v. Hallett*, 4 Cow. 67.

7. And so where judgment was for the plaintiff by *nil. dicit* for \$250, the penalty of a bond; held, that the plaintiff could not add nominal damages to raise it above \$250, in order to carry Supreme Court costs. *Ibid.*

8. In an action on a note for a certain sum of money, payable in specific articles, at a certain price, the value of the articles, not the sum expressed, is the measure of damages. *Gleason v. Pinney*. (Note. This case was reported as holding the opposite doctrine at 5 Cow. page 159, but is explained and corrected at page 411, 5 Cow.)

9. Where there is a default in the vendor, upon a contract to sell and deliver chattels, the vendee to pay at the time, the measure of damages, in an action by the vendee, is the difference between the contract price and the value of the chattels when they should be delivered by the contract. *Clark v. Pinney*, 7 Cow. 681.

10. But where the price or consideration is paid in advance, the vendee is not confined, in measuring his damages, to the value of the articles at the time when they should have been delivered; but may, if he bring his suit in a reasonable time, recover according to the highest price at any time between the period for delivery and the day of trial; especially where the chattels are intended by the vendee for the purpose of trade. (E. g. an action on a note promising to deliver, acknowledging value received.) *Ibid.*

11. How it would be if the chattels were intended for the private use of the vendee? *Quære. Ibid.*

12. If the suit be delayed by attempts to compromise, *semble*, the damages should be according to the value when the suit is commenced. *Ibid.*

13. Notice of the assessment of damages cannot be given until after default; but such notice would be good, though previous to the entry of the rule for interlocutory judgment. *Boyd v. Seely*, 2 Wend. 242.

14. In an action of debt against a sheriff for an escape, in which an issue of fact is joined on a plea in abatement, a *tam quam* clause is not necessary to authorize the assessment of damages. *Haight v. Holley*, 3 Wend. 258.

15. Where drovers are sued for the price of cattle intrusted to them to be taken to market and sold, the jury will be warranted to allow the highest sum according to the evidence, the defendants neglecting to shew the prices for which the cattle actually sold. *Clark v. Miller*, 4 Wend. 628.

16. In an action on a note in this form, "For value received, I promise to pay A. B. \$79 50 on, &c., in salt, at fourteen shillings per barrel," the sum specified in the note, and not the value of the salt, on the day specified for the payment, is the measure of damages. *Pinney v. Gleason*, 5 Wend. 392.

17. In trover, a party having the *special property* in a suit against the *general owner*, or one claiming under him, is entitled to recover only the value of the special interest. *Spoer v. Holland*, 8 Wend. 445.

18. Where the property of a party is sold under illegal process, and the sum demanded is raised by a bid at the sale of the property made by an agent of such party, who purchases for the benefit of his principal, and pays for the same with the money of the principal, the measure of damages in an action of trespass in such case is the amount of the bid and the interest thereof, and not the value of the property sold. *Baker v. Freeman*, 9 Wend. 36.

19. Previous to the revised statutes, a writ of inquiry of damages was unauthorized; and a judgment entered on an inquisition, assessing damages, was held to be erroneous. *Pike v. Gandall*, 9 Wend. 149.

20. The measure of damages, where a vendor refuses to deliver an article of merchandise, which he has agreed to sell, and where no money has been paid by the vendee, is the difference between the contract price and the value of the article at the time when it should have been delivered. *Dey v. Dox*, 9 Wend. 129.

21. Where a party took a lease of a ferry, and covenanted to maintain and keep the same in good order, and, instead of doing so, diverted travellers from the usual landing to another landing owned by himself, by means whereof a tavern stand belonging to the plaintiff, situate on the first landing, was so reduced in business as to become tenantless; *it was held*, in an action by the landlord for breach of covenant, that he might assign, and was entitled to recover, as damages, the loss of rent of the tavern stand. *Devin v. Wilse*, 9 Wend. 325.

22. A statement of damages made out by a plaintiff, with a view to a compromise, and sent to the defendant, will not bind the plaintiff, but he may recover on the trial of the cause all the damages which he can show that he has sustained. *Beebe et al. v. Robert*, 12 Wend. 413.

23. Where a complainant in a Court of equity claims a compensation in damages for the non-fulfilment of a contract which has been in part performed, the benefit received by him from such part performance will be allowed to the defendant, in estimating the damages of such complainant. *Taylor v. Read*, 4 Paige, 561.

24. The proper measure of damages for the breach of a contract for the delivery of goods on sale, to be paid for when delivered, and where no part of the goods have been received, is the difference between the contract price and the actual value of such goods at the time they should have been delivered, and the interest upon such difference. *Ibid*.

25. Where particular articles of property are to be delivered within a limited period, to be applied for specific purposes, and not for general merchandise, the party who fails to perform his contract to deliver the articles is bound to make good the loss occasioned by his delinquency; but he is only liable for direct damages, which, according to the nature of the case, may be presumed to have resulted from his failure to perform the contract, and not for remote or speculative damages. *Ibid*.

II. Liquidated damages.

26. In an action on a written promise, not sealed, to pay and deliver \$360, or twelve cows, &c., expressed to be for value received; *held*, that the value of the consideration, and of the cows to be delivered, might be inquired into, with a view to see whether the sum expressed was intended by the parties as a penalty or as liquidated damages; and it appearing that the sum expressed was much beyond the value of either; *held*, that it was in nature of a penalty; and that the plaintiff must be confined to the value of the cows to be delivered, with interest, as the measure of his damages. *Spencer v. Tilden*, 5 Cow. 144.

27. Where it is agreed on a bond, that if a party do a particular thing, a stipulated sum

shall be paid by him, there the sum stated may be treated as liquidated damages. *Smith v. Smith*, 4 Wend. 468.

28. Where, by the terms of a contract, a sum certain is fixed upon as liquidated damages for the nonperformance of covenants, in case of breach of the covenants, the party failing is liable to pay the specified sum. *Knapp v. Maltby*, 13 Wend. 587.

29. A purchaser who has entered into a contract, agreeing to pay a specific sum of money as the price of land to be conveyed to him, cannot be relieved from the payment thereof by the tender of a less sum, agreed upon in the contract as stipulated damages, to be paid in case of non-performance of the contract on his part. *Syres v. Pease et al.* 12 Wend. 393.

DEBT.

- I. *When and against whom an action of debt will lie.*
- II. *Debt on bond.*
- III. *Debt on judgment.*
- IV. *Debt on recognisance.*

I. *When and against whom an action of debt will lie.*

1. Debt, and not *assumpsit*, is the proper form of action for the recovery of money from a stakeholder of a bet on a trotting match. *M'Keon v. Caherty*, 3 Wend. 491.

2. The action may be maintained, although the plaintiff in fact acted as the agent of others in making the bet. *Ibid*.

3. An action of debt for an escape, against a sheriff, lies only where the escape is from imprisonment on an execution issued from a Court of record. *Brown v. Genung*, 1 Wend. 115.

4. Debt is the proper form of action against a stockholder of a joint company, by the charter of which stockholders are liable in their individual capacities for the payment of debts contracted by the company, to the nominal amount of stock held by them respectively. *Simonson v. Spencer*, 15 Wend. 548.

5. The declaration in such case may be on a general *indebitatus* count, although the debt of the company arose under a special contract. *Ibid*.

6. An action of debt for the recovery of rent, founded on a lease, will lie in favour of the lessor, notwithstanding the lease may have expired. *Norton v. Vultee*, 1 Hall, 384.

7. The assignee of a lease who enters upon and occupies the demised premises is liable for the rent in like manner with the assignor. In declaring against him, he may be described as assignee in general terms; and the manner which the assignment was made need not be set forth. But the assignee cannot be made answerable, by the action of debt, for the rent of any part of the premises demised, except that which has been possessed and enjoyed by himself; and the rent in such cases may be apportioned, the action being founded on the privity of estate merely, and not on the privity of contract. *Ibid*.

8. The plaintiffs demised certain premises for a term of years to one F. L. Vultee. The lessee, a short time before the expiration of the term, died, and the defendant (his widow) took out letters of administration upon his estate, and continued in possession of a part of the premises until the lease expired: an action of debt being brought against her for all the rent which was in arrear at the time of the expiration of the lease; *it was held*, that she was only liable in this action for the rent of such parts of the premises as had been occupied by her after her husband's death. *Ibid.*

II. Debt on bond.

9. An action on a bond given by a putative father and his sureties to the overseers of the poor, to indemnify a town against the maintenance of a bastard child, will not lie, unless the overseers show that they have been damnified by an actual payment of money, or other disbursement in support of the child. *Donely v. Rockefeller*, 4 Cow. 253.

10. A mere liability to maintain the child is not sufficient. *Ibid.*

11. The dismissal of an appeal in the Common Pleas, on the ground of variance between the judgment recited in the appeal bond and the justice's return, will not support an action on the appeal bond for the breach of the condition that the appeal shall be prosecuted with due diligence. *Bench v. Springer et al.* 4 Wend. 519.

12. An action on a bastardy bond, given to A. and B. as overseers of the poor of a certain town, must be brought in the names of the overseers in office at the time of the commencement of the suit. *Armist v. Spencer et al.* 4 Wend. 406.

13. The omission of the comptroller for eight years to prosecute the bond of a commissioner of loans, forfeited by the nonpayment of interest, constitutes no defence to the surety, although for three years subsequent to the default the principal was solvent, and able to pay, and at the time of the commencement of the suit was insolvent, and unable to indemnify his surety. *The People v. Russell et al.* 4 Wend. 570.

14. In an action on a judgment against several, the imprisonment of one of the defendants on an execution issued on such judgment, is as to him a satisfaction of the debt so long as it continues, and a defence against any ulterior proceedings so far as he is concerned; and is fatal to a joint action against all the defendants. *Chapman v. Hatt and others*, 11 Wend. 41.

15. Although the obligee of a bond, the penalty of which exceeds \$50, may bring an action of covenant in a Justice's Court, to enforce the condition, where the sums specified in the condition, or the damages claimed for breach thereof, do not exceed \$50; still he is not bound to do so; but may bring an action of debt on the penalty in a Court of record, and recover costs. *Lewis v. Spencer*, 12 Wend. 139.

III. Debt on judgment.

16. A suit cannot be maintained here on a judgment obtained in a Justice's Court in a sister state, unless the statute organizing such Court be shown; if, on the statute being proved,

it appear that the subject-matter of the suit was within the jurisdiction of the Court, and that the proceedings were had in conformity to the statute, the judgment will be entitled to full faith and credit. *Thomas v. Robinson*, 3 Wend. 267.

17. An action of debt in this Court will lie upon a judgment obtained in the Marine Court. And where the declaration alleged, that the plaintiff "*levied his certain plaint*" in the Marine Court, against the defendant, for a cause of action arising within its jurisdiction, and such proceedings were had, that a judgment was obtained, &c., a demurrer to it for want of jurisdiction, as manifested by the pleading, *was held* to be not well taken. *Bennett v. Moody*, 2 Hall, 471.

18. Debt lies on a judgment against two joint debtors, though one was not arrested, and did not appear in the original action; and it is sufficient, in answer to a plea of the one who was not arrested, that the debt for which that action was brought was the sole debt of the other defendant, to prove the sole admission of the former that the debt was joint. *Thwmsend v. Carman*, 6 Cow. 695.

IV. Debt on recognisance.

19. A license or permission by a plaintiff to a defendant to depart from this state, and an agreement that all proceedings on the judgment against him shall be stayed until his return, may be plead in bar to an action against the bail on the recognisance. *Niblo v. Clark*, 3 Wend. 24.

20. In an action of debt on recognisance of bail, a variance of six cents in the amount of the judgment against the principal between the declaration and the record produced, is fatal on a plea of *nul tiel record*. *Bibbins v. Noxon*, 4 Wend. 207.

21. A recognisance that a putative father of a bastard child shall appear at the General Sessions, and abide such order as shall be made for the relief of the town in which the child was born, remains in force, notwithstanding that, subsequent to the time of the entering into the recognisance, the distinction between town and county poor is abolished, and the child by means thereof becomes a county charge, instead of a town charge; the suit on the recognisance being considered as prosecuted for the benefit of the county. *The People v. Haddock*, 12 Wend. 475.

22. In an action of debt on such recognisance, where it is averred in the declaration that the party *did not appear*, and the defendant pleads *non est factum*, it is not cause of nonsuit that it is omitted to be shown on the trial that the default of the party was entered of record, or that the General Sessions had directed the clerk of the county to prosecute the recognisance. *Ibid.*

DEED.

I. Consideration of a deed.

II. *What passes by a deed, and what estate vests in the grantee, and herein of the description of lands granted.*

III. *Exception or reservation in a deed.*

- IV. *Date of a deed, execution, and delivery.*
- V. *How to be construed.*
- VI. *Registry of deeds: (a) Acknowledgment, proof, and registering; (b) Priority of conveyance.*
- VII. *When a deed is valid, and for what it may be avoided.*
- VIII. *Canceling a deed.*

I. *Consideration of a deed.*

1. A pecuniary consideration is essential to give effect to a conveyance of lands, as a bargain and sale. A conveyance, expressed to be in consideration of the future performance of certain conditions, though one of them be to pay money, is not valid as a bargain and sale. *Jackson v. Delancey*, 4 Cow. 427.
2. When a deed states a consideration, and does not say, for other considerations, none other than the one expressed can be shown. *Ibid.*
- 2*. A pecuniary consideration is necessary to support a deed of bargain and sale; but this is not confined to money alone. *Jackson v. Pike*, 9 Cow. 69.
- 2†. The rule is satisfied by a deed of a lot for a Court-house, expressed to be as well in consideration of accommodating the grantees with a site for a Court-house and jail, as for increasing the value of the grantor's adjoining land. *Ibid.*
3. The support of the gospel is a sufficient consideration to render valid a release. *Reformed Dutch Church v. Feeder*, 4 Wend. 494.
4. A deed *inter partes* is an instrument commencing thus: This deed, &c. between A. of the one part, and B. of the other part. *Spencer v. Field*, 10 Wend. 91.

II. *What passes by a deed, and what estate vests in the grantee, and herein of the description of lands granted.*

5. It is a general rule in the lines of description contained in a deed of conveyance, that what is most material and certain shall control that which is less so. Thus a river or known stream, a spring or even a marked tree, shall control both course and distance. *Jackson v. Camp*, 1 Cow. 605.
6. A grant of a river, *eo nomine*, will not pass the soil of the river, or an island within it. *Jackson v. Halstead*, 5 Cow. 216.
7. In the description of land by a conveyance, any permanent object fixed upon by the parties controls the distance; and a clearing is a permanent object within the rule. *Jackson v. Widger*, 7 Cow. 723. *S. P. Jackson v. Ives*, 6 Cow. 661.
8. A deed of a thing passes the incident as well as the principal, though the latter only be mentioned; and this effect cannot be avoided without a reservation in the deed, or at least by an instrument contemporaneous with, and therefore making a part of the deed; and this rule is the same at law as in equity. *Patterson v. Hull*, 6 Cow. 747.
9. Where a patent or grant conveys a tract of land by metes and bounds, the land under water as well as other land will pass, if the land under water lies within the bounds of the grant. *Rogers v. Jones*, 1 Wend. 237.
10. A conveyance of land (on which there is a mill) with the appurtenances will pass the water-right which the grantor held under a lease for years, and the grantee will become chargeable with rent as assignee of the interest conveyed by the lease. *Provost v. Calder*, 2 Wend. 517.
11. Where a party owning the bed of a stream, and also the land adjoining one side of the stream, conveys to the owner of the opposite shore the land under water to the middle of the

stream, reserving a right to butt a dam on both shores of the stream, and covenanting to allow the grantee to do the same; *it was held*, that the parties were entitled to an equal participation in the use of the water. *Case et al. v. Haight et al.* 3 Wend. 632.

12. Where one, who has quit-claimed his interest in lands in which, at the time of the quit-claim, he had no title, subsequently acquires a title, it does not enure to his grantee. *Jackson v. Peck*, 4 Wend. 300. *S. P. Jackson v. Winslow*, 9 Cow. 13.

13. Where two tracts of land were laid out in a parallelogram form, each being eight miles long and six miles wide, containing together 67,438 acres, and distinguished as townships No. 3 and No. 4, and a deed was subsequently executed by the proprietor of those townships, conveying two tracts of land, described as townships No. 3 and No. 4, "to be six miles square, and containing 23,040 acres each, and no more;" *it was held*, that the deed should be so construed as to carry into effect the manifest intention of the parties, that the township should be resurveyed, and a correction made of the boundaries, so as to reduce each township to six miles square and to the contents specified in the deed; that the grantees had a right of election to place their grant in a square form in any part of the two townships as surveyed at the date of the deed. *Moore v. Jackson*, 4 Wend. 58.

14. Where demised premises were described in an indenture of lease by the number of the lot, and also by metes and bounds, and the metes and bounds applied to a different lot from that described by its number, and the tenant entered into possession of the lot as described by its number, and continued such possession for thirty-six years; *it was held*, that such possession was evidence of a mistake in the latter part of the description, and that the lease was good and operative on the lot on which the tenant had entered, though it contained less land than the description in the lease required. *Lusk v. Druse*, 4 Wend. 313.

15. Where a grant is made to individuals for the use of a church, which at the time of the grant is not incorporated as such, the persons to whom the grant is made stand seised to the use, and if the church should afterwards acquire a legal capacity to take and hold real estate, the statute will execute the possession to the use, and the estate will vest. *Reformed Dutch Church v. Feeder*, 4 Wend. 491.

16. A known and well ascertained place of beginning governs in the location of a grant or patent. *Jackson v. Wendell*, 5 Wend. 142.

17. The right to overflow adjoining premises of a grantor to the extent necessary to the profitable employment of a water privilege conveyed, in the manner in which it existed and had been used previously to the grant, passes to the grantee as necessarily appurtenant to the premises conveyed. *Oakley et al. v. Stanley*, 5 Wend. 523.

18. The acts and declarations of parties, as to the location of land, may control the courses and distances in their deeds; and to give operation to such acts and declarations, it is not necessary that their effect should be known to the parties. *Rockwell v. Adams*, 6 Wend. 467.

19. *Acquiescence in an erroneous location* for a great length of time (e. g. eighteen years) is conclusive upon a party making or acquiescing in such location. *Ibid.*

20. Evidence of the possessions of settlers on adjacent tracts in reference to a *division line*, attempted to be shown as recognised by one of the parties in a suit, is admissible. *Ibid.*

21. Where a *division line* between adjoining tracts exists at its two extremities, and for the principal part of the distance between the two tracts, and as such is recognised by the parties, it will be considered a *continuous line*, although on a portion of the distance there is no improvement or division fence. *Ibid.*

22. Where one of the lines of a lot was described as running in a particular direction a certain number of chains and links, to a stake and stones standing in the northwest corner of the east moiety of lot No. 8, and neither the stake and stones, nor the place where they originally were, could be ascertained; *held*, that the next most certain call, in the deed, was for the northwest corner of the east moiety of lot No. 8; which call must prevail over the distances described in the deed, if they did not agree. *Cudnty v. Earley*, 4 Paige, 209.

III. Exception or reservation in a deed.

23. An exception in a grant of lands in these words, "excepting and reserving out of the said piece of land so much as is necessary for the use of a grist mill on the east side of the road at the west end of the saw mill dam," is a good exception; but until the grantor or his assigns exercise the right reserved, and build the mill, it is inoperative, and the whole premises vest in the grantee, who may maintain trespass against a stranger, or even against the grantor or his assigns, for an entry on the land for any purpose other than that specified in the reservation. *Dygert v. Matthews*, 11 Wend. 35.

IV. Date of a deed, execution, and delivery.

24. It is essential to the validity of a deed that it should be delivered and accepted. *Jackson v. Richards*, 6 Cow. 617.

25. But the fact of non-acceptance cannot be shown by the written declaration of the grantee; especially where third persons are interested in maintaining or defeating the deed. It must be proved, like any other fact, by competent witnesses under oath. *Ibid.*

26. A deed requiring the approbation of a third person to render it valid, although executed before, becomes operative from the time that such approbation is in fact given. *Jackson v. Hill*, 5 Wend. 532.

27. Where four promissory notes, and a release of dower as the consideration of the notes, were executed, and the whole delivered as *escrows*, to take effect on delivery of possession of the premises, in which dower was released, by a certain day; and the widow died before that day, without having delivered possession; *it was held*, that the notes were inoperative, having been given upon a condition which was never performed. *Archer v. Whalen*, 1 Wend. 279.

28. Where a deed of lands was delivered as

an *escrow*, and an absolute delivery subsequently made, but previous to the second delivery a judgment was obtained against the grantor, under which the lands were sold; *it was held*, that the purchaser under the judgment was entitled to the land. *Jackson v. Howland*, 6 Wend. 666.

29. A deed delivered as an *escrow* does not take effect until the condition is performed, except where the operation of the conveyance would be absolutely defeated unless the first delivery should be permitted to have effect, as in the case of the death of the grantor before condition performed. *Ibid.*

30. Where a note was given as a consideration for a deed of real estate, and both papers were deposited by the parties with a third person, with directions to keep them until both parties should agree to have them exchanged; *it was held*, that such transaction did not constitute an absolute delivery of the deed, so as to enable the grantor to maintain a suit upon the note. *Clark v. Gifford*, 10 Wend. 310.

31. It is not necessary that the term *escrow* should be used when an instrument is delivered to a third person, to prevent its taking immediate effect; that term evinces more clearly than any other the actual intention of the parties; but where such intention is indicated in any other manner, effect will be given to it, unless the technical or legal phraseology employed by the parties renders it impracticable. *Ibid.*

32. Whether the delivery of a deed is absolute or conditional, and what were the actual intentions of the parties, are questions of fact, to be settled by a jury, where the evidence leaves any doubt upon the subject. *Ibid.*

33. Although adjudged cases seem to consider a declaration by the grantor, when he executes the instrument or delivers it to a third person, that he delivers it as his deed, as strongly indicating an intention that it shall take immediate effect, nevertheless such a declaration is but matter of evidence, to be weighed in connexion with the other circumstances of the case, to determine the real character of the transaction. *Ibid.*

34. A deed for land takes effect only from its delivery; although signed, sealed, and acknowledged, if it be not actually delivered by the grantor during his life, nothing passes by it. *Jackson v. Leek*, 12 Wend. 105.

35. *Delivery* is essential to the validity of a deed; but the delivery need not be to the grantee in person; it is enough if the deed be delivered to a third person for the use of the grantee. *Church v. Gilman*, 15 Wend. 656.

36. If the delivery to the third person be absolute, the grantor *not reserving any future control over the deed*, the estate passes, the assent of the grantee to accept the conveyance being presumed from the fact that the conveyance is beneficial to him. *Ibid.*

37. Where a party is entitled to a deed of lands, upon the payment of a specific sum, and a stranger, without his knowledge, makes the payment, procures the deed to be executed, and takes it into his possession; whether it can be adjudged in such case, that there has been such a delivery of the deed as to pass the title to

the grantee? *Quere. Sayre v. Townsend*, 15 Wend. 647.

38. It is essential to an *escrow*, that it be delivered to a third person, to be delivered to the obligee or grantee upon the happening of some event, or the performance of some condition. *James v. Vanderheyden*, 1 Paige, 385.

39. Where a bond and mortgage and deed were delivered to a third person, to be kept by him during the pleasure of the parties, and subject to their further order; *held*, that the papers were not *escrows*, and that he was a mere depositary. *Ibid.*

40. Where a deed was delivered as an *escrow*, to be delivered to the grantee upon the payment of a sum of money due from him to the grantor, after the death of the latter, settled with the grantee, and delivered the deed to him, which was, thereupon, duly recorded; *it was held*, to be a valid delivery as to such heir. *Keirsted v. Steery*, 4 Paige, 9.

V. How to be construed.

41. The words "has bargained and sold," in a conveyance sealed, are operative to pass an estate for life. *Jackson*, ex dem. *Murphy*, v. *Van Hoesen*, 4 Cow. 325.

42. Tenant for life, unless restrained by condition, may alien his whole estate or any less estate. *Ibid.*

43. If lands are conveyed to a natural person without words of limitation, an estate for the life of the grantee passes, unless the grantor be tenant for his own life only. Then only an estate for the life of the grantor passes. *Ibid.*

44. If a tenant for years convey, without limitation, his whole estate passes. *Ibid.*

45. A deed cannot operate as a covenant to stand seised, unless the consideration of blood or marriage be expressed on its face. *Jackson v. Delancy*, 4 Cow. 427.

46. A grant of land as abutting in the rear upon a certain street which was merely laid down as such upon a map, but not actually opened, the land being accessible by a street in front, is not an implied grant of way in the supposed street in the rear; nor is it an implied covenant to open the street in the rear. *Case of Mercer Street*, 4 Cow. 543.

47. A quit-claim deed, or deed without warranty, by one having no title at the time, will not operate to carry a title subsequently acquired by the grantor. Otherwise of a deed with warranty. *Jackson v. Winslow*, 9 Cow. 13. S. P. *Jackson v. Hubble*, 1 Cow. 613.

48. Where one sells his crop by parol, and afterwards conveys the land, this conveyance will not carry the title to the crop. *Austin v. Sawyer*, 9 Cow. 39.

49. In the construction of a deed, it is a well settled rule of law, to lean against that interpretation which creates a forfeiture, if admissible from the words of the instrument. But its grammatical sense is not to be adhered to, where a contrary intent is apparent. Thus, "and" may be read "or" if the general intent of a deed require it. *Jackson v. Topping*, 1 Wend. 388.

50. On a covenant that a grantor may enter for a condition broken, his heir, after the death

of his ancestor, may, although not expressly named, avail himself of the covenant. *Ibid.*

51. A deed by a tenant by the courtesy passes only a life estate, although purporting to convey a fee, when the form of conveyance used by him carries only such estate as he had. *Jackson v. Mancuis et al.* 2 Wend. 357.

52. Where a deed of a tract of land to three grantees, reciting a will devising the same land to one of the grantees during widowhood, and the remainder in fee to the others, declares its object to be to carry into effect the intention of the testator, and then grants the premises to the three persons in fee, "*habendum* to them, their heirs, and assigns, in the manner mentioned in the said will," the "*habendum*" is not inconsistent with and will control the premises. *Jackson v. Ireland*, 3 Wend. 99.

53. Where a mother conveyed a house and lot to two sons in fee, and took back an instrument in writing of the same date, executed by one of the grantees under seal, declaring the intention of the parties to be, that the grantor should hold and enjoy the property, and receive the rents and profits thereof during her natural life, and covenanting to abide by such agreement; *it was held*, that the deed and the instrument were parts of the same contract, and that the grantor had an estate for life in the premises. *Jackson v. McKenny*, 3 Wend. 233.

54. The deed, being founded on a pecuniary consideration, might take effect *in futuro*; and the defeasance being a part of the deed, and not a distinct instrument, the deed was valid and effectual as a covenant to stand seised to uses. The instrument also might operate by way of exception or reservation in favour of the grantor. *Ibid.*

55. Although the quantity of interest, or the kind or nature of the estate intended to be granted, is not specified, an estate for years will be deemed to be granted, if, from the whole instrument taken together, it is manifest that such was the intent of the parties. *Barney v. Keith*, 4 Wend. 502.

56. The legal effect of a covenant to sell certain lands is, that the covenantor shall *by deed* convey them to the covenantee; and, in averring performance of such a covenant, the covenantor should state that he conveyed the lands, and should set forth in general terms the nature of the conveyance. *Thomas v. Van Ness et al.* 4 Wend. 549.

57. A deed executed by husband and wife, conveying lands belonging to the wife, but *not acknowledged* by her pursuant to the statute, the consideration money having been paid by the grantee, is not such an *agreement to convey* as will be enforced against the heirs at law of the *feme*, by a decree for specific performance. *Martin v. Dwelly*, 6 Wend. 9.

58. Where a deed granted six hundred acres of land to be surveyed or taken off a large tract, and by the terms of an instrument referred to in the deed, the tract was to be divided into lots of one hundred acres each, and an election of lots was given to the grantees, which they subsequently made; *it was held*, that though by the deed the grantees became *tenant in common* with the owners of the tract, the election, followed up

by possession, operated as a *parol partition*. *Jackson v. Livingston*, 7 Wend. 136.

59. In a *covenant of warranty* in a deed of lands, where the grantor covenants to warrant the premises against himself, his heirs, &c., and against all and every other person or persons claiming or to claim the said premises, or any part thereof, *from and under him the said party of the second part*; the words *the said party of the second part* will be rejected as repugnant. *Sanders v. Bells*, 7 Wend. 287.

60. Where A., by a deed poll, "in consideration of the performances hereinafter mentioned," granted all his estate, real and personal, to B. in fee, upon condition that B. should suffer and permit A. to remain in possession, and to use and enjoy all the said estate during his natural life, without yielding or paying any thing therefor; and that at the decease of A., the grantee should pay unto C. the sum of £100; and that during the natural life of A., the grantee should provide him with a maintenance, and in the deed was contained a clause in these words: "and the said B. is to occupy and be in possession of my house situate at the corner of Eagle street, for which he is to allow me £60 a year during my natural life;" and then, after some further provisions in relation to the management of the estate, the deed concludes with a clause, that from and after the decease of A., the grantee and his heirs shall hold and enjoy the premises by the deed given and granted, and dispose thereof to his and their own proper use; *it was held*, that the deed as to the house at the corner of Eagle street was valid and operative as a conveyance to B. for the life of A., subject to rent, with a remainder to him in fee without rent. And *it was further held*, that the deed might well be considered a bargain and sale under the statute of uses as to the house at the corner of Eagle street, conveying a freehold *in futuro*, the reservation of £60 a year during the life of the grantor being a sufficient consideration to raise the use. *Rogers v. Eagle Fire Company of New York*, 9 Wend. 611.

61. A proviso on a deed conveying property in trust, with a power to sell, that the conveyances thereof by the trustee shall express the trusts upon which the property has been granted to him, is merely *directory*, and not a condition precedent of such conveyances. *Broadstreet v. Clarke*, 12 Wend. 602.

62. Where the place of beginning given in a deed is certain, or can be clearly ascertained by proof, the location must be made by commencing at such corner, although, in consequence thereof, the location cannot be made to correspond with all the subsequent courses and distances in the grant. *Bates v. Tymason*, 13 Wend. 300.

63. Where a deed granted six hundred acres of land to be surveyed or taken off a large tract, and by the terms of an instrument referred to in the deed, the tracts were to be divided into lots of one hundred acres each, and an election of lots was given to the grantees, which they subsequently made; *it was held*, that though by the terms of the deed the premises granted were undefined and uncertain, still that the subsequent location, in pursuance of the right of election given by the deed, rendered that certain and de-

finite which was before uncertain, and vested a legal title in the specific premises elected to be taken by the grantees. *Corbin v. Jackson*, 14 Wend. 619.

63*. Separate instruments executed at the same time, and relating to the same subject-matter, may be construed together and taken as one instrument. *Van Hurn v. Crain*, 1 Paige, 465. *S. P. Hills v. Miller*, 3 Paige, 254.

VI. Registry of deeds: (a) Acknowledgment, proof, and registering.

64. In certifying the acknowledgment of a mortgage or deed, &c., under the statute, (1 R. L. 369, s. 1.) it is sufficient for the officer to say, "on, &c., before me, A. B.; one, &c., came J. S., to me known, and acknowledged that he executed the above mortgage (or deed) for the uses and purposes therein mentioned," &c., without saying, "to me known to be the person described in and who executed the said mortgage," (or deed.) *Jackson v. Gumaer*, 2 Cow. 552.

65. That the omission of this clause has been extensively practised in this state, so that many titles would be disturbed, by allowing it to affect the certificate, would, perhaps, amount to a construction of the act, and at all events would render the Court unwilling to listen to an objection for this cause. *Ibid.*

66. The act for registering deeds, &c., relating to the military bounty lands, has no application to deeds or patents granted by the authority of the state. *Jackson v. Coker*, 1 Wend. 498.

67. A certificate of the proof of a deed, that the witness "testified that he saw the within grantor sign the same," without adding that the witness stated, that he knew the person who executed the deed, is not sufficient to entitle the deed to be read in evidence. *Jackson v. Osborn*, 2 Wend. 555.

68. A purchaser at a sheriff's sale of real estate, who has his deed *duly registered*, cannot claim the benefit of the *registry act* against a third person in *actual possession* of the land at the time of sale under an *unregistered deed*; such possession being constructive notice to the purchaser to make it his duty to inquire as to the rights of the person in possession. *Tuttle v. Jackson*, 6 Wend. 213.

69. Whatever will in equity charge a party with notice of the equitable rights of a prior purchaser or encumbrancer, so as to deprive him of the privilege of pleading that he is a *bona fide purchaser* without notice, must in a Court of law be sufficient to protect the legal rights acquired under an unregistered deed, against a subsequently recorded conveyance. *Ibid.*

70. It was not necessary, previously to 1801, in the certificate of the proof of a deed for land, that the officer granting the same should certify that he knew the subscribing witness, and that the witness testified that he knew the grantors to be the persons described in, and who executed the deed. *Broadstreet v. Clarke*, 12 Wend. 602.

71. Where a deed is acknowledged by the grantor before an acknowledging officer, the identity of the grantor may be proved by any third person, and need not be by any subscribing witness; and in such case, the residence of the witness need not be stated in the certificate; it is only necessary to be stated where the execution of the deed is proved by the sub-

scribing witness. *Bible v. Rogers*, 13 Wend. 536.

72. The registering a deed of conveyance is not notice to a subsequent purchaser, except in cases where its registry is made necessary by the statute; e. g. registering a sheriff's deed is not notice. *Per Sutherland, J. James v. Morey*, 2 Cow. 246.

73. A judgment debtor holding a deed of lands is seized as to his creditor, though his deed be not recorded pursuant to the statute. Hence a conveyance or mortgage, *bona fide*, by him, intermediate the judgment, and a sale on a *fi. fa.*, will not defeat the latter sale; for this relates to the time of docketing the judgment. *Jackson v. Winalow*, 9 Cow. 13.

74. The assuming, by a grantee, of the payment of a debt due from his grantor, is a sufficient consideration to make a purchase or mortgage of land valid within the registry acts, as against an unrecorded deed. *Ibid.*

75. The omission to record a deed does not prejudice the right of the grantee, or those claiming under him, as against a subsequent grantee with notice. *Jackson v. Page*, 4 Wend. 585. *S. P. Jackson v. Post*, 6 Cow. 120.

76. A purchaser for a valuable consideration cannot hold the land conveyed to him, if, previous to the conveyance to his grantor, the premises were conveyed to a third person by deed, and such deed be recorded anterior to the last purchase, although the deed to his grantor be first recorded. *Jackson v. Post*, 15 Wend. 588.

77. Both deeds being on record at the time of the last purchase, the purchaser has notice that the grantee under the prior deed, although last recorded, intends to assert his title; being thus put on inquiry, the purchaser is deemed to have such notice of the prior deed as to render his purchase as made *mala fide*. *Ibid.*

78. A purchaser of lands at a sheriff's sale, under a judgment and execution, will hold the same, although the defendant in the execution had, previous to the judgment, sold and conveyed the lands by deed, provided that the deed from the sheriff is recorded previous to the record of the deed from the debtor in the execution, unless the purchaser at sheriff's sale had actual notice of the prior deed. The case of *Jackson v. Town*, 4 Cow. 599, and *Jackson v. Post*, 9 Cow. 120, commented on and explained. *Ibid.*

79. Still, if the deed from the defendant in the execution be recorded before the purchaser at the sheriff's sale conveys away the property, the grantee of such purchaser is chargeable with notice of the prior deed, although the sheriff's deed be recorded before the prior deed is put on record. *Ibid.*

VII. When a deed is valid, and for what it may be avoided.

80. The deed to or from a lunatic, before office found, is not void, but voidable only; and, therefore, one who is not in priority with the lunatic cannot object his insanity. *Jackson v. Gumaer*, 2 Cow. 552.

81. The objection that a conveyance of land

is void because the grantor is out of possession, does not apply to a patent or deed of land from the people of the state. *Ibid.*

82. A voluntary deed is good as against the grantor's heir. *Jackson, ex dem. Cadwell, v. King*, 4 Cow. 207.

83. A bargain and sale of a freehold to vest in future is void; though otherwise, it seems, of a covenant to stand seized. *Jackson v. Delancey*, 4 Cow. 427.

84. One in possession, claiming either as heir or tenant of a mortgagor, has not such an adverse possession as will avoid a deed to the mortgagee, or his assignee, upon a foreclosure. *Jackson v. Jackson*, 5 Cow. 173.

85. To constitute an adverse possession of land, not included in a grant of it, so as to avoid a conveyance by the real owner, there must be a *pedis possessio*, or substantial enclosure; but the enclosure need not be by an artificial fence, or other erection. A river, a mountain, or continued ledge of rocks, &c., or other natural obstruction, sufficient to prevent the intrusion of cattle, is enough. *Jackson v. Halstead*, 5 Cow. 216.

86. The alteration of a deed by one claiming a benefit under it avoids it so far as respects a remedy by action upon it; and *semble*, this so whether the alteration be material or of a part wholly immaterial. Otherwise, if the alteration be by a stranger, without the consent of the party. *Lewis v. Payn*, 8 Cow. 71.

87. And where the subject-matter of the deed lies in grant, (e. g. a rent or other incorporeal hereditament,) so that the estate created cannot exist without a deed, because it is the essence of the estate, any alteration in the deed, material or immaterial, by the party claiming the estate, avoids the deed as to him to all intents and purposes; so that not only all remedy by action, but the estate itself is gone. *Ibid.*

88. But where a rent was created by duplicate deeds, each being executed by both parties, and one being delivered to and possessed by each, and the grantee of the rent altered his deed in a material part; *yet held*, that though a deed is essential to a rent as lying in grants, neither the remedy nor estate of the grantee was gone; for though the alteration of the grantee's deed avoided that, yet both deeds were originals; and so there was a good original in the hands of the grantor, which supported the estate. *Ibid.*

89. Where the deed operates by way of transmutation of possession, (e. g. of lands or other corporeal hereditaments,) the alteration would not divest the estate, though such alteration be material and fraudulent; but it avoids the covenants in the deed, if any; a valid deed being essential to these. *Ibid.*

90. So, an alteration by the obligee of a bond, or the party to any other deed creating a mere chose in action in him, utterly avoids the deed, both as to the right and the remedy upon it. *Ibid.*

91. Any person affected by a deed may, at any time, question its validity, and show that, in fact, it was not duly executed or delivered. *Jackson v. Perkins*, 2 Wend. 308.

92. Where the title alleged to have been

conveyed by a deed is set up, not by a party claiming under it, but as an outstanding title in a third person, with which the defendant has no connexion, it is competent for the grantee to show that the deed never was delivered. The doctrine of estoppel does not apply. *Ibid.*

93. Where an erasure or interlineation appears in a material part of a deed, of which no notice is taken at the time of the execution, it is a suspicious circumstance, which requires some explanation on the part of the plaintiff; but whether the explanation given is satisfactory or not, is for the jury to determine. *Jackson v. Osborn*, 2 Wend. 555.

94. A *bona fide* purchaser from a fraudulent grantee, or a grantee with notice, is under certain circumstances protected; but a purchaser under a power purchases at his peril: if there be no subsisting power or authority to sell, no title is acquired. *Jackson v. Anderson*, 4 Wend. 474.

95. Whether a sheriff's sale of land is void on account of adverse possession at the time of sale? *Quere. Ibid.*

96. A deed from residuary legatees to an executor to whom an estate was devised, with power to sell, though regarded with jealousy in a Court of equity, will be enforced at law. *Jackson v. Potter*, 4 Wend. 672.

97. The alteration by a party of a deed conveying lands to him, does not divest the estate so held, where the word *junior* in the name of the grantee, *D. Gould, junior*, appeared to have been repeatedly altered. *Jackson v. Gould*, 7 Wend. 364. *Jackson v. Jacobs*, 6 Cow. 125.

98. In the proof of a deed by a subscribing witness, he must state that he knows the grantor, or the proof is insufficient. *Ibid.*

99. A widow before dower assigned cannot convey an interest in the land in which she has a right of dower. *Sigler v. Van Riker*, 10 Wend. 414.

100. Where a deed of lands is prepared for execution, read, signed by both parties, and acknowledged before an officer authorized to take acknowledgements, it is a complete and valid deed, notwithstanding the witnesses present at its execution unite in testifying that there was no formal delivery of it, and the deed, after the death of the grantor, be found in his secretary among his private papers. *Scrugham v. Wood*, 15 Wend. 545.

101. An alteration of a sealed instrument, given to secure the payment of a sum of money, does not avoid it, although the person making the alteration acts only under parol authority. *Knapp v. Matby*, 13 Wend. 567.

102. The only fraud which can be pleaded at law, to avoid a deed, is fraud in its execution; such as a fraudulent reading of it, or the substitution of one instrument for another, or the obtaining, by some device, such an instrument as the party did not intend to give. *Belden v. Davies*, 2 Hall, 433.

VIII. Cancelling a deed.

103. The destruction or return to the grantor of a deed for land will not revert the title in him. *Jackson v. Andrew*, 4 Wend. 474. *S. P. Jackson v. Page*, 4 Wend. 585.

DESCENT.

1. If an alien holding lands under the provisions of the acts of the Legislature of 1802 and 1804, authorizing aliens to hold real estate, dies intestate, his lands descend to his heirs, although they be aliens; if he dies without heirs, the lands escheat; but until office found, the state has no right to take possession, and a grant of the lands before office found, whether by legislative act or otherwise, conveys no title. *Jackson v. Adams*, 7 Wend. 367.

2. The fifth canon of the statute of 1786, regulating descents, does not confer the capacity upon the children of alien brothers and sisters of inheriting lands; its only effect is to alter the rule of descent as it existed at common law. *Jackson v. Fitzsimmons*, 10 Wend. 9.

DEVISE.

I. *How to be construed:* (a) *What is a devise of real estate in a will;* (b) *Construction of a devise as to the lands devised;* (c) *As to the quantity of the estate devised;* (d) *As to the designation of the person of the devisee;* (e) *Estate to commence in futuro.*

II. *Executory devise:* (a) *Where a devise is good as an executory devise, or void as creating an estate tail;* (b) *Devise over after failure of issue.*

I. *How to be construed:* (a) *What is a devise of real estate in a will.*

1. A right of entry in lands is devisable within the statute of wills, (1 R. L. 364.) though at the time of the devise, and of the deviser's death, the land be in the adverse possession of another. *Jackson v. Varick*, 7 Cow. 238.

2. The like interest would pass by descent under our statute. (1 R. L. 52.) It would be bound by a judgment against the executor, and after *sci. fa.* might be sold upon execution against the heir. Per *Woodworth, J.*, delivering the opinion of the Court. *Ibid.*

3. A party holding a contract for the conveyance of lands has a devisable interest in such lands, and a devisee of such interest may transmit it to another by will. *Malin v. Malin*, 1 Wend. 625.

4. An immaterial alteration in a will, if made by a stranger, will not destroy it. *Ibid.*

5. A mere adverse possession of land, not amounting to disseisin, does not take from the owner the right to devise the premises. *Varick v. Jackson*, 2 Wend. 166.

(b) *Construction of a devise as to the lands devised.*

6. A codicil not expressly revoking a former will of real estate, though it profess an intention to make a disposition of the whole estate different from the will, if it do not do so in fact, but only in part, is but a revocation *pro tanto*. *Brant v. Wilson*, 8 Cow. 56.

7. Where there are two devises of the same testator, the last operates as a revocation of the first only so far as it is inconsistent with it. As to the residue, the former devise shall stand. *Ibid.*

8. A testator devised real estate to his son T. in fee; afterwards by codicil he declared, that if T. should die without issue male, the real estate should be disposed as follows: T.'s widow and child to have the use of one-half of the real estate as long as she remained a widow; and after her death or marriage to be equally divided between the testator's two other children, and T.'s child or children. T. died without issue, leaving a widow and three daughters, who entered and possessed the whole; *held*, that half of the land passed under the will to the heirs of T. till the death or marriage of the widow; and that the use of the other half passed by the codicil to the widow and children during the same period, the will as to an estate in half the land for that period not being revoked. *Ibid*.

9. Parol evidence of the declarations of the testator may be given, to show his intention in the case of a latent ambiguity in a will. *Doe v. Roe*, 1 Wend. 541.

10. If there be a certain description in a will of a thing devised, and a further description is added, it is immaterial whether the superadded description be true or false. Thus, by a devise of "my whole share of all the land I own, which lies along Schoharie creek, which is connected or belonging to the old farm, and known by the name of Ten Eyck's patent," a farm owned by the testator, lying along the Schoharie creek, was *held* to pass, although but a small portion of it was within the bounds of Ten Eyck's patent. *Ibid*.

11. On a general devise of all the testator's estate, real property acquired after the making of the will descends to the heir at law, and does not belong to the devisee. *Douglass v. Sherman*, 2 Paige, 358.

(c) *As to the quantity of the estate devised.*

12. A devise with power to convey in fee carries a fee. Otherwise if the power be to devise merely. *Doe v. Howland*, 8 Cow. 277.

13. But if the devise be in terms for life, though it give power to convey in fee, whether this will carry a fee? *Quære. Ibid*.

14. Under a devise of land to two daughters, "to be equally divided between them, share and share alike, and to be to them for and during their natural life; and after their death, then to be to their and each of their children; and to be divided between them, share and share alike;" *held*, that this conveyed a mere tenancy in common for life to the two daughters, without the power to make partition binding upon, or in the least affecting their respective children. *Jackson v. Luquere*, 5 Cow. 221.

15. *Held*, also, that on the death of one, the other surviving, the remainder in an equal undivided moiety of the whole land devised vested in possession in the children of the former. *Ibid*.

16. A devise to A. B. for and during his natural life, and after his decease to the children of his body lawfully begotten, followed by an *habendum* clause to have and to hold unto the said A. B., for and during his natural life, and after his decease to the heirs of his body lawfully begotten, and their heirs and assigns for

ever, gives a life estate to A. B., and a remainder in fee to his children. *Rogers v. Rogers et al.* 3 Wend. 503.

17. Where a testator devised a tract of land to a son and to the wife of such son *habendum* unto them and the survivor of them, for and during their natural lives, and by a subsequent clause, devised the same premises, from and immediately after the decease of the son and wife, unto their heirs male, *habendum* unto such heirs male, and to their heirs and assigns for ever, share and share alike; *it was held*, that the son of the testator and his wife took estates for life, and that their heirs male, living at the death of the testator, took a vested remainder in fee, which opened to let in after-born children. *Tanner v. Livingston*, 12 Wend. 83.

18. A direction to a devisee to pay the debts of the testator does not give a fee by implication where there is an express limitation of an estate for life, and especially where it appears from the will that the charge of the debts was not in respect to the estate devised, but in consequence of the indebtedness of the devisee to the testator for advances made and responsibilities assumed. *Ibid*.

19. So, also, a direction to pay off and satisfy a certain mortgage executed by the testator, was *held* not to give a fee by implication, the testator, in case of the neglect or refusal of the devisee, having directed and authorized his executors to sell a portion of the devised premises, and from the proceeds to satisfy the mortgage, paying over the surplus moneys, if any, to the devisee. *Ibid*.

20. Where a deviser in and by his last will and testament devised and bequeathed all his estate, real and personal, to two daughters, equally to be divided between them as tenants in common in fee, and charging the same with an annuity to their mother during her life, adds, "notwithstanding the former devise for the benefit of my wife and daughters, I empower my executors to do all acts and execute all instruments which they may consider requisite to the partition of my landed estate, and I devise the same to them as joint tenants, to be by them sold at such time and in such manner as they shall think most for the interest of my daughters;" *it was held*, that the devise to the executors gave them a legal estate in fee. *Bradstreet v. Clarke*, 12 Wend. 602.

21. Where the provisions of a will are so repugnant that they cannot stand together, the last provision will prevail. *Ibid*.

22. A devise of lands, where there are no words of perpetuity, gives only a life estate, and a fee will not be implied from a direction to the devisee to pay the debts of the testator, where such payment is not made a condition to the devise, or declared a personal charge upon the devisee. *Van Alstyne v. Spraker*, 13 Wend. 578.

(d) *As to the designation of the person of the devisee.*

23. A devise to executors *eo nomine* to hold and manage real estate until the coming of age of the youngest child of the testator, vests the estate in the executors; and it is not neces-

sary, to the perfecting of the estate in them, that they should take out letters testamentary. *Judson et al. v. Gibbons et al.* 5 Wend. 224.

(e) *Estate to commence in futuro.*

24. Where a man by his will devised real estate to three sons, adjudged to be illegitimate, "if they should live to come of age;" it was held, that during their minority the property went to the heir at law. *Jackson v. Winne*, 7 Wend. 47.

II. *Executory devise: (a) Where a devise is good as an executory devise, or void as creating an estate tail.*

25. Rule recognised, that an executory devise shall not prevail, when it extends beyond a life or lives in being, and twenty-one years and nine months afterwards. *Wilkes v. Lion*, 2 Cow. 333.

26. All dispositions in the nature of entails are opposed to the policy of our institutions. *Ibid.*

27. It seems, that estates-tail are not simply abolished and thrown back to fees conditional at the common law, either by the statute of 1792, the statute of 1796, (vide 1 Greenleaf, 905; 1 Kent and Radcliff, 44; 1 Woodworth and Van Ness, 52; or by the act of 1788, repealing all the English statutes. Vide 2 Greenleaf, 116, sec. 37; 1 Kent and Radcliff; 358, sec. 28; 1 Woodworth and Van Ness, 526, sec. 30.) But these statutes suffer the estate tail to arise, and then change it into a fee simple. *Ibid.*

28. A limitation over contained in a devise in the following words, "I give, devise, and bequeath unto my six sons, viz. F., &c., all my real and personal estate, share and share alike, whatsoever and wheresoever, to hold to them, their heirs and assigns, and if any of the above six should happen to die without heirs, then his or their share shall fall to the survivors of the above-named sons, share and share alike," is good and effectual, by way of executory devise, to vest in the surviving brothers the share of one of the devisees on his dying without issue. *Jackson v. Christman*, 4 Wend. 377.

29. Where a testator, by a will made in 1778, devised lands to his son S. B. during his natural life, with remainder to the first son of his son S. B. for life, with remainder to the first and every other son and sons of the eldest son of his son S. B., successively to hold the same in tail male; and the son only was living at the death of the testator, and he unmarried, though he subsequently married and had a son, which son also married and had a son, so that there was a son, grandson, and great-grandson of the testator; it was held, that the son took a life estate in the premises, that the limitation to the grandson was good, although he was unborn at the death of the testator, but that the limitation over to the great-grandson was void; and such limitation being void, the grandson, instead of taking a life estate in the premises according to the terms of the devise, took an estate in tail, which, by the statute abolishing entails, was converted into an estate of inheritance in fee-simple. *Jackson v. Brown*, 13 Wend. 437.

(b) *Devise over after failure of issue.*

30. Where a testator devised one portion of his real estate to his son A., and another portion thereof to his son B., and directed that if either of his sons should die without lawful issue, his share or part should go to the survivor; it was held, that the right of A., during the life of B., in the share devised to B., was a mere naked possibility, and was not assignable or releasable. *Jackson v. Waldron*, 13 Wend. 178.

DISSEISIN.

1. To constitute a disseisin, upon which a descent may be cast, so as to toll the right of entry, it must be commenced by wrong, and founded in an ouster of the true owner. There must be a disseisin in fact, and the rightful owner must have been expelled, either by violence, or by some act which the law regards as equivalent in its effects. *Dos v. Thomson*, 5 Cow. 371.

2. A mere entry upon another is no disseisin, unless it be accompanied with expulsion. *Ibid.*

3. An estate by disseisin is an estate gained by wrong and injury; and herein it differs from disposssession, which may be by right or wrong. *Ibid.*

4. To establish a disseisin, the party must show a tortious seisin affirmatively. *Ibid.*

5. Entering on land apparently vacant, and enclosing it with a fence, will not *per se* furnish a presumption of wrong, so as to make out a disseisin. *Ibid.*

6. The holding over of a tenant for life, after the determination of his estate, though he claims the fee, is not a disseisin of the rightful owner. *Varick v. Jackson*, 2 Wend. 166.

DISTRESS.

1. For a rent service, the landlord may distrain of common right; but for a rent charge, only in virtue of a clause of distress. He cannot distrain for a rent seek, for the statute (4 Geo. 2, ch. 28.) which gives distress for all rents has not been enacted in this state. *Cornell v. Lamb*, 2 Cow. 652.

2. Fealty is not, in fact, due upon any tenure in this state. It is altogether fictitious. It is retained by statute as to lands holden in socage, and abolished as to all grants made directly from the state, (1 R. L. 70.) but the right to distrain is not impaired by the statute. It remains as at common law, by which fealty was incident to every tenure, and the right of distress incident to fealty; and even if the latter be taken away, yet where it would have existed at common law, distress may be made. *Ibid.*

3. So that a distress may in all cases be made upon a lease by parol, which would be valid by the statute of frauds, where the lessor retains the reversion. *Ibid.* *S. P. Schuyler v. Leggett*, 2 Cow. 660.

4. *Seemle*, fealty is no longer necessary to supported the right to distrain. *Ibid.*

5. The common law right of distress was not intended to be abolished, but to be preserved in full force, by the act concerning distresses, rents, and the renewal of leases. (1 R. L. 434.) *Ibid.*

6. Whether where the landlord executed a lease for seven years, and left it with a depositary appointed by the lessee, for him to execute on his part, which he agreed to do, but neglected; and yet took possession of the premises, and held them more than a year, the landlord may consider the lease as executed by the tenant, and distrain under it? *Querc. Schuyler v. Leggett*, 2 Cow. 660.

7. The thirteen section of the act concerning distresses, &c., giving a right to distrain goods within a certain time after they are removed, is confined to the continuance of the lease, or the continuance of the landlord's right and the tenant's possession; though the landlord's right continue, if the tenant's possession have ceased, there cannot be a distress, within that section, of the tenant's goods removed off the demised premises, though such distress be made within thirty days after the rent fall due. *Burr v. Van Buskirk*, 3 Cow. 263.

8. The thirteenth section of the act concerning distresses, &c. (1 R. L. 437.) as amended by the act, (sess. 43, ch. 194, s. 7.) authorizes the taking of goods which are removed off the demised premises, within thirty days after the rent for which they are distrained falls due; but they cannot be distrained for rent which fell due more than thirty days previous to the distress. *Ibid.*

9. The common law did not allow a distress off the premises. *Ibid.*

10. Previous to a distress for rent in the city of New York, the landlord must file an affidavit with the clerk of the city and county, that the rent distrained for is due, according to the act. (Sess. 38, ch. 153.) *Ibid.*

11. In the case of a distress for rent, the affidavit required by law, specifying the amount of rent, &c., cannot be made before a justice of the peace; it must be made before an officer generally authorized to administer oaths. *Christman v. Floyd*, 9 Wend. 340.

12. A constable of the town where the demised premises are situate, to whom a distress warrant is delivered to be executed, may pursue into another town, and take goods which have been fraudulently removed to avoid a distress for rent. *Ibid.*

13. A suspension of proceedings under a distress, at the request of the tenant, does not deprive a landlord of the right to pursue the goods distrained, and retake them, though the tenant has quit the possession of the demised premises. An original distress off of the demised premises, after the tenant has quit possession, is not good. *Pemberton v. Van Rensselaer*, 1 Wend. 307.

14. A landlord cannot distrain either on or off the demised premises, where the term has expired, and the tenant has abandoned or yielded up the possession to the landlord. *Williams v. Terbos*, 2 Wend. 148.

15. A landlord has a right (under the act of 1813 and the act of 1820) to distrain either on or off the demised premises, at any time within six months after the expiration of the lease,

where the interest of the landlord and the possession of the tenant both continue to exist; provided the distress, if made off the demised premises, be also made within thirty days after the goods are removed; or within thirty days after the rent becomes due, in those cases where the goods were removed before the rent became due and payable. But the landlord is in no case authorized to distrain goods carried off the premises, where he would not have been allowed to distrain the same goods, if the tenant had permitted them to remain. *Ibid.*

16. In an action on the case by a tenant against his landlord, for distraining for a greater sum than is due for rent, whereby the tenant was obliged to pay the pretended arrears of rent, &c.; it was held, that he could not recover more than nominal damages, on proof that he gave his landlord a negotiable note with sureties for the amount claimed as rent, as a collateral security only, and not as a payment or satisfaction of the rent, the note not having been paid nor negotiated by the landlord. *Lewis v. Loeze*, 3 Wend. 70.

DISTRICT ATTORNEY.

1. A district attorney is not liable for clerk's fees accruing in the course of suits, for fines and forfeitures upon recognisances, pursuant to the act of the 21st of April, 1818, (sess. 41, ch. 283, s. 7, Laws N. Y., vol. 4, page 307, (c),) unless such fees are in fact collected by him. *The People v. Van Wyck*, 4 Cow. 260.

2. The board of supervisors are not bound to allow him a compensation for services under that section, but only for those which arise in the course of criminal proceedings, viz. such as are provided for district attorneys in the statute of 1813, (2 R. L. 21.) which do not extend to suits upon recognisances, &c. *Ibid.*

3. A district attorney is not liable to the clerk of the Circuit, for fees in a criminal case tried in that Court. *Fairlie v. Maxwell*, 1 Wend. 17.

4. Their duty in relation to the collection of recognisances. *The People v. Van Epe*, 4 Wend. 387.

5. A district attorney is not entitled to charge for his attendance at an Oyer and Terminer, unless the attorney-general also attends on requirement, &c. *People v. Supervisors of Schoharie*, 6 Wend. 505.

DISTRINGAS.

1. A rule to show cause why a *distringas* should not issue will be awarded against a banking company for the nonpayment of a bill of costs. *Warden ads. Orange County Bank*, 1 Wend. 309.

DOGS.

1. If one's dog chases or worries cattle, an action lies against him, if he have notice that his dog is in the habit of doing this. *Hinckley v. Emerson*, 4 Cow. 351.

2. But no one has a right for this reason to kill the dog, except he worry sheep, and thus be brought within the statute. (1 R. L. 167.) *Ibid.*

3. To justify killing him, except in the case of sheep, it is necessary to show that he could not otherwise be separated. *Ibid.*

4. When a dog attacks persons, he may be killed as a common nuisance. *Ibid.*

5. And so if he attack, and actually kill domestic animals on the owner's land. *Ibid.*

DOWER.

I. *Title of the widow, and of what she shall be endowed.*

II. *Assignment of dower.*

III. *What is a bar to dower.*

IV. *Action and damages.*

I. *Title of the widow, and of what she shall be endowed.*

1. Count in dower, that the plaintiff demands the third part of certain premises, with the appurtenances, as her dower of the endowment of her husband, whereof she hath nothing. Plea in bar that demandant is an alien. Replication that she and her husband came to this state in 1786, with intent to become citizens, and resided here till his death in 1820; that her husband was naturalized August 29th, 1803, and that he purchased the premises in question, not exceeding 1000 acres, January 4th, 1804; *held*, that this purchase ensured to the demandant's benefit; and a right of dower then vested in her, and she, having done nothing to divest it, is entitled to recover. This is by the statute of 1803. *Sutliff v. Forgey*, 1 Cow. 89.

2. Dower is due of iron or other mines wrought during the coverture, but not of mines unopened at the death of the husband. *Coates v. Cheever*, 1 Cow. 460.

3. A widow is in general entitled to dower in an equity of redemption; but where the tenant enters upon the land by virtue of a foreclosure, or after a forfeiture for the nonpayment of the money, then the estate is deemed never to have vested in the husband, and the widow is not entitled to dower. *Ibid.*

4. Where the tenant in possession enters by virtue of a purchase of the equity of redemption from the mortgagor, and then buys the mortgage, and takes an assignment to himself, this extinguishes the mortgage, and the widow of the mortgagor is entitled to her dower, and in such case her right relates back to the purchase of her husband. *Ibid.*

5. A right to dower is an interest in lands contingent during the life of the husband, but rendered absolute by his death. But it is a right resting in action merely, and cannot be so aliened as to enable an assignee to bring an action in his own name, although it may be released. *Sutliff v. Forgey*, 1 Cow. 316.

6. Dower cannot be had of an estate *per autre vie*. *Gillis v. Brown*, 5 Cow. 388.

7. If not devised, such an estate goes to the executor, and is assets in his hands. *Ibid.*

8. The widow of an alien purchaser under the statute (2 R. L. 542.) takes her dower as purchaser, within the meaning of that act: according to *Sutliff v. Forgey*, 1 Cow. 89 to 97. *Forgey v. Sutliff*, 5 Cow. 713.

9. D. took a deed in fee of land from B., at the same time giving the latter a mortgage to secure the purchase money. D. then intermarried with M.; and then released his equity of redemption to B., and died, M. surviving; *held*, that M., his widow, was not entitled to dower. *Jackson v. Dewitt*, 6 Cow. 316.

10. Possession of land by the husband, claiming ownership, is *prima facie* evidence of seisin, to entitle his widow to dower. *Jackson v. Wallermire*, 7 Cow. 353.

11. A widow is entitled to dower in lands whereof her husband died seised, notwithstanding that dower hath before been assigned in the same lands to the widow of the husband's father; the only effect of the previous assignment of dower is to reduce the extent of the recovery, as thus: if the estate originally consisted of nine acres, the widow of the father is endowed of three acres, and the widow of the son of two acres; and on the death of the widow of the father, the widow of the son becomes entitled to one-third of the three acres originally assigned to the widow of the father. *Beav v. Snyder*, 11 Wend. 599.

12. The widow of an alien is entitled to recover dower in lands, against a party whose title is derived from her husband, although the husband, at the time he took a conveyance of the lands, was not entitled to take and hold real estate, and such conveyance was not subsequently affirmed by statute. *Davis v. Darrow*, 12 Wend. 65.

13. The widow of a mortgagor is entitled to dower in the equity of redemption; but her title is subject to the mortgage, and may be defeated by a foreclosure. The title she acquires by a marriage subsequent to the mortgage does not affect the security or any of the remedies under it. *Van Dyne v. Thayer*, 14 Wend. 233.

14. After forfeiture, the mortgagee or his heirs, having obtained possession of the mortgaged premises, may, until the mortgage is satisfied, defend themselves, in the possession under the mortgage, against a claim for dower. *Ibid.*

II. *Assignment of dower.*

15. On application to set aside the admeasurement of dower, under the statute, (1 R. L. 60.) it must appear that copies of the papers upon which the application is grounded have been served upon the opposite party. *Matter of Peleg Shaw*, 1 Cow. 176.

16. If land assigned for dower contain an open mine, tenant in dower may work it for her own benefit. *Coates v. Cheever*, 1 Cow. 460.

17. Dower may be assigned of mines, either collectively with other lands, or separately of themselves. *Ibid.*

18. It shall be assigned by metes and bounds, if practicable; if not, a proportion of the profits or

the separate alternate enjoyment of the whole for short proportionate periods, may be assigned for dower. *Ibid.*

19. Where the assignment is of lands aliened by the husband in his lifetime, and improved by the tenant, the admeasurers should assign one-third of the whole value of the land, deducting the improvements made since the sale; and the assignment should be so made, if practicable, as to give the tenant possession of the improvements which he has made; or if made in any other way, it should always be in such manner as to secure to him, under the statute, (sess. 29, ch. 168, s. 1, 1 R. L. 60.) his own improvements, or a suitable allowance for the use of them. *Ibid.*

20. In proceedings to assign dower, before the surrogate, the admeasurers appointed by him under the above-mentioned statute have no power to decide upon the widow's right in the land; but this is a question which belongs to the surrogate, and the admeasurers must obey his order. *Ibid.*

21. Where the surrogate orders one-third of certain premises to be set off, the admeasurers have no right to confine their admeasurement to one-sixth, upon the ground that the husband was entitled only to one undivided half of the land. *Ibid.*

22. But they have the same powers as a sheriff, under an execution upon a judgment in dower; and accordingly are not confined to the mere measuring off by metes and bounds, but may assign dower in mines, as above mentioned; and a surrogate's Court is, under the statute, a legal and fit tribunal for directing and enforcing such an assignment. *Ibid.*

23. On appeal from the proceedings to assign dower before the surrogate, where the respondent resides out of the state; it seems, the notice of the appeal and other papers may be served by putting them in the post-office, directed to the respondent, or by delivering them to his tenant upon the premises, or upon his attorney in fact, if he has any; but service upon the attorney who appeared before him, and conducted his proceedings before the surrogate, is not *per se* sufficient notice; for attorneys are not known as officers of that Court; and the person appearing as attorney there is not considered as an attorney on record, upon whom notices may be served in the progress of a suit prosecuted or defended by attorney. *Ibid.*

24. Where the notice of appeal and other papers were served upon the agent and counsel of the respondent, who appeared for him before the surrogate and the admeasurers, and who was directed by him to keep a look-out, and it appeared that the respondent was in fact apprized of the service, and retained counsel, who appeared, and brought his whole case before the Court; *held*, that these circumstances were equivalent to a personal service. *Ibid.*

25. The statute directs no particular manner of service, and it is satisfied if the Court see that the party has been fully apprized of the appeal, so that his rights cannot be affected for want of notice. *Ibid.*

26. The proceedings before a surrogate to

admeasure and set off dower, are no evidence of title in the widow. *Jackson v. Dewitt*, 6 Cow. 316.

27. A widow, before her dower is assigned to her, cannot convey an interest in the land whereof her husband died seised. *Ritchie v. Putnam*, 13 Wend. 524.

28. On a proceeding for the admeasurement of dower, if one of the admeasurers dies before the execution of his trust, the vacancy may be supplied by a new appointment made by the surrogate for the time being, although the original appointment was made by his predecessor. *Gale v. Edsall*, 8 Wend. 460.

29. On a proceeding before a surrogate for the appointment of admeasurers of dower, an inquiry cannot be gone into, whether a settlement has been made by the husband in lieu of dower. *Hyde v. Hyde*, 4 Wend. 630.

30. Admeasurers of dower, in ascertaining the part to be assigned to the widow, are not authorized to make any deduction in consequence of any conveyance of land made by the husband to the wife during marriage. *Ibid.*

31. On an appeal to the Supreme Court, from proceedings before a surrogate on admeasurement of dower, only the regularity and fairness of the proceedings will be examined into. *Ibid.*

32. In proceedings before a surrogate, by a widow, to obtain admeasurement of dower, it is necessary to give notice of such proceedings only to the tenant of the freehold; tenants for years are not entitled to notice. *Ward v. Kille et al.* 12 Wend. 137.

III. What is a bar to dower.

33. The alien widow of a natural born citizen cannot be endowed; and it follows that the alien widow of a naturalized husband cannot be endowed, independent of the statutes authorizing aliens to purchase and hold real estates. *Sutliff v. Forgey*, 1 Cow. 89.

34. It seems, that the widow does not take as purchaser, heir, assign, or under any other word used by the statute, expressly to designate the person intended to take; but rather as a constructive right as a purchaser within the general spirit and object of those statutes. *Ibid.*

35. Demand of dower is not necessary to warrant an action for it. *Jackson v. Churchill*, 7 Cow. 287.

36. A devise or bequest to the widow, in lieu of dower, and which is accepted by her, is a good bar. *Ibid.*

37. That a devise to the widow was intended to be in lieu of dower may be inferred from the provisions of the will; as where it is inconsistent with the claim of dower. But the incongruity must be plain. Thus, where the husband devised to his wife his dwelling house and part of his gardens *durante viduitate*, with certain of his personal property, &c.; and then devised his farm to his two sons, &c., and the wife accepted the provisions of the will; *held*, this was no bar to dower. *Ibid.*

38. The acceptance by a widow of an estate given to her, by the will of her husband, in lieu of dower, is a bar at law as well as in equity to her right of dower in other lands whereof

her husband died seised. *Kennedy v. Mills*, 13 Wend. 553.

39. And although such other lands are charged by the will with a contribution to her support, the neglect or refusal of the owners of such lands to comply with the requirements of the will does not entitle the widow to her action of dower; her remedy is otherwise. *Ibid*.

40. Where a testamentary provision is made for the widow, which is intended to be in lieu of dower, she has her choice; she may take the provision in the will or her dower, but cannot have both. *Ibid*.

IV. Action and damages:

41. In dower *unde nihil habet*, view is not of course. *Fischer v. Conant*, 4 Cow. 396.

42. In general, a view will not be granted unless boundaries are in question. *Ibid*.

43. In ejectment for dower, admeasurement on application to the surrogate, under the act, (1 R. L. 60, 1, 2.) the proceedings are no evidence of title, nor of any thing more than that the part assigned belongs to the widow, after a title is shown to the whole. The plaintiff must prove his title, the same as in any other action of ejectment; and the defendant may impeach it. *Jackson v. Randall*, 5 Cow. 168.

44. The proceedings to set off or assign dower by the Court of Common Pleas, under the act, (1 R. L. 60.) are merely evidence of the location of the land to be recovered. All the other facts, as seisin of the husband, &c., must be proved in the ordinary way, as in an action of dower. *Jackson v. Wallermire*, 5 Cow. 299.

45. The same evidence of seisin which would entitle the heir to recover in ejectment, will sustain an action for dower. *Ibid*.

46. Actual possession of the husband, or his receipt of rent, is *prima facie* evidence of seisin in action for dower. *Ibid*.

47. Where it appeared by parol that the husband bought a farm, paying something towards it, taking possession and selling to another, who succeeded him in the possession; and so through several tenants down to the defendant, who was in possession; held, that this was *prima facie* evidence of the husband's seisin, and sufficient to entitle his widow to recover dower, though no deeds were shown. *Ibid*.

48. The proceedings upon a petition to the Court of Common Pleas, for the admeasurement of dower, under the statute, (1 R. L. 61, 2.) cannot be impeached, in ejectment for the dower, because the partition does not show, on its face, that the husband died forty days before it was presented. *Jackson v. Wallermire*, 7 Cow. 353.

49. It will be intended, that the fact appeared to be so on the hearing in the Common Pleas. *Ibid*.

50. If there be an irregularity in the proceedings of that Court, the mode of taking advantage of it is, by motion there to set them aside, or by appeal under the act. *Ibid*.

51. A writ of dower *unde nihil habet* lies only against the tenant of the freehold. *Hurd v. Grant*, 3 Wend. 340.

52. Where dower has been assigned by ad-

measurers appointed by the surrogate, and ejectment is brought for the recovery of possession of the premises, the plaintiff is not bound to declare by demanding the one undivided third part, &c., but may demand the specific lands admeasured. *Borst v. Griffin*, 9 Wend. 307.

53. Where, however, in such case, an undivided third part is demanded, and the plaintiff on the trial shows her right to dower independent of the admeasurement, and also shows that such admeasurement was had on due notice to the defendant, and a verdict is rendered for the specific portion assigned as dower, the Court will, after verdict, permit an amendment of the declaration, and will not send back the parties to a new trial. *Ibid*.

54. The dower which the widow is entitled to in lands aliened by the husband during the marriage, is one-third of the value at the time of alienation, and no more. *Walker v. Schuyler*, 10 Wend. 480.

55. A widow who brings ejectment to recover her dower is entitled to costs, though the suit be brought before admeasurement of dower. *Ibid*

DRUNKENNESS.

1. Voluntary drunkenness will not protect a person from liability for torts, or from punishment for crimes committed while in that situation. *Prentice v. Achorn*, 2 Paige, 30.

DUELLING.

1. Since the adoption of the new constitution, the oath against duelling cannot be required of a solicitor, counsellor, &c. In the case of Wood, note (b), 2 Cow. 29.

EJECTMENT.

I. When an ejectment lies.

II. What title or claim will support an action: (a) Title by deed, judgment, fine, award, devise, location, patent, &c.; (b) Title by possession; (c) Equitable title; (d) When there is a subsisting title.

III. Notice to quit, when necessary, and when waived by the tenant's disclaimer.

IV. Defence: (a) Title in the defendant or a third person; (b) Adverse possession; (c) How the lessor may repel the defence of adverse possession; (d) When the defendant is precluded from disputing the lessor's title; (e) Other matters of defence.

V. Declaration: (a) Demise; (b) Declaration, and amending declaration; (c) Service of declaration and notice.

VI. Proceedings when the tenant appears, and enters into the consent rule: (a) Consent rule and plea; (b) Admitting the landlord to defend; (c) Subsequent proceedings until judgment inclusive.

- VII. *Proceedings in cases of re-entry for non-payment of rent.*
 VIII. *Habere facias possessionem.*
 IX. *Action of trespass for the mesne profits.*

I. *When an ejectment lies.*

1. Merely moving hay scales on the ground of another, and never afterwards interfering with them, does not amount to a possession in the party removing, so as to subject him to an action of ejectment. *Jackson v. Pike*, 9 Cow. 69.

2. Ejectment may be maintained against a vendee who fails to perform his part of the contract under which he enters, on showing notice from the vendor that the contract was at an end. *Jackson v. Minnecrief*, 5 Wend. 26.

3. Where premises, for which an action of ejectment is brought, are actually occupied and possessed, though by a mere servant of the owner, the action must be brought against such servant; but if one engaged in the cultivation of property, as a mere servant of the owner, be not in the actual occupation of the premises, an action of ejectment will not lie against him, *Shaver et al. v. M'Graw*, 12 Wend. 558.

4. Ejectment will not lie against a remainderman during the continuance of the particular estate. *Ibid.*

5. It seems, that ejectment for dower can only be brought against the tenant of the freehold. *Ibid.*

6. Where A. owned a patent, and B. owned another patent adjoining, and in the location under their respective patents, A., by a mistake in locating, curtailed his patent on the side of B., in consequence of which B., though he located at first on the true line, afterwards claimed up to A.'s location, and deeded a supposed gore between the patents; held, that A. was not concluded in an action of ejectment, but might recover against one claiming a part of the supposed gore under the title of B. *Jackson v. Woodruff*, 1 Cow. 276.

7. And though A. actually give conveyances of his land according to such mistaken location, he will not be concluded in relation to any persons other than those to whom he has thus conveyed. *Ibid.*

8. In ejectment by the mortgagee, or his assignee, or a purchaser under a mortgage expressly conditioned for the payment of money, evidence that the mortgage was given to indemnify the mortgagee as special bail for the mortgagor, and that no damage had followed his being bail, is inadmissible. *Jackson v. Jackson*, 5 Cow. 173.

9. Where, in ejectment, the defendant gave evidence to show that certain lands of D. C., under whom the lessors of the plaintiff claimed title, were forfeited by an act of attainder; held, that this was *prima facie* evidence that the title to the premises in question was once in D. C.; and that the plaintiff might, without further proof of title in D. C., proceed to deduce title from him. *Jackson v. Cole*, 4 Cow. 587.

10. Where an act for vesting certain lands of D. C. in C. C. referred to a location and enumeration of the lands D. C. made, &c., and delivered to the commissioners of forfeitures,

and directed them to be appraised by such persons as the commissioners of forfeitures should appoint, and the appraised value to be paid either to the commissioners or treasurer, &c. as against the state, the location and enumeration thus adopted by the act are conclusive that the lands mentioned in them belonged to D. C. *Ibid.*

11. *Cestuis que trust*, who have paid the consideration for a conveyance of lands, may claim the benefit of a resulting trust, and will be considered as holding the legal estate so far as to enable them to defend or maintain an action of ejectment for lands thus held. *North Hempstead v. Hempstead*, 2 Wend. 109.

12. Where a plaintiff in ejectment claims to recover under a mortgage as forfeited, it is enough that it be found by a special verdict that there is a mortgage, and that from its terms it appears that the day of payment was past at the commencement of the suit; it is not necessary that the jury should find the nonpayment of the mortgage moneys. *Rogers v. Eagle Fire Company*, 9 Wend. 611.

13. Long acquiescence by a plaintiff in an erroneous location will authorize a jury to find that the plaintiff had agreed to a location different from that given by his deed; and whether the plaintiff knew his rights or not, such location or acquiescence will bind him. *Dibble v. Rogers et al.* 13 Wend. 536.

14. The declarations as well as the acts of parties are competent evidence upon the question of location. *Ibid.*

15. A contract for the purchase of land, after performance by the vendee of the terms of the contract, and the accruing of a right to a deed, is a sufficient colour of title whereon to base a defence of adverse possession in an action of ejectment by the vendor for the recovery of the premises. *Briggs v. Prosser*, 14 Wend. 227.

16. A possession of twenty-five years under such contract, after the accruing of the right to a deed, authorizes the presumption that the deed was executed. *Ibid.*

(b) *Title by possession.*

17. Where one in possession of land claiming title, but having no other right, conveys the land by quit-claim deed, and the grantee enters upon and improves part, claiming title according to his deed, the possession of the residue continuing in the grantor, the possession of the grantor is the possession of the grantee; and the latter may maintain ejectment grounded upon such a possession against the grantor, or any one who is in by subsequent possession without title. *Jackson v. Hubble*, 1 Cow. 613.

18. A prior possession is *prima facie* evidence of title in an action of ejectment; but where a recovery by ejectment is had against a prior possessor, he cannot set up his possession as the foundation of a recovery in a cross ejectment, unless it was of sufficient length to be evidence of title, as where it was for twenty years and more. *Jackson v. Miller*, 6 Cow. 751.

19. In ejectment, a prior possession short of twenty years, under a claim of right, will prevail over a subsequent possession short of twenty years, if the first be not relinquished. *Jackson v. Dem*, 5 Cow. 200.

20. Though a prior possession is good ground of recovery in ejectment against one who claims by mere possession; yet if such previous possession was not continued, but voluntarily abandoned, it becomes unavailable against the subsequent one. *Jackson v. Walker*, 7 Cow. 637.

21. And though such previous possession be not voluntarily abandoned, yet it will not avail against a subsequent possession acquired by ejectment. *Ibid.*

22. Where lands have been held *adversely* for twenty years, and an entry is made by a party who has the *true title*, each party may be dispossessed by an ejectment brought by him who held the premises adversely. *Jackson v. Orz*, 8 Wend. 440.

23. A plaintiff in ejectment, claiming the premises in fee, is entitled to recover, although he only shows title by possession. *Day v. Alverston*, 9 Wend. 223.

24. Neither an actual entry under title or the actual receipt of profits need be shown to maintain an ejectment; it is sufficient to show a right to the possession at the time of the commencement of the suit. *Sigler v. Van Riper*, 10 Wend. 414.

(c) *Equitable title.*

25. An equitable title is not available in an action of ejectment, so as to defeat the legal title. The latter alone is in question. *Sinclair v. Jackson*, 8 Cow. 543.

(d) *When there is a subsisting title.*

26. To warrant one's being made a lessor in ejectment, he must have a subsisting claim to a title or interest in the premises. *Jackson v. Paul*, 2 Cow. 502.

III. *Notice to quit; when necessary, and when waived by the tenant's disclaimer.*

27. Notice to quit is not necessary where there is no tenancy in fact, and especially where the defendant disclaims to hold as tenant. *Jackson v. French*, 3 Wend. 337.

28. A tenant for one year holding over is a tenant from year to year, and entitled to notice to quit before an ejectment can be brought against him; and one coming in under such tenant stands in the same relation to the landlord, and is also entitled to notice to quit. *Jackson v. Salmon*, 4 Wend. 327.

29. Notice to quit is not necessary from a purchaser at a sale, by virtue of a surrogate's order for the payment of debts, to a person in possession under a conveyance from the heirs of the intestate. *Jackson v. Robinson*, 4 Wend. 436.

30. Notice to quit to a vendee is not necessary, though he enter into possession of the land by the assent of the vendor. *Jackson v. Moncrief*, 5 Wend. 26.

31. It is essential to a valid disclaimer, that the case be such that the estate or thing disclaimed would pass or vest but for the disclaimer; unless it be made an express condition of the grant, that the grantee shall elect. *Jackson v. Richards*, 6 Cow. 617.

32. This proposition illustrated by the cases. *Ibid.*

33. A disclaimer may be by record, and sometimes by deed or *in pais*. *Ibid.*

34. Where a conveyance of land is drawn and sealed, but not delivered, it is void; and not a case for disclaimer on the part of the grantee. *Ibid.*

35. A written disclaimer, therefore, in such case, being put on that ground, not affecting the title to lands in any way, is not an instrument which can be acknowledged or proved and recorded within the registry act. (1 R. L. 369.) *Ibid.*

IV. *Defence: (a) Title in the defendant or a third person.*

36. One making a contract to buy land, and taking possession under it, though strictly the relation of landlord and tenant is not thus created, yet the vendee, in ejectment by the vendor against him, is absolutely estopped from either showing title in himself, or setting up an outstanding title in another. *Jackson v. Walker*, 7 Cow. 637.

37. So of any one coming in under him, either with his consent or as an intruder. *Ibid.*

38. And where G. brought ejectment against such a vendee, who went into another state, leaving his wife and children in possession; and G. then persuaded the wife to surrender the possession to him for a compensation; on ejectment by the vendor against G.'s tenant; *held*, that he was estopped to show G.'s title, or any title outstanding against the vendor. *Ibid.*

39. *Held*, also, that the question, whether G. claimed under the vendee, was a question of law; and it having been submitted to the jury, who found for G., a new trial was granted. *Ibid.*

40. An outstanding title in a person other than the lessor of the plaintiff in ejectment is sufficient to defeat his recovery, though the defendant do not claim under that title. *Jackson v. Harrington*, 9 Cow. 86.

41. And this, *it seems*, though the title be outstanding in the trustees of the lessor. *Ibid.*

42. When a reconveyance from a trustee will be presumed. *Ibid.*

43. A defendant in ejectment, a naked possessor without colour or claim of right, is entitled to have facts and circumstances submitted to a jury, from which a presumption may arise of a conveyance of the estate claimed by the lessors of the plaintiff; so that if, in the judgment of the jury, such facts and circumstances are sufficient to warrant the inference of a conveyance, they may say so; and by thus showing the title out of the lessors of the plaintiff, a defendant may protect his possession, although he may be unable to trace such title to himself. *Schauber v. Jackson*, 2 Wend. 14.

44. In an action of ejectment brought against the grantee of a tenant by the courtesy, the fact of assuming to convey a fee, supported by proof of the destruction of the house of the grantee by fire many years before, is not sufficient to warrant the presumption of a conveyance to the tenant authorizing the grant of a fee, especially when rebutted by other circumstances. *Jackson v. Mancius*, 2 Wend. 357.

45. In an action of ejectment by a mortgagee against a mortgagor, the latter may set up an

eviction under a paramount title, in bar of a recovery; and though the mortgagor has become a purchaser under such hostile title, and remains in possession of the mortgaged premises, the mortgagee is not entitled to recover. *Jackson v. Marsh*, 5 Wend. 44.

46. A tenant cannot set up an outstanding adverse title in a third person, in an action of ejectment brought against the tenant by those deriving title from his landlord. *Jackson v. Harper*, 5 Wend. 246.

47. The acceptance of a lease by the tenant from such third person is a fraudulent attornment; and notwithstanding such title and the lease under it, the original landlord is entitled to recover, on proof of the acknowledgment of the tenant that he entered under him into possession of the premises. *Ibid.*

48. A party in possession of lands, who has recognised the title of a claimant, and agreed to purchase, may subsequently deny such title, set up title in himself, and show that his recognition of the other title was produced by imposition, or made under misapprehension of his own rights; but a party, entering into possession under an agreement to purchase, cannot dispute the title of him under whom he enters, until after a surrender of the possession. *Jackson v. Spear*, 7 Wend. 401.

49. In ejectment, a defendant who has entered forcibly into possession of the premises in question, is not debarred by such forcible entry from showing title in himself; the remedy of the party dispossessed, if any, is under the statute of forcible entry and detainer. *Jackson v. Stanbury*, 9 Wend. 201.

50. A mortgagee in possession of the mortgaged premises, lawfully acquired after condition broken, cannot be dispossessed by an action of ejectment commenced against him. The revised statutes have not altered the law in this respect. *Phyfe v. Riley*, 15 Wend. 248.

(b) *Adverse possession.*

51. In ejectment, the defence of twenty years possession, in order to countervail a legal title, must be supported by twenty years actual occupancy, or a substantial enclosure of the premises by the defendant, or by him and those through whom he derives title. *Jackson v. Woodruff*, 1 Cow. 276.

52. A cultivation of part of the premises, with a claim of title to the whole for that time, will not constitute a defence beyond the portion actually improved. *Ibid.*

53. And even where such possession is under a deed or paper titled for a large tract of land, (e. g. 783 acres,) and only a small part is improved, (e. g. 2 acres,) with a claim of title to the whole, this will not constitute an adverse possession beyond the actual improvement. *Ibid.*

54. And where one takes a deed purporting to describe a tract of land, but which by mistake in the description covers nothing, and the grantee, by occupation, takes possession of a part, and claims title to the whole of the supposed tract under the deed, this is an adverse possession only as to the part actually improved. *Ibid.*

55. And accordingly in *Jackson v. Loyd*, (M. S. Oct. Term, 1820,) where the defendant had a deed for lot 4, but took possession of lot 5 adjoining, believing it to be lot 4, and claiming it as such, and improving a part; held, that his adverse possession did not extend beyond his actual improvement. *Ibid.*

56. The doctrine of constructive adverse possession, by the cultivation of a part, accompanied by a claim of the whole under a deed, does not apply to large tracts of land not purchased for the purpose of actual cultivation. *Ibid.*

57. This doctrine is, in general, applicable to a single farm or lot of land only, purchased for the purpose of actual cultivation. *Ibid.*

58. A rightful title is not necessary to constitute an adverse possession. *Ibid.*

59. A constructive adverse possession must be founded on a deed or paper title, though such title need not be a rightful one. *Ibid.*

60. To constitute an adverse possession of land, an entry under claim of title is in general sufficient; and it is not material whether the title prove to be valid or not. *Jackson v. Camp*, 1 Cow. 605.

61. But if the claim is not founded on a deed of conveyance or writing, the possession is limited to actual occupancy and substantial enclosure, which must be definite and notorious. *Ibid.*

62. To support a constructive possession beyond these, grounded on an actual occupation of part only, it is essential that the writing relied on as evidence of title should include the land not occupied. *Ibid.*

63. Where one makes a contract to have a deed, though he enter into possession of the land described by it, he is not in a situation to hold adversely, until the condition upon which he contracts to have his deed is fulfilled, for such a possession is not hostile in its inception. *Ibid.*

64. To bar a right of entry, a possession must not only be hostile in its inception, but must continue so for twenty years. *Ibid.*

65. Where one contracts for a deed, which is afterwards executed, this extinguishes all claim under the contract, even though the deed vary from the contract. The contract becomes a nullity. *Ibid.*

66. And accordingly, the extent of the adverse possession can no longer be determined by the contract, but must be determined by the deed. *Ibid.*

67. Where two adjoining owners of land have agreed on a division line between them, and held and occupied accordingly for twenty-nine or thirty years, they are concluded, and the line cannot be questioned by either party, though it be not according to their title. *Jackson v. Hubble*, 1 Cow. 613.

68. One claiming under a deed from a judgment debtor has not such an adverse possession as will avoid a conveyance executed by a purchaser under an execution upon the judgment. *Jackson v. Collins*, 3 Cow. 89.

69. A., in 1787, was vested by act of the Legislature with certain lands in fee, in trust for B., a female infant, and others, he having power to sell, &c. On the 12th of May, 1790.

he contracted by his attorney to sell a farm to R., on his (R.'s) paying, &c.; and R. took possession under the contract, and began to improve the land; but soon assigned his contract to J., who in 1790 succeeded him in the possession. B., the female *cestui que* trust, being still an infant, intermarried with C., April 7th, 1792; and on the 5th November of the same year, A. conveyed all the trust property (including the land contracted for by R.) to the *cestui que* trust. Afterwards, December 13th, 1793, A. the trustee, by his attorney, conveyed the fee to J. During the same year, but at what time in the year it did not appear, B. had issue, a son born alive, by her husband C. B. died in July, 1797, having attained the age of twenty-one; C. her husband surviving. The son died intestate and unmarried in 1816; and his father, the husband of B., died in 1817, the daughter surviving. On ejectment, *ex dem.*, the daughter against J., who had held claiming title from the date of his deed of December 13th, 1793; held, first, that his possession was not adverse, so as to avoid the deed to the *cestui que* trust, for champerty or maintenance; secondly, that his possession was adverse from the date of his deed; but thirdly, as B., the owner, was then under disability, both of infancy and coverture, the statute of limitations should not run against her till both these disabilities were removed; that she or her heirs should have, in any event, ten years after the removal of her disabilities, and at least twenty years after the adverse possession commenced, within which to enter or bring ejectment; and fourthly, that C. was tenant by the courtesy, whether the adverse possession or disseisin took place before or after issue of the marriage; and fifthly, that this suspending the right of entry or action of her heirs, they had yet ten years within which to bring ejectment after the estate by the courtesy terminated by the death of her father in 1817. *Jackson v. Johnson*, 5 Cow. 74.

70. A possession and claim of land, under an executory contract of purchase, is not such an adverse possession as will render a deed from the true owner void for champerty or maintenance; nor is it such an adverse possession as, if continued for twenty years, will bar an entry within the statute of limitations; and especially it is in no sense adverse as to the one with whom the contract is made. *Ibid.*

71. To constitute an adverse possession, it must not only be hostile in its inception, but the possessor must claim the entire title; for if it be subservient to, and admit the existence of a higher title, it is not adverse to that title. *Ibid.*

72. Yet, *it seems*, that where one enters under a contract for a deed with A., and afterwards takes a deed from B., his possession from this time is adverse to A., and, if continued for twenty years, will bar A.'s entry. *Ibid.*

73. To constitute such an adverse possession as will bar a right of entry, it must be accompanied with what the law will consider, *prima facie*, a good title. *Jackson v. Frost*, 5 Cow. 346.

74. Where one entered, and possessed land, claiming it as a gore between two patents; held, that this was not such an adverse possession as

would bar the true owner's right of entry, though continued for more than twenty years before ejectment brought. The declarations of a tenant that he has a deed are inadmissible, even to show in what character he claims, as whether adversely or not. *Ibid.*

75. Though a tenant in common enter without claiming adversely to his co-tenants; yet his possession may afterwards become adverse, by some notorious act and claim of title; as if he purchased his co-tenants' interest under a deed from the sheriff; and this, though the deed be defective for want of a particular description of the land. *Jackson v. Brink*, 5 Cow. 483.

76. To constitute an adverse possession, it is not necessary that the deed under which it is claimed be valid. *Ibid.*

77. The rule that an adverse possession, to bar an action of ejectment, must be hostile in its inception, and continue so for twenty years, does not apply to the entry of the tenant, but to the act by which the possession becomes adverse. *Ibid.*

78. Where a large tract of land is divided into lots, the possession of one lot adversely will not create a constructive adverse possession of other parts of the tract. *Jackson v. Richards*, 6 Cow. 617.

79. Whether a possession with claim of title under a parol gift of land from the owner, is such an adverse possession as will bar an ejectment? *Quere.* *Jackson v. Whitbeck*, 6 Cow. 632.

80. A lease of a small tract of land, (e. g. sixty-three acres,) and actual possession by the lessee of a part, with a claim of title to the whole, constitutes an adverse possession of the whole. *Jackson v. Vermilyea*, 6 Cow. 677.

81. And while it is so possessed, a conveyance by any one except the adverse possessor to another of a part of the land so possessed, though it also include an adjoining parcel not so passed, and the grantee enter upon the latter parcel, claiming to the whole extent of his conveyance, will not constitute the grantee a constructive or actual possessor beyond the parcel on which he enters. *Ibid.*

82. If one have constructive possession by colour of title, and occupying a part, another cannot acquire a constructive possession to the same extent in the same manner; but though the latter enter on part with colour of title to the whole, and claim the whole, his possession will be confined in extent to the part which he actually occupies. *Ibid.*

83. It is not necessary that an adverse possession, in order to be available within the statute of limitations, should commence under an effectual deed. *La Frombois v. Jackson*, 8 Cow. 589.

84. Though the possessor claim under written evidence of title, and on producing that evidence it prove to be defective, yet the character of his possession, as adverse, is not affected by the defects of his title. *Ibid.*

85. If the entry is under colour of title, the possession will be adverse, however groundless the supposed title may be. *Ibid.*

86. The fact of possession, and its character, or the *quo animo*, are the test. *Ibid.*

87. A claim under an executor's contract to

convey land, the consideration being paid, and which a Court of equity would, therefore, superficially enforce against the vendor, is a sufficient claim, under colour of title, to constitute an adverse possession within the statute of limitations. *Ibid.*

88. An adverse possession of public lands for a term short of forty years will not obstruct the operation of a patent, nor bar the people of their right. *Ibid.*

89. Not so of an individual, though he be a grantee of the people. For though he take a grant while the forty years are running against the people, yet he must sue within twenty years, or his entry is barred. *Ibid.*

90. *Seemle*, a possession may be adverse, though by one claiming it under an executory agreement; and that *Jackson v. Johnson* (5 Cow. 74.) *contra*, therefore, is overruled. *Clapp v. Bromagham*, 9 Cow. 530.

91. Though, where a tenant in common enters and takes exclusive possession generally, he shall be presumed in as a tenant in common; yet when he enters adversely, claiming in severalty, the statute of limitations runs in his favour and against his co-tenants. *Ibid.*

92. A forfeiturement is equivalent to a disseisin in respect to constituting an adverse possession. *Ibid.*

93. Though one enter as the committee of a lunatic, a subsequent sale to another by such committee, and claim of the title by the purchaser absolutely, changes the character of the possession, and makes it adverse. *Ibid.*

94. The entry of one of several heirs claiming the whole, and denying possession to his co-heirs, and selling the land to a stranger, constitutes a possession adverse to the co-heirs, and being continued twenty years, bars their right of entry. *Ibid.*

95. Possession under claim of title, with or without a valid deed, is adverse. *Ibid.*

96. *It seems*, that an adverse possession taken in fraud of the true owner shall not avail to bar his right of entry, though continued twenty years. *Ibid.*

97. But mere neglect to inquire into a title by the purchaser is not a fraud upon the owner, nor should notice of a defect in the title be imputed to a purchaser because he is negligent, so as to preclude him the benefit of the statute of limitations. *Ibid.*

98. Though the title of an adverse possessor be clearly defective, yet the true owner must sue within twenty years, or he is barred his entry. *Ibid.*

99. The rule, that what is sufficient to put a party on inquiry shall operate as notice to him, does not apply to a purchaser who claims under the statute of limitations; clear and positive proof is, in such case, necessary, of notice that the title supposed to be acquired is bad, accompanied with proof of an intent to defraud the real owner. *Ibid.*

100. Whether there be an adverse possession is a question of fact for the jury; but the trial of such possession often involves questions of law which the Court is to decide; and in such case, the judge should submit the question of

fact to the jury, with his directions as to the law involved with the evidence. *Ibid.*

101. Adverse possession for twenty years, by several successive persons, in order to bar an entry, must be continued by a regular chain of privity between them. *Jackson v. Leonard*, 9 Cow. 653.

102. Where one entered, and then another claimed adversely to him, and took possession under such claim, by consent of the first possessor, pursuant to a compromise between them; *held*, that this was not a continuity of the first possession within the rule. *Ibid.*

103. In ejectment, where the grantor of a lot of ground remained in the possession of the premises conveyed for twenty-seven years, and no entry or act of ownership on the part of the grantee was shown; *it was held*, that such possession was not adverse; and that nothing but a clear, unequivocal, and notorious disclaimer of the title of the landlord could render such possession, however long continued, adverse; that the relation of landlord and tenant did not subsist between the grantor and grantee, and the former was not entitled to notice to quit. *Jackson v. Burton*, 1 Wend. 341.

104. Where a person entered into the possession of land belonging to his father-in-law, who promised to give the land to him and his wife, and subsequently by will devised it to the wife; *it was held*, in an action of ejectment brought by the heirs of the wife, that a possession of thirty-six years' continuance under a conveyance from the husband was not adverse, and that a conveyance to the husband from the ancestor could not be presumed. *Jackson v. French*, 3 Wend. 337.

105. Where a grantee, under a conveyance from a tenant by the courtesy of a house and lot, goes into possession of the same, and of an adjoining alley, (which had been used for thirty years as appurtenant to the premises,) continues in possession himself nine years, and then acquires title to the alley from a third person, the grantee cannot set up such title as adverse in an action of ejectment brought by the heir to recover the premises as the inheritance of his mother, the action being brought within twenty years after the termination of the life estate. *Jackson v. Mancius*, 3 Wend. 357.

106. If a party in possession of land to which he has title offer to purchase from another who claims the property, such offer does not impair or affect the right of him who made it, though it would bar a defence, on his part, of adverse possession. *Jackson v. Britton*, 4 Wend. 507.

107. A possession under a quit-claim deed, obtained from a naked possessor without colour or claim of title, or any valuable consideration, is not such an adverse possession as renders void a deed from the owner to a *bona fide* purchaser, executed during the continuance of such possession. *Jackson v. Hill*, 5 Wend. 539.

108. In ejectment, where the defendant produces no written title, but relies solely on possession with an assertion of title, he can retain so much only as he has under actual improve

ment, and has been in possession of for twenty years. *Jackson v. Warford*, 7 Wend. 62.

109. Where a party has been in possession of land for thirty-five years, claiming it as his own, and had built a barn upon it, and where the owner, who resided within sixty miles of the premises, instead of asserting his claim, embarked in the service of the Northwest Company in Canada for twenty years, and suffered eighteen years to elapse after his return before bringing suit, and the original *letters patent* were found in the possession of the occupant of the premises; it was held, that the facts and circumstances were such as would have warranted the presumption of a conveyance to the occupant. *Ibid.*

110. A patent for a lot of land was granted in 1830 to a revolutionary officer by an act of Legislature, which also declared that the patent should have the same effect as to the title of the lot as if it had been issued in 1790. Held, that no adverse possession of the lot could be set up as a defence to an action of ejectment by the heirs of the patentee. *Jackson v. Vail*, 7 Wend. 125.

111. A possession under a void title does not defeat the operation of a conveyance on the ground of the premises being held adversely; for in such case the possession is not adverse. *Jackson v. Andrews*, 7 Wend. 152.

112. Several defendants may be joined in one suit in ejectment where the plaintiff's title in relation to all is the same, although their possessions may be several, and not joint; each defendant may be found separately guilty for the part of the premises in his possession, and the plaintiff have judgment against them severally. *Ibid.*

113. Where a party was in possession of a lot of 600 acres, and appropriated fifty acres thereof (to which he had colour of title, but the true title was in another) as a wood lot, refused on that account to sell the same, and dug stone from a quarry thereon at various times during an interval of twenty-five years; it was held, that such possession should be deemed adverse against the true owner. *Jackson v. Oliz*, 8 Wend. 440.

114. To constitute an adverse possession, there must, in all cases, be a claim of title; but it is not necessary that a deed should be shown as evidence of such title. Where, however, there is no paper title, there must be a *pedis possessio*; an actual occupancy; a substantial enclosure. *Ibid.*

115. Where a party claims to hold adversely a whole lot by proving actual occupancy of a part only, his claim must be under a deed or paper title; and where colour of title is shown, occupancy of part for twenty years is enough to entitle a party to recover a whole lot, unless the deed under which the claim is made includes more than is necessary for the purpose of cultivation or ordinary occupancy. *Ibid.*

116. A deed fraudulently obtained is not available as the foundation of an adverse possession, so as to avoid a subsequent conveyance; nor is a deed available for such purpose executed by a person assuming to act as the attorney of the grantor, but without authority, when such want of authority is known to the grantee.

Livingston v. Peru Iron Company, 9 Wend 523.

117. To constitute a possession adverse, so as to bar a recovery or to avoid a deed subsequently executed by the true owner, the party setting up the possession must, in making his entry upon the land, act *bona fide*; he must rely on his title; he must believe the lands to be his, and that he has title thereto, although his title may not be rightful or valid; but if the title be an absolute nullity, as a deed obtained by fraud or forgery, it will not serve as the foundation of an adverse possession. *Ibid.*

118. An adverse possession without paper title is good only to the extent of actual enclosure, and no further. *Ibid.*

119. A prior possession is sufficient to entitle a party to recover in an action of ejectment against a mere intruder or wrong-doer, or a person subsequently entering without lawful right, if the action to acquire the prior possession be brought within a reasonable time; if, however, there has been delay in bringing the suit, the *animus revertendi* must be shown, and the delay must be satisfactorily accounted for, or the prior possessor will be deemed to have abandoned his claim to the possession; and it was accordingly held, where there was a prior possession of eleven years, and then entry by the defendants claiming under a title adverse to such possessory title, that the omission to bring a suit for thirteen years, with knowledge of the adverse entry and continuance of possession under it, would authorize a jury to find an abandonment of claim by the prior possessor. *Whitney v. Wright*, 15 Wend. 171.

120. A possession under an executory contract for the purchase of land renders void a deed executed under a title adverse to such possession; and evidence of want of confidence by the possessor in the title under which he holds, and of belief in the better title of the individual executing such deed, does not estop him from objecting to the validity of the deed; at all events, he is at liberty to show that he possessed the premises under a claim of title adverse to that of the grantor of the deed. *Ibid.*

121. A defendant in ejectment who has entered into possession of lands, claiming title by deed of an undivided sixth part of an extensive tract, cannot set up an adverse possession to more of the tract than he has under actual improvement or within a substantial enclosure. *Sharp v. Brandow*, 15 Wend. 597.

122. When one of several tenants in common conveys the entire premises held in common, and the grantee enters into possession under the conveyance, claiming title to the whole premises, such possession is adverse to the co-tenants of the grantor, and at the expiration of the period of limitation, their right will be barred. *Bogardus v. Trinity Church*, 4 Paige, 178.

(c) *How the lessor may repel the defence of adverse possession.*

123. A party entitled to bring a writ of right when the revised statutes went into operation, is not barred from a recovery in an action of ejectment subsequently commenced by an ad

verse possession of less than twenty-five years. *M' Cormick v. Barnum*, 10 Wend. 104.

(d) *When the defendant is precluded from disputing the landlord's title.*

124. Where one takes by descent as a co-heir and tenant in common, in ejectment by his co-heir, or one claiming under him, he cannot show that the ancestor had no title. *Jackson v. Streeter*, 5 Cow. 529.

(e) *Other matters of defence.*

125. A release by one of two lessors of the plaintiff is no bar to a recovery in an action of ejectment, such release affecting only the *quantum* of interest. *Jackson v. M'Cluskey*, 2 Wend. 541.

126. Where a term is in trust for the benefit of the lessor of the plaintiff, a defendant in ejectment cannot set up such trust in bar of a recovery. *Jackson v. Baleman*, 3 Wend. 570.

127. An equitable lien or mortgage cannot be set up at law, as a legal estate, to defeat a recovery in an action of ejectment. *Jackson v. Parkhurst*, 4 Wend. 369.

128. Where a farm had been divided into two parts, and according to such division, the separate parts had been possessed as distinct farms for *thirty years*, and on survey, it was ascertained that the owner of one portion had in his possession about twenty-two acres more than the other; *it was held*, in an action of ejectment, brought to equalize the possessions, that the rights of the parties were controlled by the original division and the possession under it; notwithstanding that the survey had been procured by the defendant, it not having been consummated by a conveyance or surrender, and notwithstanding the repeated admissions of the defendant that the plaintiff was the owner of one-half of the farm, and the fact that the parties had always each paid one-half of the rent reserved in the original grant. *Jackson v. Long*, 7 Wend. 170.

129. It is only in the case of a *resulting trust* that the estate of a *cestui que trust* can be set up, to bar a recovery by the person having the legal estate. *Jackson v. Leggett*, 7 Wend. 377.

130. It is no objection to a recovery in ejectment, that the title, as proved on the trial, varies from that set up in the declaration; as where, in ejectment for dower, the title is shown to be subject to a previous estate in dower assigned in the premises, and the declaration alleged, generally, that the plaintiff was possessed of an undivided third part of the premises, without noticing the previous dower assigned. *Bear v. Snyder*, 11 Wend. 591.

131. An acquiescence for a period of five years in a boundary line between two adjoining lots, in a village or city, where there was no express agreement settling the line, and where the parties manifestly acted under a mistake as to the true location, will not bar the party whose lot has been encroached upon from maintaining an action of ejectment, although the other party has erected a valuable building, extending beyond his lot to the erroneous line. *Kip v. Norton et al.* 12 Wend. 197.

132. Acquiescence for twelve years, in an

erroneous location of lands is conclusive on a party who aided in the survey, conformably to which the location is made; and it is not necessary to show that he expressly agreed to abide by the location, with a full knowledge of the mistake. *Jackson v. M'Connell*, 12 Wend. 421.

133. *It seems*, that every intentment and presumption will be made against a party seeking to set aside a location fixed under such circumstances. *Ibid.*

134. An entry by a defendant, under a recovery in an action of ejectment against a person in possession, is sufficient to bar a recovery of the premises in a subsequent action of ejectment by a plaintiff who relies merely upon a prior possession, although such possession was continued for a period of eleven years, and no connexion existed between the defendants, against whom the recovery was had, and the present plaintiff. *Whitney v. Wright*, 15 Wend. 171.

V. *Declaration: (a) Demise.*

134*. Several demises added in ejectment on payment of costs, it appearing that the lessors sought to be added had a subsisting legal title. *Jackson v. Travis*, 3 Cow. 356.

135. The demise in a declaration in ejectment must be laid as of a day subsequent to that when the lessor's right of entry accrued. *Dickerson v. Jackson*, 6 Cow. 147.

136. In ejectment by the mortgagee against the mortgagor, or those claiming under him, the demise must be laid as of a day subsequent to a default in payment, and subsequent to a dissolution of the tenancy, by a notice to quit or otherwise. *Ibid.*

137. A demise in a declaration in ejectment, laid from a man who was dead at the commencement of the suit, may be objected to at the trial, and is cause of nonsuit. *Doe v. Butler*, 3 Wend. 149.

138. Where a joint demise is laid in the names of several lessors, unless it be shown that the lessors had such an interest as would enable them to join in a demise, the plaintiff will be nonsuited. *Ibid.*

139. In a declaration in ejectment, the averment of title must be of a day subsequent to the accruing of the title of the plaintiff, and the ouster complained of must be stated as having happened on some subsequent day. It is not essential, however, to prove the accruing of title precisely as laid; it is enough if it be shown to exist before the day laid in the declaration; and in ordinary cases it is not necessary to give any proof whatever of the ouster. *Siglar v. Van Ripper*, 10 Wend. 414.

(b) *Declaration, and amending declaration.*

140. The title to a declaration in ejectment is mere form and good, though of a term after its service. *Jackson v. Stiles*, 6 Cow. 597.

141. So, though it be without any title at all. *Ibid.*

142. In ejectment, although the use of the names of any other than the real claimants is abolished, still counts may be inserted in the name of both grantor and grantee, where the objection of adverse possession at the time of the conveyance to the grantee is anticipated. *Ely v. Ballentine*, 7 Wend. 470.

143. In a declaration in ejectment, the plaintiff must truly describe the premises, but he

need not set forth the nature of his estate nor the quantity of his interests therein; and though he claim the whole of the premises, he may recover an undivided interest therein. *Harrison et al. v. Stevens*, 12 Wend. 170.

144. In an action of ejectment for dower, the plaintiff is entitled to recover, notwithstanding that in the declaration she claims the third of an undivided half of a farm, and the proof is that she is entitled to the third of a half held in severalty; and after verdict, she will be permitted to amend the declaration, and make it conformable to the verdict. *Oothout v. Ledinga*, 15 Wend. 410.

145. A declaration in ejectment may contain several counts in the names of several persons as plaintiffs, in the manner heretofore used when the suit was brought in the name of a fictitious plaintiff, and separate demises were laid in the names of separate lessors; it is not necessary that it should contain a joint count, or that a joint interest or joint injury should be alleged. *Smith v. Dewey*, 15 Wend. 601.

(c) *Service of declaration and notice.*

146. Where a printed declaration and notice in ejectment were served upon an illiterate tenant, who was told merely that they were a declaration in ejectment, without any farther explanation, but it appeared from circumstances that he must have known the nature of the papers, the Court considered this equivalent to a technical service. *Jackson v. Stiles*, 1 Cow. 322.

147. After the consent rule in ejectment, the plaintiff must, before he can enter a default, serve a new or altered declaration. *Jackson v. Wood*, 6 Cow. 586.

148. A rule to appear and plead in ejectment will be ordered where the declaration was served by delivering it to the wife of the defendant on the premises. *Jackson v. Salisbury*, 3 Wend. 430.

149. A declaration in ejectment may be filed at any time during a term, and the notice to appear need not be for a day in the first two weeks. *Borst v. Griffin*, 5 Wend. 84.

150. In an action of ejectment, by a landlord against his tenant, for the nonpayment of rent, where the premises are unoccupied, and there is no dwelling house or other building on the premises, the affixing of the declaration on a post in a conspicuous place on the premises will be deemed a good service. *Evans v. Moran*, 12 Wend. 180.

151. Whether such service would be deemed good where the relation of landlord and tenant does not exist? *Quære. Ibid.*

VI. *Proceedings where the tenant appears, and enters into the consent rule: (a) Consent rule and plea.*

152. In ejectment, where the lessor neglects or refuses to join in the consent rule, the Court will, on motion, order that the lessor pay the costs of the motion, and join in the consent rule, within twenty days after the service of the rule; or that the tenant may enter a *non pro*; and that on being *non pro*ced, the lessor pay

the costs of the defence. *Jackson v. Stiles*, 1 Cow. 166.

153. The lessor in ejectment is not bound of course to enter into special consent rule; but only on application to the Court. *Jackson v. Stiles*, 2 Cow. 442.

154. To entitle the tenant to enter into a special consent rule, in an action of ejectment, as a tenant in common, he must at least swear that he claims as tenant in common. *Ibid.*

155. That he believes the action will involve a question between tenants in common, is not enough. *Ibid.*

156. Where two defendants are sued jointly in ejectment, they have no right to enter into separate consent rules in the name of each alone. *Ibid.*

157. To obtain leave to enter into the consent rule specially, the defendant in ejectment must apply to the Court, and is, therefore, entitled to have the costs of such application taxed in his final bill of costs, if he be successful. *Jackson, ex dem. Prindle, v. Lytle*, 4 Cow. 16.

158. So if the plaintiff discontinues. *Ibid.*

159. An affidavit that the tenant "claims as tenant in common with the lessors of the plaintiff; and that as he is advised by counsel, and believes he is tenant in common" with them, is sufficient to entitle him to enter into the consent rule specially. *Jackson v. Stiles*, 6 Cow. 391.

160. A plaintiff in an action of ejectment brought against eleven persons, in possession of distinct portions of the premises claimed, holding by separate titles, though all derived from the same source, but without any connexion or community of interest between them, will be compelled, on the application of the defendants, to enter into a separate consent rule with each defendant. *Jackson v. Scoville*, 5 Wend. 96.

161. Under a special consent rule, to admit lease entry and ouster, in case an actual ouster be proved, but not otherwise, such ouster must be shown, or the plaintiff will fail. *Jackson v. Leek*, 12 Wend. 105.

(b) *Admitting the landlord to defend.*

162. The landlord will not be permitted to defend alone in ejectment, until the tenant first neglect or refuse to appear, which should be stated in the affidavit for the motion. *Jackson v. Stiles*, 1 Cow. 134.

163. A motion to admit a landlord to defend in ejectment may be grounded on the affidavit of his agent, showing the relation of landlord and tenant between him and the tenant in possession. *Ibid.*

164. Where the landlord is admitted to defend alone, judgment may be signed against the casual ejector. *Ibid.*

165. To entitle the landlord to defend alone, it must be first shown, by affidavit, that the tenant refuses or has neglected to appear. *Ibid.*

166. One claiming in opposition to the title of the tenant is not entitled to be admitted defendant in ejectment with the tenant. *Jackson v. Flint*, 2 Cow. 594.

167. *Ner, acerbis*, is he entitled to be admitted a co-defendant with the landlord of the

tenant, though he claim as tenant in common with such landlord, who is willing and requesting to have him joined as a defendant. *Ibid.*

168. On a motion to be received to defend as landlord, in ejectment, it is competent for the plaintiff to show that the landlord had, after the lease, conveyed away all his interest in the premises in question. *Jackson v. Stiles*, 5 Cow. 447.

169. In ejectment, the landlord may move to defend at the term when the declaration is returnable; especially where the tenant has expressly refused to appear. *Jackson v. Stiles*, 6 Cow. 589.

170. The affidavit on which to move that the landlord defend in ejectment, should show the relation of landlord and tenant. That the tenant claims no interest except as tenant to the landlord, is not sufficient. *Ibid.*

171. Where the lessor of the plaintiff, in ejectment, claims no more than the interest of the tenant, the landlord is not entitled to be admitted to defend. *Stiles* ads. *Jackson*, 1 Wend. 103.

172. In ejectment, every person is considered as a landlord (so as to entitle him to defend) whose title is connected and consistent with the possession of the occupier. *Stiles v. Jackson*, 1 Wend. 316.

173. Ladies who are married women, trustees of a corporation which has expired, are not entitled to be admitted to defend an action of ejectment in the place of the tenant, without their husbands being joined. *The People v. Webster*, 10 Wend. 554.

(c) *Subsequent proceedings until judgment inclusive.*

174. In ejectment, an objection cannot be made at the bar that the plaintiff failed at the trial to make out a title, unless such objection was previously made at the trial. *Jackson v. Collins*, 3 Cow. 89.

175. In ejectment, where the rights of the defendant are not affected by the proceeding, or he consents, the name of a lessor may be stricken out, on motion in his behalf, at any stage of the proceedings, though he originally consented to its insertion, on paying his share of the costs to plaintiff's attorney. *Jackson v. Stiles*, 5 Cow. 418.

176. Inserting the word judgment in the entry of the tenant's default for not appearing, &c. in an action of ejectment, will not alter the legal effect of the entry; but it will, notwithstanding, be good; and the word judgment may be rejected as surplusage. *Ibid.*

177. Following this by a rule for judgment generally, without saying against whom; *held*, a good rule for judgment against the casual ejector. *Ibid.*

178. Where the plaintiff, on judgment by default against the casual ejector on a writ of possession, took possession of the whole premises, it appearing that he had no title to three-sixths, he was ordered to restore so much to the defendant. *Ibid.*

179. The affidavit on moving for a view in ejectment should show not only that boundaries are in question, but the particular circumstances which render a view necessary to the

understanding of the cause by the jury; so that the Court may judge whether the view be necessary. *Jackson v. Gauger*, 6 Cow. 578.

180. If, in real actions, the tenant wish a more definite knowledge of the extent of the demandant's claim than he can obtain from the count, he should obtain a bill of particulars, as in the action of ejectment. *Vischer v. Conant*, 4 Cow. 396.

181. In ejectment, the execution for costs against the defendant properly issues in the name of a nominal plaintiff alone. *Brown v. Demont*, 9 Cow. 263.

182. The plaintiff in ejectment must at the trial prove the defendant in possession of the premises in question, or he cannot recover. *Jackson v. Ives*, 9 Cow. 661.

183. A judgment for the plaintiff in ejectment generally terminates all presumption in favour of the defendant's title arising from prior possession. *Jackson v. Tuttle*, 9 Cow. 233.

184. A defendant in ejectment cannot, in general, transfer his possession, so as to defeat execution in the ejectment suit; nor would a sale of his right on judgment and execution protect the purchaser in his possession. *Ibid.*

185. But otherwise, where a judgment in ejectment is obtained by *cognovit*, after a judgment at the suit of a creditor is docketed against the defendant in ejectment, under which his right is sold. In such case, the purchaser may hold or recover possession against the plaintiff in the ejectment, on the defendant's prior possession; and this even though the *cognovit* be given in pursuance of the award of arbitrators. *Ibid.*

186. Though one has recovered in an ejectment, yet the recovery is not conclusive upon the defendant, or those claiming under him; and accordingly, where, after a recovery in ejectment, the defendant's title was sold on judgment and execution, and the purchaser brought ejectment against the former recoverer in possession, who set up a mortgage against the former defendant, which proved to be usurious, and therefore void; *held*, that the purchaser should recover. *Ibid.*

187. One, setting up and claiming under a mortgage, admits the mortgagor's title at the execution of the mortgage; and proving the mortgage to be usurious shows that such title was not affected by it. *Ibid.*

188. In ejectment, the death of a lessor does not abate the suit. *Austin* ads. *Jackson*, 1 Wend. 97.

189. Such occurrences will, however, be received as an excuse for not proceeding to trial, and the plaintiff be permitted to stipulate anew. *Ibid.*

190. In ejectment, where a tenant appears and defends for part only of the premises, the plaintiff may proceed, and take judgment against the casual ejector for the residue, on the usual affidavit. *Underwood* ads. *Jackson*, 1 Wend. 95.

191. In an action of ejectment, where a defendant stands by and suffers a verdict to be taken against him, on the supposition that the plaintiff's proceedings are irregular, the Court will not set aside the verdict even on terms, when it is manifest that the object of the de-

defendant is to vex and harass the plaintiff, and subject him to costs. *Johnson ad. Jackson*, 1 Wend. 284.

192. Where a conveyance in fee is shown from the original proprietor, the grantee is presumed to have entered into possession, or whoever is in possession is presumed to have held for such grantee, and in subordination to his title, until the contrary appear. *Doe v. Butler*, 3 Wend. 149.

193. In ejectment, where the tenant after suit brought offers to surrender the premises, to pay the costs, and to enter into a stipulation as to *meane* profits, giving the plaintiff the same rights as if judgment was entered against the casual ejector, the Court will stay proceedings. *Jackson v. Stiles*, 3 Wend. 499.

194. A plaintiff in ejectment is entitled to recover upon the parol acknowledgment of the tenant, that the plaintiff is the owner of the premises; the tenant having no title himself. *Jackson v. Denison*, 4 Wend. 558.

195. A party to an action of ejectment commenced previously to the revised statutes going into effect, in the name of the *nominal* plaintiff, is not entitled to a new trial according to the provisions of those statutes. *Jackson v. Coe*, 5 Wend. 101.

196. Where there are two demises in an action of ejectment, one in the name of the *grantor*, and the other in the name of the *grantee* of the premises, and at the time of the conveyance to the grantee the premises are held adversely, so as to render the conveyance inoperative, the recovery may be in the name of the *grantor*. *Jackson v. Leggett*, 7 Wend. 377.

197. A conveyance by a lessor in ejectment, after suit brought to third persons in trust, is no bar to a recovery. *Ibid.*

198. If the facts of a case would have warranted a jury to have found livery of seisin under a feoffment, but in a special verdict, only the evidence of the fact is stated, instead of the fact being found, the Court cannot adjudge the feoffment to be a feoffment with livery, but will award a *venire de novo*. *Rogers v. Eagle Fire Company*, 9 Wend. 611.

199. The same principles apply to a title to lands by possession inferred into a right under the statute of limitations; if there has been an adverse entry and continued possession for twenty years, the facts must be found by the jury, and the evidence of the facts must not be merely stated in a special verdict. *Ibid.*

200. Parties succeeding to the title of a plaintiff in ejectment dying after issue, and before verdict, may be substituted, but it must be by *scire facias*, and not by motion. *James v. Bennett*, 10 Wend. 540.

201. A verdict in ejectment may be for a part of the premises claimed, and this rule applies as well to the quantity of interest as to the extent of the premises in question; a verdict for the whole of the premises claimed, when the plaintiff is entitled to only a part thereof, will not be set aside, but will be amended according to the right of the case. *Bear v. Snyder*, 11 Wend. 599.

202. A description of the premises claimed,

setting them forth as the one undivided third part of all that part of a certain lot, in a certain township, of which the defendant is in possession under a purchase at sheriff's sale, on execution against A. B., is sufficiently certain; and a further specification of the premises, by reference to a record of partition in a public office, does not hurt the declaration. *Ibid.*

203. In ejectment by a tenant in common, proof of the assertion by the defendant of his ownership of the whole premises, and his offer to sell, coupled with his declaration that the plaintiff *would be compelled to sign the deed* through which the defendant derived his title, is sufficient evidence of the denial of the plaintiff's denial as co-tenant, to entitle him to a verdict. *Valentine et al. v. Northrop*, 12 Wend. 494.

204. Parol evidence of the acts and declarations of the covenantor is admissible, to show the courses and distances actually run, and the monuments actually established, in a survey made previously to the execution of the deed, in reference to the premises conveyed, for the purpose of proving that the land from which the plaintiff is evicted is embraced within the description of the premises as set forth in the deed. *Bates v. Tymason*, 18 Wend. 300.

205. Where, on the trial of an action of ejectment, the defendant introduces a deed to show title in himself, but omits to prove that the deed covers the premises in question, and no objection is taken to the defect of evidence until the summing up of counsel, it is in the discretion of the Circuit judge, whether he will permit the plaintiff to insist upon such defect, especially if he is satisfied that it was taken for granted in the progress of the trial that the deed covered the premises. *Dibble v. Rogers*, 13 Wend. 536.

206. A plaintiff on ejectment may recover a less estate than he claims in his declaration, and a verdict may be rendered in his favour for an *undivided part*, although in his declaration he claims the whole of certain premises. *Van Alstyne v. Spraker*, 13 Wend. 578.

207. A judgment in ejectment is of the same binding force and efficacy as any other judgment, and is a bar, except in a second action of ejectment. *Van Wyck v. Seward*, 1 Edw. 337.

208. Therefore, where an action of ejectment was brought in the Supreme Court, to try the validity of a deed, and the question of fraud was ultimately passed upon by the Court of Errors, who rendered a judgment against the plaintiff, Chancery would not sustain a bill for the same plaintiff to impeach the deed as fraudulent upon the grounds involved in the former suit. *Ibid.*

VII. Proceedings in cases of re-entry for nonpayment of rent.

209. Where the tenants of a large tract of land, having made partition of it amongst themselves, had enjoyed the portions allotted to each, in severalty, for a period of thirty years; it was held, that notwithstanding such partition, the landlord (not having been a party to it) could not proceed by action of ejectment for the recovery of a subdivision of such tract, for the want of a sufficient distress thereon, it appear-

ing that on the residue of the tract, there was sufficient property to countervail the rent. *Jackson v. Wyckoff et al.* 5 Wend. 53.

210. In an action of ejectment by a landlord against his tenant, seeking a re-entry, for non-payment of rent for want of distress, the defendant is concluded by his admission, made at the time of the service of the declaration in ejectment, that there was not sufficient property on the premises liable to distress to countervail the arrears of rent, and will not be permitted to prove such admission untrue. *Presbyterian Congregation of Salem v. Williams*, 9 Wend. 147.

211. The plaintiff may avail himself of such admission, although the party making it be but a tenant at will. *Ibid.*

VIII. *Habere facias possessionem.*

212. In ejectment, where the declaration, verdict, and judgment are general, the plaintiff may take possession, at his peril, to any extent which he chooses, under the writ of *habere facias possessionem*, subject to be put right by the Court, if he takes too much. *Jackson v. Rathbone*, 3 Cow. 291.

213. But where the judgment is upon a special verdict describing the premises, the plaintiff is confined to such location in the first instance, and the sheriff may refuse to give him possession beyond it. *Ibid.*

214. Where, in an action of ejectment, a writ of *habere facias possessionem* has been executed, by putting the plaintiff into possession of the premises claimed, and the plaintiff is subsequently dispossessed by a person claiming under the defendant's title, an *alias* will be awarded where there is no pretence of collusion between the plaintiff and defendant as to the judgment, although the return day of the *habere facias* has not arrived. *Jackson, ex dem. Miller, v. Hawley*, 11 Wend. 182.

IX. *Action of trespass for the mesne profits.*

215. In trespass for mesne profits, consequent on an ejectment, and judgment by default against the casual ejector, the defendant can set up no matter of defence admissible in the original action; *e. g.* that he was not in possession of the premises in question. *Jackson v. Combs*, 7 Cow. 26.

216. In the action for mesne profits, founded on a recovery by default against the casual ejector, it is, in general, necessary to show a writ of possession executed. *Ibid.*

217. But not where the tenant voluntarily abandons the possession, and the plaintiff in the ejectment enters. *Ibid.*

218. Where the judgment in ejectment is against the tenant, who comes in and defends the judgment, is sufficient evidence in the action for mesne profits, without any writ of possession executed. *Ibid.*

219. *Semble*, a verdict in ejectment is evidence, in an action for mesne profits, against any one in possession of the premises. *Jackson v. Hills*, 8 Cow. 290.

220. Action for mesne profits is abolished by the revised statutes; the remedy of the plaintiff is by suggestion on the record of judgment

in the ejectment suit. *Jackson v. Leonard*, 6 Wend. 534.

221. If the ejectment suit was commenced previous to the revised statutes going into effect, the suggestion may be in the name of the nominal plaintiff. *Ibid.*

222. An action for mesne profits will not lie until after a recovery in ejectment; nor will it lie for an injury to the freehold until after such recovery; and if the injury was done more than six years before the commencement of the suit for the recovery of damages, and the defendant pleads the statute of limitations, the plaintiff is remediless, although the injury was done after the commencement of the ejectment, and the defendant prevented judgment in the ejectment suit after verdict by an injunction from Chancery. *Morgan v. Varick*, 8 Wend. 587.

ELECTION.

1. In an issue to try whether one was elected county clerk, whose name, at length, was Henry F. Yates; *held*, that votes for H. F. Yates were allowable, if, under all the circumstances, the jury should believe that they were intended by the voters for Henry F. Yates; *e. g.* that he often subscribed his name H. F. Yates; that he had formerly been clerk, and was a candidate when the disputed votes were given; that people would generally apply the abbreviation to him, and that no other person was known in the county where he was a candidate, to whom it would apply. *The People v. Ferguson*, 8 Cow. 102.

2. So the elector who gave the abbreviated vote may be sworn as to the person intended. *Ibid.*

3. A certificate of town inspectors was, that 212 votes were given for Y. for the office of county clerk, 30 votes for D, &c., and 116 for F., each for the same office; *held*, that F.'s votes were well certified for him as a candidate for county clerk, and should be allowed. *Ibid.*

ELISORS.

1. Two elisors appointed to execute an attachment on motion *ex parte*. *People v. Palmer*, 1 Cow. 32.

EMBEZZLEMENT.

1. An indictment for embezzlement lies against a clerk or servant for converting to his own use the money, goods, &c. of his master or employer, as well as for converting to his own use the money, goods, &c. of any other person which shall have come into his possession or under his care by virtue of his employment; the words "any other person" in the statute mean any person other than he who is guilty of the embezzlement. *People v. Hennessey*, 15 Wend. 147.

2. The confessions of a party, not made in

open Court or on examination before a magistrate, but to an individual, uncorroborated by circumstances, and without proof *aliunde* that a crime has been committed, will not justify a conviction. *Ibid.*

3. A barkeeper in an inn, intrusted to carry letters to and from the post-office, who fraudulently converts to his own use a letter enclosing money, given to him to carry to the post-office, is guilty of embezzlement; and to convict him, it is not necessary to show that he broke open the letter, or fled after the commission of the offence, or to show the dissent of his employer; it is enough that there be a fraudulent conversion, and that being shown, a felonious intent is established. *The People v. Dalton*, 15 Wend. 581.

ENTRY.

1. One purchases land upon a decree of the Court of Chancery, he may enter peaceably and take possession without writ, and being so in possession, may distrain cattle damage feasant. *Orser v. Storms*, 9 Cow. 687.

2. Though, *semble*, if he enter forcibly, he would be subject to an indictment. *Ibid.*

ERROR.

I. On what a writ of error may be brought.

II. Writ of error, when and how to be obtained, and effect of it.

III. Proceedings in error: (a) *Non prossing or quashing a writ of error*; (b) *Assignment of errors, joinder, and amendment*; (c) *Error on bill of exceptions*.

IV. When a judgment will be reversed, or affirmed, in part or in whole.

V. Judgment in error, and *venire de novo*.

VI. Error coram vobis.

I. On what a writ of error may be brought.

1. It seems, that where a judge omits to notice material testimony in his charge to the jury, this is not error, unless the party call his attention to it, and request him to give it in charge. *Ex parte Bailey*, 2 Cow. 479.

2. The remedy for refusing to comply with such request is not by *mandamus* to compel a new trial, (though the refusal be by a judge of the Common Pleas, who should refuse to grant a new trial,) but by a bill of exceptions and a writ of error. *Ibid.*

3. Where in *assumpsit* in the Court below, the defendant pleaded a tender, but the jury found for the defendant, though there was no proof of the tender; *held*, that this was a fatal error; and a motion in behalf of the defendant below, who was also defendant in error, that the justice amend by returning proof in the cause upon another point, was denied. *Wightman v. Clapp*, 2 Cow. 517.

4. It seems, that error will not lie for the mere omission of a Court to charge the jury

upon a part of the evidence or matter of law, to which the attention of the Court was not drawn by the party. *Dunlop v. Patterson*, 5 Cow. 243.

5. But if they comment upon a piece of testimony given to the jury, and leave it generally open for the jury to pass upon, without adding such views as to its credibility as the law requires the jury to consider, the judgment will be reversed. *Ibid.*

6. The facts before referees appointed by the Court, pursuant to the statute, (1 R. L. 516.) may, under the order of the Court in which the cause is pending, be entered on the record, and the decision upon them reviewed on error. *Rensselaer Glass Factory v. Reid*, 5 Cow. 587.

7. In the Common Pleas, a record immediately after the issue (of June term, 1825) continued the cause by a general continuance to October term (then) next; and then said, "therefore let there come a jury, &c. at December term next;" and then said, "at which day, &c. came the parties, &c., and the jurors, &c. also came, who to speak the truth, &c." *Held*, that this referred the appearance of the parties and jury, and the rendition of the verdict, to December term; and that, therefore, there was no error in the record. But that, at most, it was a mere miscontinuance, which was cured by the statute of amendments and *jeofails*. *Miller v. Plumb*, 6 Cow. 665.

8. Judgment in partition is against A., and owners unknown, either of the defendants may bring error without joining any other; but the record must be described correctly in the writ as to parties. *Clark v. Bromagham*, 9 Cow. 304.

9. P. recovered in the Common Pleas against G.; who brought error to the Supreme Court, who reversed the judgment of the Common Pleas, and ordered a *venire de novo* in the Common Pleas. In the mean time P. had collected his judgment below, G. then took a writ of restitution and an execution for his costs in the Supreme Court, and the money collected in the Common Pleas was restored, and the costs in the Supreme Court collected; G. then compelled P. by rule in the Common Pleas to go to trial on the *venire de novo*, who went on accordingly, and obtained a second verdict and judgment against G.; and then brought a writ of error from the judgment of the Supreme Court. *Held*, that he had a right to his writ of error from the Supreme Court; that his proceedings in the Common Pleas were no waiver of his right to bring error; and per *Jones*, chancellor, a reversal of the judgment in the Supreme Court will be a reversal of all the consequent proceedings, including those in the Common Pleas upon the *venire de novo*. *Pinney v. Gleason*, 9 Cow. 635.

10. Where, in an action on a note, the defence was usury, founded on an agreement for more than seven per cent. made at the time of the loan, and witnesses were examined, who proved an agreement for more than seven per cent., without showing in express terms that it was at the time, and not showing that it was subsequent, and no subsequent agreement appearing, or being alluded to in the course of the trial; *held*, that the Court should have charged

the jury that the inference of law was, that the agreement alluded to as by the witnesses was at the time of the contract of the loan; and the Court not having so charged, it was error. *Merrill v. Law*, 9 Cow. 65.

11. Where a judgment is arrested by a Court of General Sessions, the remedy is by writ of error, and not by *mandamus*. *The People v. Onondaga General Sessions*, 2 Wend. 631.

12. It is error in a Court of Common Pleas to refuse to decide questions of law pertinent to a case on trial, upon which a decision is asked by one of the parties. *Van Hoesen v. Van Alstyne*, 3 Wend. 75.

13. It is irregular for a sheriff and jury, on executing writs of inquiry, to hear evidence in several causes before they retire to make up their inquisitions. Such irregularity may be waived by the assent of parties; if not waived, the remedy is not by writ of error, but by motion to set aside the proceedings. *Van Wageningen v. M'Donald*, 3 Wend. 478.

14. A writ of error to the Court of Errors cannot be sustained, except in those cases where the matters assigned for error have been actually considered by the Court below, or fairly presented to that Court in such a manner that they might have been considered and passed upon there. *Houghton v. Starr*, 4 Wend. 175.

15. The Court for the Correction of Errors has no cognisance of a cause, and is not competent to make any order respecting it, where a decree of the chancellor has been duly affirmed in the Court for the Correction of Errors, according to the settled rules of practice of that Court, and no irregularity has intervened either on the part of the party obtaining the affirmation, or of the clerk of the Court in entering the order of the Court, or in remitting the proceedings, and the proceedings have been duly remitted. *Legg et al. v. Overbagh et al.* 4 Wend. 188.

16. Where a Court of Common Pleas, on *certiorari*, reverse a Justice's judgment on the merits, and not for any error in law happening before the justice, this Court will not review the decision of the Common Pleas, although they cannot discover the grounds on which the reversal was had. *Whitney v. Sutton*, 10 Wend. 411.

17. Where illegal evidence is adduced on the trial of a cause in a Justice's Court, when the defendant does not appear at the trial, error lies, although no objection was taken to the admission of the evidence. *Souier v. Gould*, 14 Wend. 159.

II. Writ of error, when and how to be obtained, and effect of it.

18. A writ of error returnable here must issue out of this Court. *Bhint v. Greenwood*, 1 Cow. 15.

19. If issued from the Court of Chancery, it is a nullity. *Ibid.*

20. A writ of error will not supersede an execution executed. *Ibid.*

21. But in such case the Court may order the money to be brought into Court, to abide the event of the writ. *Ibid.*

22. The plaintiff cannot, by omitting to enter

continuances between the return of the postea and judgment, prejudice the defendant's right to bring a writ of error. *Marshallan Company v. Osgood*, 1 Cow. 65.

23. And where the judgment is in fact rendered within the five years, but by omitting the continuances, it appears of record to be more than five years before error brought, the Court will order the continuances entered *nunc pro tunc*, so as to avoid the statute of limitations. *Ibid.*

24. It seems, that in order to warrant the issuing a *certiorari*, on error, to bring up any proceedings *dehors* the record, the plaintiff in error must first assign the diminution specially, and serve it upon the defendant or his attorney, as in ordinary cases of an assignment of errors. *Rowan v. Lytle*, 4 Cow. 91.

25. The Court may award a *certiorari* to support the judgment at any time. *Ibid.*

26. Form of a rule for this purpose. *Ibid.*

27. Where an attorney has been negligent, in not informing himself of an irregularity for several terms, he cannot move to set aside the proceedings. *Ibid.*

28. The act concerning writs of error, (1 R. L. 143, s. 2.) which requires the plaintiff in error to give bail for the debt, or damages and costs, extends to a judgment for the defendant for costs only. *Raymond v. Merchant*, 4 Cow. 129.

29. A writ of error is a writ of right, and need not be allowed by a judge. *Van Antwerp v. Newman*, 4 Cow. 82.

30. Filing it with a clerk, and his entering a receipt, is a sufficient allowance; and will stay execution if bail be in. *Ibid.*

31. No particular form of a recognisance of bail in error is necessary; and where it was drawn up in the form of a bond, with a proper penalty and condition, and acknowledged before a judge, who certified the acknowledgment in this form; "signed, sealed and delivered, in the presence of J. W.," the judge; held, that this was sufficient. *Ibid.*

32. A writ of error by a plaintiff in ejectment stays an attachment against his lessor for nonpayment of costs. *Jackson v. Smith*, 6 Cow. 580.

33. A writ of error from a judgment in partition, does not stay execution *per se*; but bail in error is necessary. *Bromagham v. Clapp*, 6 Cow. 611.

34. A writ of error, at the suit of a citizen in criminal cases, though not capital, cannot issue without the *fiat* of the attorney-general. *Lavett v. The People*, 7 Cow. 339.

35. But should he refuse his *fiat* in a proper case for error, the Supreme Court will order him to grant it. *Ibid.*

36. A writ of error returnable in the Court of Errors should be made returnable at a general session of that Court. *Clapp v. Bromagham*, 9 Cow. 304.

37. The Court ordinarily will not inquire whether a writ of error is prosecuted for delay. All the defendants need not join in the recognisance, one of several defendants having the right to bring error. It is a good exception to bail in error, that the person offered is an

attorney or counsellor, but it cannot be urged as a ground for quashing the writ. *Craig* ads. *Scott et al.* 1 Wend. 35.

38. A party may sue out execution within the four days allowed for bringing error, but it is at the peril of a *supraedeas* of execution and restitution of property, if error is brought and bail perfected within that time. *The People v. The Judges of New York*, 1 Wend. 81.

39. A recognisance in error to remove a cause into the Supreme Court is good taken before any judge of the Common Pleas. *Bennett v. Dodd*, 5 Wend. 79.

40. A recognisance in error is valid, and may be enforced, although it produces no stay of execution; as where a recognisance to prosecute a writ of error was entered into after four days had expired, and on the day of its entry the defendant in the judgment below was arrested on a *ca. sa.*; it was held, that notwithstanding the arrest, the recognisance might be enforced. The imprisonment of the defendant in such case is no discharge of the surety, especially where the judgment on the writ of error is for a greater sum than was recovered in the Court below. *Mitchell v. Thorp et al.* 5 Wend. 287.

41. Defects in pleadings which could not have been taken advantage of by demurrer will not be considered as amended upon a writ of error, nor will defects be supplied if the effect be to alter the issue between the parties or the trial consequent thereon. *Reed v. Drake*, 7 Wend. 345.

42. A writ of error does not lie upon the refusal of the Supreme Court to set aside the decision of trustees, under the statute relative to absconding debtors, upon an allegation of error in the adjustment of the demands due the creditors of the absconding debtor. *In the matter of Negus*, 10 Wend. 34.

43. Bail in error must justify that each of them is worth double the amount of the penalty of the bond. *Murray v. Buck*, 10 Wend. 619.

44. Where bail justified that each was worth the amount of the penalty only, the justification was held insufficient, but the party was allowed to justify anew on payment of costs. *Ibid.*

45. Where a suit is brought on a judgment, and a writ of error is prosecuted for the reversal of such judgment, it is usual to stay the proceedings in the suit until the determination of the writ of error, unless the Court see that the writ of error is brought in bad faith, or for the purpose of delay. *Ames v. Webbers' Executors*, 10 Wend. 624.

46. On a writ of error, it cannot be urged that the auctioneer fraudulently concealed the fact, that part of his sales had been cash sales, although his accounts were rendered as sales on credit, the question not appearing to have been raised at the Circuit. *Coleman v. Lamb*, 15 Wend. 329.

III. Proceedings in error: (a) Non proceeding or quashing a writ of error.

47. Mere delay to have a writ of error returned for nearly a year is not a sufficient ground for allowing the defendant in error to

proceed with his executions. *Van Antwerp v. Newman*, 4 Cow. 82.

48. Where a party assigned for error in the Court for the Correction of Errors, that he was a foreign consul at the time of the commencement of the suit against him in the Court below, to which the defendant in error put in a joinder of *in nullo est erratum*; because it nowhere appeared by the record that the plaintiff in error was such consul, and the Court for the Correction of Errors affirmed the judgment below, which judgment of affirmances was subsequently reversed by the Supreme Court of the United States; it was held, on the filing of the mandate, that although the Court for the Correction of Errors were bound to reverse the judgment rendered by themselves, they were not obliged to reverse the judgment of the Court below, and that under the circumstances of the case, the writ of error might be dismissed, which was done accordingly. *Davis v. Packard*, 10 Wend. 50.

49. On a writ of error, after a trial and verdict for the plaintiff, it is too late for the defendant to object that the subject-matter of the suit was a copartnership transaction between him and the plaintiff. *Chandler v. Heart*, 10 Wend. 487.

50. Where the error relied on was the entry of a judgment on a verdict rendered after the death of the party, but the trial in which the verdict was rendered was had in pursuance of a stipulation given in the lifetime of the party, on an application in his behalf, at a previous circuit, to put off the trial of a cause for the want of a witness, the Court refused to stay the proceedings, and denied the motion for that purpose with costs. *Ames v. Webbers' Executors*, 10 Wend. 624.

51. A writ of error sued out, against good faith, will be quashed. *Ames et al. v. Webbers' Executors*, 11 Wend. 186.

(b) Assignment of errors, joinder, and amendment.

52. After joinder in error, the party cannot allege diminution, and have a *certiorari*. *Rew v. Barker*, 2 Cow. 408.

53. The plaintiff in error may assign common errors, and allege diminution at the same time, and take out a *certiorari*, and enter his rule to join in error. *Brisbin v. M'Laughlin*, 4 Cow. 533.

54. If the defendant does not join in error, according to the rule, the plaintiff may enter a default, though the *certiorari* be not returned. *Ibid.*

55. Where a judgment is pronounced in the Supreme Court on pleadings brought up from an inferior Court, and the party against whom the judgment has been given has asked and obtained leave to amend his pleadings, which he accordingly did, and issue was joined, and a trial had on such amended pleadings, the party amending is estopped from afterwards alleging error in the judgment pronounced on the original pleadings. *Campbell v. Stakes*, 2 Wend. 137.

56. Where a general objection is made to a decision of a Court on the trial of a cause, and on a review thereof, it appears that the decision, if erroneous at all, is so only in part, such ob-

jection will not be available from the want of precision in its statement at the trial. *M'Allister v. Read*, 4 Wend. 483.

57. Where *error in law* and *error in fact* are assigned together in one assignment of errors, the assignment is bad for *duplicitly*, but advantage can be taken of such fault only by a *special demurrer*. *Moody v. Freeland*, 7 Wend. 55.

58. If an error in fact that is *not assignable* be assigned, the plea of *in nullo est erratum* is no confession to it, but operates as a *demurrer*; if the error in fact be *well assigned*, then the plea is a confession. *Ibid.*

59. On the return of a writ of error, if the errors relied on do not appear on the record, but exist in the files or records of the Court below, the correct practice is to put in a general assignment of errors, and also a special assignment alleging diminution, and on service of a copy of the allegation to enter a rule of *course*, awarding a *certiorari* to bring up the matters alleged in diminution. *Pelletreau v. Jackson*, 7 Wend. 478.

60. If, after the service of a copy of the allegation, the defendant plead *in nullo est erratum*, he admits the facts stated in the allegation to exist, but not that they are causes of error; if he does not choose to make such admission, he may rule the plaintiff to return the *certiorari* within twenty days; and if the rule be not obeyed, the plaintiff will be *non prosequi*; if the return be made, the defendant pleads such plea as he is advised. *Ibid.*

61. The Court will not, on motion, determine the relevancy of the matters alleged in diminution, and brought up by *certiorari*, but leave the same to be decided when the case shall be argued. *Ibid.*

62. It cannot be assigned for error, that a record of judgment in the Common Pleas is signed by a judge not authorized by law to sign it; the remedy of the party in such case is by motion. *Moody v. Freeland*, 9 Wend. 125.

63. On a writ of error to the Supreme Court, it is no answer to an error assigned, that the point relied on for error was not presented to and passed upon by the Court below; such objection is peculiar to the Court of *dernier resort* in this state. *Pike v. Gandall*, 9 Wend. 149.

64. An assignment of errors in fact is not abolished, by the revised statutes, in cases of *certiorari* removing justices' judgments. *Williams v. Mayor's Court of Albany*, 13 Wend. 266.

65. Where there is no appearance in a Justice's Court, and judgment is rendered against the defendant, he may, on *certiorari* in the Common Pleas and on writ of error in this Court, object to the sufficiency of the declaration, and to the legality of the proof in the Justice's Court. *Northrop v. Jackson*, 13 Wend. 85.

66. A consul of a foreign power sued in the Supreme Court of this state, upon a recognisance of bail, acknowledged in that Court, who appeared and *pleaded to the merits*, cannot, upon a writ of error, assign as an *error in fact* that he is such consul, and therefore allege that the Supreme Court has no jurisdiction. *Davis v. Packard*, 6 Wend. 327.

67. A proceeding upon a *recognisance of bail* is merely a continuation of the original suit. *Ibid.*

68. Where a Court has jurisdiction of the *subject-matter* of a suit, and facts are stated in the proceedings sufficient to give it jurisdiction as to the *parties*, if the defendant appears and confesses the facts, or tacitly *admits them by pleading to the merits*, he cannot afterwards assign for error the want of jurisdiction. *Ibid.*

69. A party who agrees that his adversary may go into evidence, inadmissible if objected to, cannot afterwards complain of the reception of such evidence, or of other proof of the same character; having established a law of his own, he must be content to abide by it. *Rundell v. Butler*, 10 Wend. 119.

(c) *Error on bill of exceptions.*

70. When a bill of exceptions has been taken, but not entered on the roll, nor filed, nor attached to the record, the Court will even, after a delay of several years, direct it on motion to be so filed and attached, for the purpose of enabling the party to bring error. *Manhattan Company v. Osgood*, 1 Cow. 65.

70*. Where a cause was tried by a circuit judge, and the verdict was subject to a case to be turned into a bill of exceptions, which was done *in forma*, but the bill signed by the chief justice; the Court of Errors, even after assignment of errors and issue and argument, refused to decide the cause upon the matters in the bill, considering it a nullity. *Law v. Jackson*, 8 Cow. 746.

71. A cause will not be heard on writ of error, unless the bill of exceptions, if there be one, is entered on the record. *Anon.* 4 Wend. 193.

72. If a bill of exceptions be improperly allowed or erroneously dated, it will be set aside on special motion; if the error be pointed out on the argument, an amendment will be permitted by the Court. *Dean v. Gridley*, 10 Wend. 254.

73. Where a plaintiff is nonsuited, and brings error on a bill of exceptions, the Court will not, on the suggestion of the defendant in error, examine into the correctness of other decisions made by the Court below to sustain the judgment; the only questions before the Court are those arising on the bill of exceptions. *Benson v. Brown*, 10 Wend. 258.

74. The decision of a subordinate criminal Court, on a motion in arrest of judgment, cannot be reviewed on a bill of exceptions. *People v. Dalton*, 15-Wend. 581.

75. Such Court has not power to grant a new trial to a prisoner who has been convicted of embezzlement. *Ibid.*

76. A bill of exceptions lies only to bring up exceptions taken at the trial to the decisions of Court upon the evidence, or to the charge given to the jury; it properly should contain no more of the facts which transpired at the trial than are necessary distinctly to raise the questions intended to be presented for review. *Ibid.*

77. Exceptions not properly presented will not be regarded even in criminal cases. *Ibid.*

78. The Court will regard an exception taken at the trial, although in the bill it be stated to have been taken after verdict; they will presume it to have been taken in due time, until the contrary be shown. *Wakeman v. Lyon*, 9 Wend. 241.

IV. *When a judgment will be reversed, or affirmed, in part or in whole.*

79. A witness, on his examination in chief, after having sworn to a conversation, and stated that there was nothing in it from which he could say that it alluded to a particular time,

should not be permitted to express his belief as to that fact. And where such an answer was objected to, but admitted in a Justice's Court, the judgment was for that reason reversed. *Cutler v. Carpenter*, 1 Cow. 81.

80. A party may reverse his own judgment for error; as where he recovers less damages than should have been allowed by a verdict. *Ingalls v. Lord*, 1 Cow. 240. *Sarles v. Hyatt*, 1 Cow. 253, S. P.

81. Where there is conflicting evidence in the Court below, it is the peculiar province of the jury to weigh and decide upon it. And this Court will not, in such a case, interfere with the verdict, unless the error is very apparent. *Trowbridge v. Baker*, 1 Cow. 251.

82. If improper evidence be given in the Court below, though it be merely cumulative, the judgment will be renewed. *Osgood v. Manhattan Company*, 3 Cow. 612.

83. Misconduct of a jury in a Justice's Court properly assignable as error in fact, and if found, the course is to move the Court specially for judgment of reversal, on producing the postea, &c. *Rose v. Smith*, 4 Cow. 17.

84. That spirituous liquors were circulated among the jury while sitting as such, even though by consent, is cause for reversing the judgment. *Ibid.*

85. Where the material fact in a cause depended for its proof upon the testimony of F., a single, unsupported witness, who swore to that fact; but upon whose cross-examination, it was plain that he had perjured himself, either in the cause pending, or in a former cause relative to the same matter; and the Court charged the jury that he was competent; that they might give his testimony such weight as they thought it deserved; that it was in some measure supported by R., (a witness who had agreed with the testimony of F. in a collateral, immaterial fact,) and therefore entitled to that additional weight; held, that the jury should have been instructed to disregard F.'s testimony; that the Court erred in not so instructing them; and the judgment was, for that cause, reversed on error upon a bill of exceptions presenting this point. *Dunlop v. Patterson*, 5 Cow. 243.

86. The Court of Errors may reverse a judgment of the Supreme Court in part and affirm it in part. *Flower v. Allen*, 5 Cow. 654.

87. A verdict cannot be reversed on error, as being against the weight of evidence; but it will be reversed for a wrong direction of the Court to the jury on a question of law, or the legal result of the evidence. *Clapp v. Bromagham*, 9 Cow. 530.

88. A charge or opinion of a Court which is entirely abstract, or out of the case, so as not to affect it, though erroneous by exception. But the Court of Error will look through the case; and if they find that it might have been affected by the charge or opinion injuriously to the plaintiff in error, the judgment will be reversed. *Clark v. Dutcher*, 9 Cow. 674.

89. Where there is a misnomer of the plaintiff throughout the declaration, judgment in his favour by his true name will be reversed for error, though the true name appears in every part of the record except the declaration. The

case is not within the statute of *jeofails*. *Wilber v. Widner*, 1 Wend. 55.

90. The Court of Errors will not reverse a judgment of the Supreme Court for mere formal defects in the record, which had not been submitted to that Court for their actual decision. *Safford v. Stevens*, 2 Wend. 158.

91. Where a Court of Common Pleas refuse to exercise a discretion vested in them by law, under the impression that they do not possess the power which they are called upon to exercise, and in consequence a judgment is erroneously obtained, such judgment will be reversed for error. *Beach v. Chamberlain et al.* 3 Wend. 366.

92. Where a party to a writ of error dies after joinder in error, a judgment in error will be directed to be entered *nunc pro tunc*, as of a time previous to the death. *Bemus v. Beckman*, 3 Wend. 667.

93. On reversal in the Court for the Correction of Errors of a judgment of the Supreme Court, rendered on a judgment removed into that Court from the Common Pleas, such judgment is given as ought to have been given in the Supreme Court. *Close v. Stuart*, 4 Wend. 95.

94. Where there is error in a record of an inferior Court, which the party obtains leave to cure by an order or rule of such Court, but neglects to amend his record conformably to such rule, the judgment will be reversed notwithstanding such rule. *Waldron et al. v. Green*, 4 Wend. 409.

95. A judgment will not be reversed for a technical error in entering it. *Wilson v. Gale*, 4 Wend. 623.

96. Although a suit is manifestly vexatious, and a plaintiff entitled to only nominal damages, a judgment of a subordinate tribunal, if erroneous, will be reversed by the Supreme Court. *Herrick v. Storer*, 5 Wend. 580.

97. Where a witness had testified to admissions made by a plaintiff, tending to show that a note for the payment of money was *usurious*, but leaving the time of the corrupt agreement vague and indefinite, and where it was asked, after the cause was summed up and the jury charged by the Court, that the witness should be recalled and re-examined on the allegation, by the defendant, that he *had testified* positively to the fact that the usurious agreement was made at the time of the loan, and the Court refused to allow it; it was held, that the decision was correct, and that for such cause a judgment will not be reversed. *Law v. Merrill*, 6 Wend. 269.

98. Where a suit, brought by commissioners of highways in a Justice's Court, to recover a penalty of *five dollars* for the obstruction of a highway, was dismissed by the justice, in consequence of a *plea of title* being interposed by the defendant, and the suit was subsequently prosecuted in the *Common Pleas*, where the plaintiff had a verdict for *five dollars* debt, and *double costs* were awarded them; on a writ of error being sued out by the defendant, the judgment was affirmed as to the debt, and reversed as to the costs, and the plaintiff in error was awarded to pay costs to the defendants in error. *Parker v. Van Houten*, 7 Wend. 145.

99. In an action on a note payable in specific

articles, where the defendant asked the Court of Common Pleas, in an appeal case, to instruct the jury that the plaintiff was not entitled to recover, because a sufficient demand before suit had not been proved, and the Court decided that the evidence was sufficient to submit the question to the jury, and then delivered their opinion to the jury that the matters given in evidence constituted a demand, and were sufficient to entitle the plaintiff to a recovery, the Court refused to reverse the judgment, considering what was said by the Common Pleas as a mere expression of opinion on the weight of evidence, and not as a charge, that as a matter of law, the demand was sufficient. *Durkee v. Marshall*, 7 Wend. 312.

100. Where a plaintiff declares in *assumpsit*, for money paid, &c., omitting the ordinary *super se assumpsit*, and instead thereof, stating the circumstances of his case; that he bought a quantity of fish for the purpose of shipping it to a foreign port; that the defendant put on board of the same vessel in which he had made his shipment an equal quantity of fish, for the purpose and with the intent of creating a joint adventure, so that the parties should share in the profit and loss; and that the fish was so damaged at sea, or otherwise, as that after its arrival at the port of destination, it was sold at a loss, the whole of which the plaintiff individually sustained and paid, without having received any part thereof from the defendant, whereby the plaintiff had sustained damage to the amount of \$500; it was held, on writ of error, after verdict for the plaintiff in the Court below, that the declaration was bad in not stating a contract or agreement with sufficient distinctness, in not alleging a promise by the defendant, and in not setting forth a consideration; and the judgment of the Court below was accordingly reversed. *Candler v. Rossiter*, 10 Wend. 487.

101. Where a party brought an action on the case against another for his non-attendance in a Justice's Court as a witness, to prove a judgment rendered by him, and failed in his suit, and then sued out a *certiorari* to a Court of Common Pleas, who reversed the justice's judgment, and awarded costs against the defendant; and it appearing upon a writ of error removing the record into this Court, that the plaintiff had voluntarily submitted to a nonsuit before the justice, and that the witness appeared at the place of trial a short time after the nonsuit was entered, the Supreme Court reversed the judgment of the Common Pleas, with costs to be paid by the plaintiff below. *Heermans v. Williams*, 11 Wend. 636.

102. Where a general verdict is rendered on a declaration containing several counts, if either of the counts is so defective, that no proof which may be presumed to have been given would constitute a good cause of action, and the Court in which the suit was instituted denies a motion in arrest, and renders a judgment on the verdict, such judgment will be reversed; but if the evidence given was as applicable to the good as to the bad counts, the cause will be sent back to the Court below, with liberty to the plaintiff to apply for an amendment of the postea by the

judge's notes, and to enter judgment upon the good counts only. *Addington v. Allen*, 11 Wend. 374.

102*. A party cannot reverse a judgment in his favour for the error of the Court. *Hughes v. Stickney*, 13 Wend. 280.

102†. Where a person, within the age of 21, brings a suit in the Common Pleas, and appears by attorney, and judgment is rendered against him for costs; on bringing a writ of error, and assigning his infancy as error in fact, the judgment will be revoked, but costs will not be allowed to him. *Moyward v. Downter*, 13 Wend. 675.

103. In an action before a justice against joint debtors, where only one defendant was brought into Court, and the note upon which the suit was brought was read in evidence without objection, though only proved to have been made by one of the defendants; it was held, on error brought, that the defendant not brought into Court could not take advantage of such defect of proof, inasmuch as he could not be prejudiced by the judgment to be rendered against him, he having still the right to contest his joint liability. *Eddy v. O'Hara*, 14 Wend. 221.

104. The judgment of a Court of Common Pleas, upon a justice's return to a *certiorari*, will be reversed by the Supreme Court, if the Common Pleas err in the application of the law to the facts of the case, where there is no conflict in the testimony. *Look v. Comstock*, 15 Wend. 244.

V. Judgment in error, and venire de novo.

105. Upon error brought, and the judgment of the Court below being reversed for a defect of form, as the want of a *venire*, the merits being with the defendant in error, the proper course is to award a *venire* to the Court below, that the cause may be tried in due form, and a verdict and judgment rendered accordingly. *Flower v. Allen*, 5 Cow. 654.

106. Where a declaration contains two counts, one good and the other bad, and there is a general verdict, the judgment will be reversed, and a *venire de novo* awarded. *Candler v. Rossiter*, 10 Wend. 487.

107. Where a judgment rendered by the Supreme Court has been reversed in the Court of Errors with costs, and a *venire de novo* awarded, the proceedings of the plaintiff will be stayed until the payment of the costs in error. *Jackson v. Schaubert et al.* 4 Wend. 216.

VI. Error coram vobis.

108. A writ of error *coram vobis* will be quashed, where the names of the parties in the judgment sought to be reversed are not truly stated; but leave will be given to amend on payment of costs. *Brown et al. v. Davenport et al.* 4 Wend. 205.

See COURT OF ERRORS and BILL OF EXCEPTIONS.

ESCAPE.

- I. What is an escape.
- II. Escape on *meane process*.
- III. Escape on execution.
- IV. Reception, voluntary return, and other matters of defence in an action for an escape, and what may be shown in mitigation of damages.

I. What is an escape.

1. A defendant in a Justice's Court, who has given security, on the adjournment of a cause, to appear and answer, and in default thereof to pay the debt or damages and costs to be adjudged to the plaintiff, may be removed from the limits of a

jail to which he has been subsequently committed in another cause, and brought before the justice on a *habeas corpus*, to save the surety from liability; and such leaving of the limits will not subject the sheriff to an action for an escape. *Martin v. Wood*, 7 Wend. 132.

II. Escape on mesne process.

2. The assent of an officer to the escape of a defendant whom he has arrested does not affect the rights of the plaintiff, and even the officer, if the process be *mesne*, may retake the defendant. *Arnold v. Steves*, 10 Wend. 514.

III. Escape on execution.

3. The statute limiting suits against sheriffs for escapes of persons imprisoned on civil process to one year, applies as well to escapes after arrest and before commitment as to escapes after commitment. *Roe v. Reakes*, 7 Wend. 459.

IV. Reception, voluntary return, and other matters of defence in an action for an escape, and what may be shown in mitigation of damages.

4. A *ca. sa.* tested out of term is not void, but voidable only, and may be amended on motion. But although not amended, in fact, on motion, a sheriff is not, for that reason, warranted in suffering a party arrested thereon to escape; and if he escapes, the sheriff is liable. *Jones v. Cook*, 1 Cow. 309.

5. Where in debt for an escape, the declaration set forth the *ca. sa.*, with the usual words "and him safely keep," and the *ca. sa.* produced in evidence omitted the word "keep," this was held not to be a fatal variance. *Ibid.*

6. In such action the usual endorsement on a *ca. sa.*, directing the sheriff what sum to levy, need not be set forth in the declaration. *Ibid.*

7. And if set forth, it is mere surplusage, and need not be proved as laid. *Ibid.*

8. It is settled that a sheriff who is sued for an escape cannot protect himself by error in the process. It protects him in making the arrest, and is good till reversed, which can be on the application of a party or privy only. *Ibid.*

9. Under a declaration for several escapes, the defendant may plead a voluntary return, &c. to the escapes set forth, and may, on issue thereon, excuse any and all escapes which the plaintiff proves at the trial by showing a subsequent voluntary return, &c. *Middle District Bank v. Deyo*, 6 Cow. 732.

10. If the plaintiff wishes to confine the defence to any escape or escapes in particular, he should new assign. *Ibid.*

11. The day of the escape or escapes laid in the declaration is not material, unless made so by a novel assignment. *Ibid.*

12. Where a plaintiff declares for several escapes, on different days, from writs of *ca. sa.* upon different judgments, but at the trial proves only one judgment, he is entitled to recover upon only one count. *Ibid.*

13. The usual averment in the plea, of a voluntary return or reception, to an action for an escape, that the prisoner continued in custody intermediate the return or reception and the suit, is immaterial, and no proof of it need be given under an issue upon the plea. *Ibid.*

14. It is a good defence to an action for a negligent escape that the prisoner was taken on fresh pursuit, or voluntarily returned, before suit brought, and was in custody at the time of suit brought, without an allegation that he continued in custody intermediate the reception or return and the time of suit brought. *Ibid.*

15. A right of action once extinguished is gone for ever; and cannot be revived or continued by any subsequent, distinct, and independent act. *Ibid.*

16. Consent or agreement by the plaintiff to an escape, after it has happened without consideration, will not discharge the sheriff. *Powers v. Wilson*, 7 Cow. 274.

17. Otherwise, where it is, upon good consideration. *Ibid.*

18. Where the plaintiff agreed with the sheriff, in consideration that he would not retake W., who had escaped from a *ca. sa.* at the suit of the plaintiff, that he would not sue the sheriff without notice and reasonable time to retake, &c.; held, that he could not sue without such notice, the consideration being a good one. *Ibid.*

19. The plaintiff's consent that a prisoner at his suit on *ca. sa.* may go at large, is a discharge of the judgment. *Ibid.*

20. Under a single count for an escape, and plea of voluntary return, the plaintiff may, without a new assignment, prove a single escape on any day before suit brought, electing which; and the defendant may then show a return into custody, &c. before suit, and apply his plea to such return. *Howland v. Squire*, 9 Cow. 91.

21. But though the plaintiff has not newly assigned, the defendant cannot show a previous escape and return, and defend himself by setting this up as the escape in question. *Ibid.*

22. A voluntary return, in escape against the sheriff, cannot be given in evidence under the general issue. *Ibid.*

23. In an action of debt against a sheriff for an escape of a prisoner arrested upon an attachment for the nonpayment of costs, an averment in the declaration that the sheriff arrested the party, and had and detained him in custody in execution, &c., is equivalent to an averment that he was committed to jail. *Ames v. Webbers*, 8 Wend. 545.

24. A sheriff in such case cannot plead in his discharge, that the prisoner was arrested and committed on a previous attachment for the same cause, and discharged from custody with the assent of the plaintiff; none but the party himself can complain of the second arrest. *Ibid.*

ESCHEAT.



1. In ejectment by the people, for lands *propter defectum sanguinis*, the jury should be satisfied beyond all reasonable doubt that the tenant, whose lands are claimed as being escheated, died without heirs. *Jackson v. Eitz*, 5 Cow. 314.

2. In ejectment for escheated land, proof that a man's intimate acquaintances for several years never heard him speak of his family, father,

mother, wife, or children, is *prima facie* evidence that he has no heirs, if the place of his birth be unknown to them, and there appear no clue to better evidence; but this may be overthrown by very slight proof of heirs. *Ibid.*

3. A grant of land to an alien soldier for military services during the revolutionary war, and who died during that war, enables his heirs, though aliens, to inherit. *Ibid.*

4. So of a slave. His heirs, though born of a wife who was a slave, may inherit under such a grant. Per *Sutherland, J.*, upon the authority of *Jackson v. Hervey*, not reported. *Ibid.*

ESTOPPEL.

1. In *assumpsit* by A. against B. for depasturing and keeping on hay the cattle of B. at his request, on land in A.'s possession, B. is estopped from showing that the title of the land was not in A., but in B., at the time the services were performed. *Eastman v. Tuttle*, 1 Cow. 248.

2. The defendant, the verdict being against him, cannot object that his own plea was vicious, as tendering an immaterial issue. *Parsons v. Parsons*, 5 Cow. 476.

3. Estoppel is where a man admits an act or deed, by reciting it in an instrument executed by him, or by acting under the deed. *Sinclair v. Jackson*, 8 Cow. 543.

4. But he is not estopped, if the truth appear by that which would otherwise work an estoppel. *Ibid.*

5. It seems, that an estoppel of a party as to a previous deed by a recital of it in a subsequent one, is only where both deeds are in the same right; not where he executes one in his own and one in the right of another. *Ibid.*

6. Where an attorney appears and defends for another, and receives money, as attorney, due to his assumed client, in an action by the latter against the former, he is estopped to deny that he is attorney. *McFarland v. Cray*, 8 Cow. 253.

7. A grantor having no title conveys, with covenants of seisin, quiet enjoyment, and warranty. He afterwards acquires title. This, in general, enures to the benefit of the grantee by way of estoppel against the grantor, who cannot recover the land from the grantee in virtue of the subsequently acquired title. *Jackson v. Hoffman*, 9 Cow. 271.

8. But where a grantor recites in his deed that the grant is subject to a certain claim, (e.g. a mortgage,) and then covenants that he is seized, that the grantee shall quietly enjoy, and that the grantor will warrant against all claims, the recital qualifies the covenants, and prevents their application to such claim. *Ibid.*

9. Where there is any thing for a warranty to operate upon, the doctrine of the estoppel does not apply. *Ibid.*

10. Nor does it apply except as between the same parties acting in the same character. *Ibid.*

11. All the parties defendants to a bill of

foreclosure in the Court of Chancery, are estopped from questioning the title derived from the decree of sale. *Ibid.*

12. To make a record evidence to conclude any matter, it should appear from the record itself that that matter was in issue; and evidence cannot be admitted that under such a record any particular matter came in question. *Jackson v. Wood*, 3 Wend. 27.

13. Although the testator, at the time of the making of the will, had no legal estate in the premises, the grantees in the deed, and those claiming under them, are estopped from setting up any title inconsistent with that conveyed thereby. *Jackson v. Ireland*, 3 Wend. 99.

14. A person entering under another, either as tenant or under an agreement to purchase, cannot dispute that title, while he continues in possession, nor can he legally attorn to a stranger. Every one entering mediately or directly under such tenant stands in the same situation as the original tenant. *Jackson v. Miller*, 6 Wend. 228.

15. A lessee of a farm, who fixes a boundary line between himself and his neighbour, is so far estopped from showing that such line was erroneously settled, that he cannot maintain trespass against his neighbour for taking and carrying away, under the supposition that the line agreed upon was the right line, crops put in by him. *Dewey v. Bordwell*, 9 Wend. 65.

16. Recitals in a deed of land are evidence against the party making them, or any person claiming under him; they estop parties and privies; privies in blood, in estate, and in law. *Jackson v. Parkhurst*, 9 Wend. 209.

17. A person entering into possession of land under a party thus bound by a recital, is a privy in law of such party, and is bound by whatever would conclude or affect him. *Ibid.*

18. A party in possession of lands, claiming the same under a warranty deed from a stranger, is estopped from saying that he holds as a tenant in common with the plaintiff. *Siglar v. Van Riper*, 10 Wend. 414.

19. But even where he holds as a tenant in common, if he denies the plaintiff's title when possession is demanded, the plaintiff is entitled to recover, such denial amounting to an ouster; a denial in terms is equivalent to an act amounting to a denial. *Ibid.*

20. It seems, too, that such demand may be made of a tenant in possession, though not the tenant of the freehold. *Ibid.*

21. A party admitting the title of land to be in another, and agreeing to purchase, is estopped from setting up title in himself under a deed which he had held for six years previously to such admission; and such estoppel extends to all claiming under him. *Sayles v. Smith*, 12 Wend. 57.

22. Where a witness, called to prove a fact, disproves it, the party calling him is not estopped from proving by other witnesses that the facts are as he alleged them, and as he expected to have shown them by the first witness. *Jackson v. Leek*, 12 Wend. 105.

23. A party in possession of lands, acknowledging the title of another, is not estopped from subsequently disclaiming holding under

such title, if the original entry was not under the person in whom the title is acknowledged; nor is any other person, deriving the possession from such tenant, estopped by such acknowledgment. *Ibid.*

24. A verdict and judgment thereon, on a fact or title distinctly put in issue, may be pleaded by way of estoppel in another action between the same parties or their privies, in respect of the same fact or title. *Eltheridge v. Osborn*, 12 Wend. 399.

25. Where a party produces in evidence in support of his title a decree of a Court of Chancery, and a conveyance in pursuance thereof, he cannot be permitted to deny the material facts which they allege, either by way of recital or otherwise. *Bradstreet v. Clarke*, 19 Wend. 602.

26. A party who, under seal, acknowledges that another has paid a certain sum of money as the consideration of the assignment of a bond, the payment of which he guarantees, is estopped, *it seems*, from subsequently showing, by proof, that the amount paid was greatly less. *Mann v. Eckford's Executors*, 15 Wend. 502.

27. Where a party, by bond, guarantees that a third person shall pay a certain sum of money by a given day, as secured by the obligation of such third person, the guarantor, in an action against him, is not at liberty to show that the obligation of the third person was assigned to the plaintiff by an insurance company in contemplation of insolvency; none but creditors and stockholders of such an institution can avail themselves of the statute provided for such cases. *Ibid.*

28. Nor can a defendant in such case show that the obligation of the third person is invalid on the ground of usury. *Ibid.*

29. A mortgagor, in an action against him for the recovery of the premises, is estopped from denying that he had title at the time of the execution of the mortgage; nor is he permitted to set up title in a stranger. *Barber v. Harris*, 15 Wend. 615.

EVIDENCE.

- I. *Matter of record; verdict; postea; judgment; execution, &c.*
- II. *Legal proceedings not of record.*
- III. *Public documents.*
- IV. *Corporation books.*
- V. *Laws and legal proceedings of other states and countries.*
- VI. *Deeds.*
- VII. *Wills.*
- VIII. *Other private writings.*
- IX. *Proof of handwriting, and subscribing witnesses.*
- X. *Parol evidence to explain, vary, or contradict written instruments.*
- XI. *Presumptions.*
- XII. *Notice to produce papers.*
- XIII. *What may be proved by parol.*
- XIV. *Confessions and declarations.*
- XV. *Hearsay and general reputation.*

XVI. *Witness: (a) Who are competent witnesses, either generally or as to particular facts; (b) How a witness is to be examined.*

XVII. *When a witness is incompetent on the ground of interest: (a) When a witness's interest will be sufficient to exclude his testimony; (b) When the witness will not be excluded; (c) Agents; (d) Release of a witness's liability; (e) Default of witness.*

XVIII. *Credibility of witnesses, and how impeached.*

XIX. *Evidence in particular cases, and under particular issues.*

I. *Matter of record; verdict; postea; judgment; execution, &c.*

1. A record signed and filed *nunc pro tunc*, under a rule for that purpose, was set forth in pleading, and given in evidence, of the term as of a day in which it was ordered to be filed. *Jones v. Cook*, 1 Cow. 309.

2. The plaintiff is never bound to prove that part of an instrument which it is not material to set forth, unless it be alleged as matter of description, or in *hæc verba*. Accordingly, where the declaration stated that the *ca. sa.* issued the 28th October, a *ca. sa.* tested the 31st October was admitted in evidence; and this though the 31st was out of term. *Ibid.*

3. The judgment of a Court of concurrent jurisdiction directly upon a point is conclusive, between the same parties, upon the same matter coming directly in question in another suit. *Gardner v. Buckbee*, 3 Cow. 120.

4. And this whether it be pleaded or given in evidence under the general issue. *Ibid.*

5. It is conclusive whether it appear upon the face of the record in the former suit, that the same matter was tried and passed upon, or not. *Ibid.*

6. If it was in fact so tried, without this fact appearing of record, the proper course is to give the record in evidence, and then prove by parol that the matter did arise, and was tried upon the pleadings in the record. *Ibid.*

7. *It seems*, that an exemplification of a record of an inferior Court of this state is evidence in the Supreme Court, and that it is not necessary to remove the record there by *certiorari*, to make it evidence, even on a plea of *null tiel record*. *Vail v. Smith*, 4 Cow. 71.

8. The text of the record is the evidence which must control as to the time when the judgment is entered; and it cannot be corrected on the trial by the judge's date of signing judgment in the margin. *Ibid.*

9. A verdict and judgment in ejectment is never conclusive, even between the immediate parties, except in an action for *mesne profits*. Per *Colden*, Senator. *Hopkins v. M'Laren*, 4 Cow. 667.

10. In an action for *mesne profits*, the record in the ejectment suit is conclusive evidence of title in the plaintiff; and where the declaration, consent rule, writ of possession, and return in the ejectment suit were all in the usual general form; the plaintiff being consulted on account

of the defendant's not confessing lease entry and ouster; in an action for the *mesne* profits; *held*, that the defendant could not show, in mitigation of damages, that the plaintiff brought the ejectment to recover only a small undivided part of the premises in question; but that this was matter of defence in the original action only. *Graves v. Joice*, 5 Cow. 261.

11. Where deeds of lands embrace premises lying in two counties, and are recorded in only one of the counties, but it is proved that the originals are lost, exemplifications of the records of the deeds are competent evidence to go to the jury to prove the contents of such deeds, in an action of ejectment for the recovery of the portion of the premises conveyed, situate in the county where the deeds are not recorded. *Jackson v. Rice*, 3 Wend. 180.

12. An exemplification of letters of administration from the surrogate's office is good evidence, without accounting for the nonproduction of the original letters. *Jackson v. Robinson*, 4 Wend. 436.

13. A warrant under which a false imprisonment takes place, produced on the trial of an action for such false imprisonment by the plaintiff, is evidence for the defendant of the facts contained in it, until she shows the contrary. *Scott v. Ely and White*, 4 Wend. 555.

14. A transcript of a justice's judgment filed in a county clerk's office, and of the entry of a judgment thereon by the county clerk, may be proved by an exemplification thereof, under the official seal of the clerk. *Tuttle v. Jackson*, 6 Wend. 213.

15. An inquisition taken under a writ *de lunatica inquirendo* is admissible, though not conclusive, evidence to prove the lunacy of an obligor in an action of debt on bond. *Hart v. Deamer*, 6 Wend. 497.

16. Where it is sought to connect a suit before a justice, dismissed under a plea of title, with a suit for the same cause of action in the Common Pleas, the written proceedings before the justice must be produced; the facts cannot be established by *parol*. *Webb v. Alexander*, 7 Wend. 281.

17. A record of a judgment in trespass for \$102.64, cannot be given in evidence in support of an averment, in an action for breach of covenant for quiet enjoyment, that the recovery was \$600. *Ibid*.

18. A copy of a declaration served on the defendant's attorney is admissible, in evidence, to show a former suit and the cause of action therein expressed; it is not necessary to produce an exemplified copy of the declaration on file. *Brown v. Littlefield*, 7 Wend. 454.

19. If it does not appear from the record that the verdict and judgment in a former suit were directly upon the point or matters which are attempted again to be litigated in a second action, the fact may be shown *aliunde*; provided the pleadings in the first suit were such as to justify the evidence of those matters, and that it also appeared that, when proved, the verdict or judgment must necessarily have involved their consideration and determination by the jury. *Lawrence v. Hunt*, 10 Wend. 84.

20. In an action by A. against B. for da-

mages for the nondelivery of a quantity of wheat; *it was held*, that a verdict and judgment in an action by B. against A., in which the plaintiff claimed to recover the price of the wheat, alleging a delivery of part and a readiness as to the residue, was no bar to A.'s right to recover, B. having claimed to recover as well for rye and corn as for wheat sold, and it not appearing that any part of the verdict was for the wheat. This was so adjudged, although, on the trial of B.'s suit, the recovery for the wheat was contested on the ground that the plaintiff had failed to perform his part of the contract in reference to the same. *Ibid*.

21. A record of a former verdict and judgment is admissible in evidence, although between different parties, where the party sought to be affected by the evidence was a party to the former suit, in which it was sought to charge him as jointly liable with another, and which joint liability he contested on the former trial. *Ibid*.

22. The judgment of a Court of concurrent jurisdiction, or one in the same Court directly on the point, is as a plea in bar, and as evidence in certain cases conclusive between the same parties upon the same matter directly in question in another Court or suit; but is no evidence of a matter which merely comes collaterally in question, nor of matter incidentally cognisable, or to be inferred only by agreement or construction from the judgment. *Ibid*.

23. Depositions *in perpetuum rei memoriam*, taken by a commissioner out of the county for which he is appointed, cannot be used as evidence on the trial of a cause. *Jackson v. Leek*, 12 Wend. 105.

24. *Parol* evidence is admissible to show that a deed absolute in its terms was intended as a mortgage; and such evidence may be received not only as between the parties to the instrument, but where third persons are concerned, if no trust or confidence has been reposed upon the strength of the absolute deed, and such third persons have not been misled by the form of the transaction. *Wallon v. Cronly's Administrator*, 14 Wend. 63.

25. A defect in the proof of a record of judgment at the trial may be supplied by the production of an exemplification in bank. *Williams v. Wood*, 14 Wend. 126.

26. The plaintiffs, to rebut the evidence of a witness introduced by the defendants, offered a bill in Chancery, filed by him, which contained allegations contradictory to his testimony at the trial. The witness stated, that the bill had been filed by his counsel, and that he had never read it, although he believed that his counsel told him what he intended to insert in it; but the bill was neither signed nor sworn to by the witness. *Held*, that the evidence thus offered was not admissible. *Belden v. Davies*, 2 Hall, 433.

II. Legal proceedings not of record.

27. The certificate of a justice that a certain demand was claimed before him by the defendant as a set-off, is extra judicial, and therefore not conclusive, and may be contradicted by *parol* evidence showing that the demand was not so claimed. *Wolfe v. Washburn*, 6 Cow. 261.

36. The official certificate of a justice, within the statute, (sess. 47, ch. 138, s. 99.) can regularly contain no more than the process, pleadings, evidence, verdict, and judgment; not what was stated before him by way of argument. *Ibid.*

29. An award of arbitrators was made between the owner of lands called L., adjoining to and bounded on an arm of the sea, where the tide ebbs and flows on one part; and the trustees of the town of H., in this state, lying on the opposite side of the arm, of the other part; which award established certain boundaries between the parties, and decided that certain fishing grounds lay within the boundaries of L. In trespass by the lessee of a part of the fishing ground, who claimed a right of several fisheries therein by prescription, against an inhabitant of H. for taking fish on the demised premises, the latter justifying on the ground that the fishery was free to any citizen of the state, the plaintiff offered the award in evidence. *Held*, that it should be received, that it determined nothing as to the rights claimed by the respective parties, and was therefore immaterial. *Gould v. James*, 6 Cow. 369.

30. A book, purporting to contain the proceedings of the commissioners of forfeitures, but not proved ever to have been in their possession, though found in the clerk's office in 1806, and having laid seventeen years there, is not admissible in evidence to show a sale by the commissioners; nor will a conveyance be presumed where such a book is shown to be genuine, unless the requisites of the statute creating the commissioners and defining their duty appear to have been complied with by the purchaser, and the certificate state that a conveyance was given. *Jackson v. Miller*, 6 Cow. 751.

31. The certificate of the commissioners is not evidence of title, and a conveyance should be produced, or its absence accounted for, and secondary evidence given. *Ibid.*

32. An enrolled decree of foreclosure, with the master's deed to the purchaser, are of themselves evidence sufficient to entitle a mortgagee to recover in ejectment, without producing the original mortgage or proving it, otherwise than by the decree. *Sinclair v. Jackson*, 8 Cow. 643.

33. A stranger, or not one of a party, cannot object to such evidence in an ejectment against him. *Ibid.*

34. The declarations or representations of an agent, relative to an article of merchandise, (in the sale of which there is alleged to have been fraud,) to other persons to whom he offered parcels of it for sale, subsequent to the sale in question, are admissible in evidence in an action against the vendee to recover the price of the article. *Welsh v. Carter*, 1 Wend. 185.

35. Where an endorsement in part satisfaction of a judgment is made, on an execution from a Justice's Court, it is competent for a party to show, when it comes collaterally in question, that the endorsement on it is not according to the fact, or that it was made under a misapprehension of the law. *Dubois v. Dubois*, 2 Wend. 416.

36. An award of the Onondaga commissioners respecting lands situate in that county at the

time of the award, may be exemplified by the clerk of that county, although such lands are subsequently included in the county of Cayuga. *Jackson v. Tibbets*, 2 Wend. 592.

37. The fact of two persons holding different parcels of what was once an undivided tract of land, and deriving title from the same source, constitutes no privity of estate between them, and the testimony of a deceased witness on the trial of an action of ejectment against one for the premises in his possession, cannot be given in evidence in an action of ejectment against the other for the premises possessed by him, although both actions be brought by the same claimant. *Jackson v. Crissey*, 3 Wend. 351.

38. To show a matter to be *res judicata* in a Court of Chancery, an exemplification of the bill, answer, and decree is sufficient evidence in a Court of law, without showing an actual enrolment of the decree. *Winans v. Dunham*, 5 Wend. 47.

39. A certificate of a justice's judgment, to be competent evidence on the trial of a cause, must show on its face that the justice rendering the judgment had jurisdiction as well of the person as of the subject-matter of the suit. *Bend v. Borst*, 5 Wend. 292.

40. A certificate of a justice of the peace, of a judgment rendered and execution by him, is evidence, as well for himself as for the plaintiff in the execution, in an action of trespass for selling property by virtue of such execution. *Maynard v. Thompson*, 8 Wend. 393.

41. Such certificate may be granted after the expiration of office of the justice. *Ibid.*

42. The certificate authenticating the certificate of the justice must be given by the clerk of the county where the justice resided at the time of the rendition of the judgment. *Ibid.*

III. Public documents.

43. An exemplification of a copy of the certificate of the appraisers filed in the treasurer's office, having an endorsement by the treasurer upon it, that the original had been delivered to C. C., deceased, and it being shown that it could not be found among the papers of C. C.; was held admissible in evidence, though it was the exemplified copy of a copy. *Jackson v. Cole*, 4 Cow. 587.

44. This copy, having been furnished to the treasurer by the commissioners of forfeitures for his information, and as his guide under the act for vesting the land in C. C., may be regarded as an original for some purposes, and especially as against the state, the treasurer having endorsed upon it all he did under it. *Ibid.*

45. Producing letters patent to one; and then tracing a descent from one of the same name, are *prima facie* evidence that the patentee and ancestor are the same person; and it lies with the defendant to rebut this, by showing another of corresponding name, age, &c., or in some other way. *Jackson v. King*, 5 Cow. 237.

46. The New York Senate Journals, printed by the state printer, and laid on the tables of members, are evidence. *Rout v. King*, 7 Cow. 613.

47. The memoranda of a deceased notary, of the demand and notice of nonpayment, are

prima facie evidence of the fact. *Buller v. Wright*, 2 Wend. 369.

48. A protest of a bill of exchange by a *huissier* (an officer of a tribunal of commerce in France, authorized by the commercial code of that country to make protests) will not be received in evidence without proof of the code. *Chanoine v. Fowler*, 3 Wend. 173.

49. The record of a certificate of incorporation of a religious society is not evidence of the fact of incorporation; the certificate itself must be produced, or its nonproduction accounted for. *Jackson v. Leggett*, 7 Wend. 377.

50. A corporation may be proved by an exemplification or admission of the act of incorporation, and acts of user under it; and the acts and admissions of a party, such as serving as president of the corporation, and giving a note to it in its corporate name; is *prima facie* evidence of user. *Williams v. Bank of Michigan*, 7 Wend. 539.

51. The fact of a contract being made with a joint stock company, designating it as an incorporated company, e. g. "the President, Directors, and Company of the Bank of Michigan," does not dispense with proof that the company is a body corporate, unless in the contract itself it is distinctly stated that the company is an incorporated company. *Ibid.*

52. Where a trustee, authorized to sell and convey lands, executes a deed for a valuable consideration of part of the trust estate, and immediately thereafter takes a reconveyance of the same premises, the conveyance at law is valid; the remedy, if any, is in equity. *Jackson v. Brooks*, 8 Wend. 427.

53. An exemplification of letters patent for an improvement in machinery, granted by the United States, and a specification accompanying the same, certified by the secretary of state, under the seal of his department, is admissible in evidence, and in such case the drawing referred to in a specification need not be exemplified. *Peet v. Farrington*, 9 Wend. 44.

54. It is no objection to an exemplification of letters patent, granted in 1787, that the name of the governor of the state *pro tempore* does not appear subscribed to it, and that the letters L. S., designating the place of the great seal, do not appear upon it; it being judicially known that at that period, and long after, the seal was appended to patents instead of being impressed upon its face, and the legal presumption being that no patent would be issued or recorded unless executed in due form of law. *Williams v. Sheldon*, 10 Wend. 654.

IV. Corporation books.

55. The general rule is, that registers of births, marriages, and burials are competent evidence, on a trial, to prove a pedigree; and when the original is of a public nature, (e. g. the records of the Reformed Dutch Church in the city of New York,) a sworn copy is admissible. *Jackson v. King*, 5 Cow. 237.

56. Hearsay in the family and among relations; tradition, and any thing which shows a general reputation, are also admissible to establish a pedigree. *Ibid.*

57. The original minutes of a corporation of a

city are competent evidence of the acts of the corporation, without further proof of their verity. *Denning v. Hoome*, 6 Wend. 651.

58. An agent of the corporation of New York, sued for acts done by order of the corporation in removing obstructions in a street, may, in his individual capacity, avail himself in his defence of the records of the corporation, as entered in their minutes, in relation to such street. *Ibid.*

V. Laws and legal proceedings of other states and countries.

59. Showing the copy of a foreign judicial record, certified by a clerk having the custody of the records of the Court in which judgment was rendered, the handwriting of the clerk being proved, and the Court having no seal, is a sufficient authentication, and entitles it to be read in evidence here; especially, where it is proved farther, that the record is authenticated in the usual form of these sent to be used as evidence in a foreign country. *Packard v. Hill*, 7 Cow. 434.

60. Parts of a record are properly admissible in evidence. The whole is not necessary. It is enough that extracts are furnished sufficient to show, *prima facie*, the facts sought to be proved. *Ibid.*

61. The history of the execution and satisfaction of a judgment or condemnation for a sum of money, in the record of a foreign judicatory, is evidence of payment. *Ibid.*

62. A book, purporting to contain the laws of a foreign state, but not published by authority, is not admissible as evidence of the written laws of that state. *Packard et al. v. Hill*, 9 Wend. 411.

63. The commercial code of France, which is a written law, cannot be proved by the production of a printed book, admitted to be conformable to the official edition of the code, published by the government. *Chanoine v. Fowler*, 3 Wend. 173.

64. The written or statute laws and judicial records of a foreign state must be proved by documents properly authenticated under the seal of the state, or a sworn copy must be produced. *Lincoln v. Battelle*, 6 Wend. 475.

65. The laws of other states must be proved, otherwise the Courts of this state cannot take notice of them. *Hosford v. Nichols and others*, 1 Paige, 220.

VI. Deeds.

66. It seems, that in order to entitle a deed to be read in evidence as an ancient deed, without farther evidence of its execution, proof that part of the premises contained in it have been possessed under it for thirty years, is sufficient even as against one in possession of another part. *Jackson v. Davis*, 5 Cow. 123.

67. One assigned a lease, and then took a reassignment, with certain exceptions, both the assignment and reassignment being endorsed on the lease, and afterwards assigned the whole; under which last assignment the assignee claimed the whole, in ejectment, against one claiming and in possession under the exception. On the plaintiff's producing the lease in evidence, with the assignment and reassignment

thus endorsed, the genuineness of the latter being established; *held*, that the assignment, when thus taken in connexion with the reassignment, might be read without being proved by a subscribing witness; and that the one taken under the reassignment, which was in nature of a sub-lease, and all claiming under him, were estopped to question the genuineness of the assignment. *Jackson v. Hahted*, 5 Cow. 216.

68. The recital of a deed in a bond is evidence of the deed, even against the obligee and those claiming under him, especially if he or they introduce it in evidence on their part, and the deed be not produced or its absence accounted for. *Jackson v. Harrington*, 9 Cow. 86.

69. An assignment of a mortgage may be read in evidence on a trial at law, without other proof of its execution than an acknowledgment by the assignor before a commissioner. *Roberts v. Jackson*, 1 Wend. 478.

70. A sheriff's deed, setting forth particularly three writs under which the sale of the property conveyed was made, cannot be contradicted by collateral parol evidence that the sale was had by virtue of one execution only. *Jackson v. Roberts*, 7 Wend. 83.

71. The remedy of a party injured, in such case, is by summary application to the Court under the authority of whose process the officer acts, or by a bill in equity. *Ibid*.

72. A lease more than thirty years old may be read in evidence without proof of its execution, although there be no direct proof of possession accompanying it, if found among the title papers of the estate affected by it, and the facts and circumstances in reference to the property specified in it be such as to afford a reasonable presumption of its genuineness; so *held*, in a case where a lease, granting to the lessee a right to flow lands for the use of a mill, dated in 1792, was found among the title papers of the estate of the lessor in 1779, and the owner of the mill in 1810 recognised the right to the land so overflowed in the person to whom the estate of the lessor had been transmitted. *Hewlett v. Cook*, 7 Wend. 371.

73. Where the question is whether a voluntary deed be fraudulent or not, evidence of other and contemporaneous transactions of the grantor and his grantees, in relation to other portions of property, is admissible. *Jackson v. Timmerman*, 12 Wend. 299.

74. The reading of a deed of lands in evidence cannot be objected to on the ground of variance between it and the oyer served, for the cause that the certificate of acknowledgment is not endorsed upon the oyer; such certificate forms no part of the deed. *Miner v. Clark*, 15 Wend. 425.

VII. Wills.

75. To prove the execution of a will, it is not enough to account for the absence of the true subscribing witnesses, and prove the handwriting of one only; but under such circumstances, proof of the handwriting of all three of the witnesses, and that of the testator, would be proper to be left to the jury, from which to infer that the formalities required by the statute

had been observed. *Jackson v. Luquero*, 5 Cow. 321.

76. Mere efflux of time, as thirty years or more, from the date of a will, does not entitle it to be read without further proof. *Ibid*.

77. But possession of thirty years, under a will, entitles it to be read as an ancient will, without further proof, the same as a deed; and it seems, that it is not necessary to show that all the devisees were thus in possession under the will; but the possession of a part under it is sufficient. *Ibid*.

78. A possession of part under the will, for less than thirty years, accompanied with proof satisfactorily accounting for the absence of all the subscribing witnesses, as where they are dead; and proof of the handwriting of one, and the acts of the devisees of the land in question, as possessing it, claiming under the will, and executing deeds of partition reciting the will and the like; are also sufficient to entitle it to be read in evidence, without further proof. *Ibid*.

79. A deed of more than forty years' standing after the death of the testator was admitted in evidence as an ancient deed, without proof of its execution, it being clearly proved that the land devised by it had, ever since the death of the testator, been held under and according to its provisions, although one of the subscribing witnesses was shown to be alive and within the jurisdiction of the Court, and the attestation did not state that the witnesses subscribed their names in the presence of the testator. *Jackson v. Christman*, 4 Wend. 277.

80. A will more than thirty years old, and possession of lands held in conformity to it for that length of time, may be read in evidence, where the execution appears regular upon its face, without proof of its execution. *Felkerly v. Waggoner*, 11 Wend. 599.

VIII. Other private writings.

81. In a suit by a mechanic for work done in the line of his business, after proof of one or two items of his account, the production of his books of account, with proof that he kept honest and fair books, is competent evidence. *Linnell v. Sutherland*, 11 Wend. 568.

82. The map of a patent, made by the proprietors, is inadmissible as evidence against the proprietors of an adjoining patent. *Jackson v. Frost*, 5 Cow. 346.

83. A. and B. are joint makers of a promissory note, but an entry in the mercantile account books of A., made near the time of the date of the note, showed that A. was the principal and B. the surety on the note; *held*, that the entry was inadmissible in evidence, since, when made, it was not against the interest of the party making the entry, as between him and the party with whom he is litigating. *Schermerhorn v. Schermerhorn*, 1 Wend. 119.

84. The memoranda of a deceased notary, of the demand and notice of nonpayment of a promissory note, are *prima facie* evidence of these facts. *Butler v. Wright*, 2 Wend. 369.

85. After a lapse of ten years, and proof of the protest of a note for nonpayment, a written memorandum made at the time of the transac-

tion, is admissible in evidence to show that due notice of the protest was given to the endorser. *Hart et al. v. Wilson et al.* 2 Wend. 513.

86. A note, although referred to in an instrument under seal, cannot be read in evidence, without producing the subscribing witnesses, or accounting for their absence; especially where the note offered in evidence purports to be a sealed note, and the fact whether sealed or not has an important bearing upon the issue of the cause. *Jackson v. Sackett*, 7 Wend. 94.

87. Where a paper is offered in evidence, the Court may require it to be submitted to their perusal to determine upon its admissibility, instead of suffering it to be read in the hearing of the jury; and if the requisition is declined, the paper may be rejected. *Gould v. Weed*, 12 Wend. 12.

88. Where a plaintiff, in an action on a fire policy, for the purpose of showing the value of the property lost, introduced in evidence accounts of stock in trade, purporting to have been taken in several consecutive years, and the insurers offered to prove by persons of skill in handwriting, that the accounts of stock appeared to have been made at one and the same time; it was held, that such evidence was improper, and was accordingly rejected. *The Phoenix Fire Insurance Company v. Philip*, 13 Wend. 81.

89. So it was held, that it was not competent for the insurers to prove the amount of stock of the largest dealer in the trade to which the assured belonged, in the city where he resided, for the purpose of raising the presumption of fraud in the account of loss furnished by the assured. *Ibid.*

IX. Proof of handwriting, and subscribing witnesses.

90. Where there are several subscribing witnesses to a deed, or power of attorney, it is not enough to prove one of them dead, or out of the jurisdiction of the Court, and then prove his handwriting with that of the party; but the absence of all must be accounted for, as that they are dead, or out of the jurisdiction of the Court, or on diligent inquiry cannot be found. *Jackson v. Gager*, 5 Cow. 383.

91. Proof of comparison of hands, i. e. the juxtaposition of two writings in order to ascertain whether both were written by the same person, is inadmissible. Witnesses cannot testify from such comparison alone, nor can the writings be submitted to the jury. *Jackson v. Phillips*, 9 Cow. 94.

92. To warrant proof of the handwriting of subscribing witnesses, or either of them, as a substitute for their production, it must be proved that they are all either dead or beyond the jurisdiction of the Court. This must be shown with reasonable certainty. *Jackson v. Cady*, 9 Cow. 140.

93. Proof that a witness cannot be found, on diligent inquiry, is evidence of his death or absence. (Inquiry in this case was made mainly at the place where the deed described the grantor as residing.) *Ibid.*

94. Where there was a dispute as to the identity of a witness to a deed, there being several persons of the same name, a witness, in order to identify him, was allowed to compare

the handwriting subscribed as an attestation to the deed, with another writing long in his possession, and reputed to be the handwriting of a man of the name subscribed, though he had never seen that man write. This evidence was received without objection; and the Court inclined to think the evidence would have been admissible for the purpose of identity, even if it had been objected to. *Ibid.*

95. Where all the subscribing witnesses to a deed are dead, proof of the handwriting of one of them proves the deed. *Ibid.*

96. On a trial at law, if one of the three subscribing witnesses to a will, will swear that the other two subscribed the will in the presence of the testator, it will be sufficient. But unless the witness produced can prove a valid execution of the will, the other witnesses, if living, and within the jurisdiction of the Court, ought to be called. *Jackson v. Vickory*, 1 Wend. 406.

97. Proof of the handwriting of subscribing witnesses to a sealed instrument, who are shown to be dead or beyond the jurisdiction of the Court, is good evidence of the execution of the instrument, without proof of the signature of the parties. *Lusk v. Druse*, 4 Wend. 313.

98. One of two attorneys executing a deed may prove the execution of it by himself, but not by his co-attorney, where there is a subscribing witness to the deed. *Jackson v. Britton*, 4 Wend. 507.

99. Where witnesses to ancient writings are dead, and such a period has elapsed since the execution that no person can be presumed to be living who can testify to the handwriting of the parties or witnesses, evidence by a person verifying the signatures of the parties and witnesses is admissible, although his knowledge of such genuineness is derived solely from an inspection of other ancient writings having the same signatures, which have been treated and preserved as muniments of title to estates. *Jackson v. Brooks*, 8 Wend. 426.

100. Proof that one of two subscribing witnesses to a deed removed from the state thirty years before the trial, and that the other has not been heard from for thirty-seven years, is accounting sufficiently for the absence of such witnesses; and on proof of the handwriting of one of the witnesses and of the grantor, the deed was read in evidence. *Jackson v. Chamberlain*, 8 Wend. 630.

101. A sealed instrument attested by a subscribing witness may be proved by proving the handwriting of the witness, if his absence be accounted for, as that he is dead, or cannot be found after diligent inquiry, or resides beyond the reach of the process of the Court. *McPherson v. Rathbone*, 11 Wend. 96. *S. P. Jackson v. Waldron*, 13 Wend. 178.

102. If the handwriting of the witness cannot be proved, and an ineffectual effort to prove it by the brother of the witness is sufficient evidence of such inability, the instrument may be proved by proving the handwriting of the party. *Ibid.*

103. Where is a subscribing witness to a sealed instrument, to justify evidence of the handwriting of the party, it is necessary not only to show that on diligent search the witness

cannot be found, but a *bons fide* attempt should be made to prove the handwriting of the witness. *Pellereau v. Jackson*, 11 Wend. 110.

X. Parol evidence to explain, vary, or contradict written instruments.

104. A note payable in specific articles, and absolute on the face of it, cannot be defeated by oral evidence, showing that it was given to be void upon the happening of a contingency; *e. g.* on its appearing that the debt for which it was given had been inventoried by one of the makers on his applying for his discharge under the insolvent act; though it seems, that an agreement between the parties, made subsequent to its execution, that it should be void on such a contingency, would be valid as a waiver of the performance, on the happening of the contingency. *Erwin v. Saunders*, 1 Cow. 249.

105. Written agreements of any kind cannot be contradicted, varied, or materially affected by oral testimony. *Ibid.*

106. A promise in writing was to deliver twelve cows, with twelve calves, which come of said cows, on, &c.; *held*, that in an action against the promisor, he could not show, that at the time of signing the contract, the promisee declared (calling witnesses to his declaration) that he would notwithstanding receive twelve cows with a calf, or with calves by their sides; and that the defendant, on the day stipulated, tendered eleven cows with calves by their sides, and one cow with calf, which calved the evening after the tender; as this would be to vary the express terms of the written contract. *Spencer v. Tilden*, 5 Cow. 144.

107. Though a plaintiff goes through with his proof without objection, and rests his cause, if (among other things) he has proved, by parol, a piece of written evidence which should be produced, it is not yet too late to object that the writing should be produced. *Southwick v. Hayden*, 7 Cow. 334.

108. Where a justice returned a document to the clerk's office, with the papers, on appeal, and the clerk took out of a pigeon hole, where such papers were usually kept, a bundle which he supposed to contain all the papers, and the document was not among them, but he made no search for the document; *held*, that this was not sufficient proof of loss to warrant parol evidence on that ground. *Ibid.*

109. Simple contracts in writing may be avoided by parol evidence of fraud, or the want or failure of consideration, or by the waiver of performance; and they may be varied by a parol enlargement of the time of performance. *Erwin v. Saunders*, 1 Cow. 249.

110. A mortgage and master's deed on foreclosure being absolute on their face, parol evidence cannot be given to show that they were taken subject to a lease; such evidence being a contradiction of the deeds. *Sinclair v. Jackson*, 8 Cow. 543.

111. Nor would such a circumstance, if properly appearing, operate to confirm a void lease. *Ibid.*

112. Where A. quit-claimed land to W., on which a crop of wheat was growing, reserving the wheat by parol, both at the time of the quit-

claim executed and in a previous conversation, when it was agreed by the parties that it should be reserved, such reservation was *held* inadmissible to contradict the conveyance in writing, which carried the title of the wheat with the land. *Austin v. Sawyer*, 9 Cow. 39.

113. The lessor of the plaintiff owned lot 66, and the defendant lot 72, and the field book of the original survey was burned. On a question of what was comprehended in lot 66; *held*, that evidence derived from maps copied from the original survey was admissible. *Jackson v. Jacoby*, 9 Cow. 125.

114. *Semble*, that an interlineation in a deed not noticed, and appearing to be of different ink from the rest of the deed, calls for explanation from the one wishing to support the interlineation as genuine. *Ibid.*

115. Where there was a patent to Patterson, who was described in the balloting book by that name, and as a revolutionary soldier, and the plaintiff proved and relied on a deed from Patterson, described as such a soldier in the body, but signed Petterson; *held*, no material variance, and that, at any rate, it was such an ambiguity as might be explained, and that if the soldier intended by the deed was Petterson, and a man different from Patterson, it was incumbent upon the defendant to show this. He had a right to show it. *Jackson v. Cady*, 9 Cow. 140.

116. The rule that a deed shall not be contradicted by parol, applies only as between parties or privies to it; and it does not apply, even as between them, in respect to the acknowledgment of consideration paid in a deed of land. In such case even the grantor may show that the consideration was not paid. *Whitbeck v. Whitbeck*, 9 Cow. 266.

117. The legal effect of a written instrument, though not apparent from the terms of the instrument itself, but left to be implied by law, can no more be contradicted, explained, or controlled by parol or extensive evidence than if such effect had been expressed. *Pattison v. Hull*, 9 Cow. 747.

118. Thus, where a debt secured by mortgage is assigned by writing under seal, without mention of the mortgage, by which a mortgage interest passes as an incident to the debt, it cannot be shown by parol that the assignor intended to reserve the mortgage. But a debt or judgment, or any part of a debt or judgment, secured by mortgage, may be so assigned as to separate it from the mortgage, by a proper reservation in the assignment. *Ibid.*

119. A certificate, by a commissioner, that "J. D., one of the subscribing witnesses" to a deed, "appeared before him, proved to his satisfaction, by the oath of J. K., to be the same person," without adding that J. K. was known to the officer, and proved the execution of the instrument; was *held* sufficient to entitle a party to read the deed in evidence. *Jackson v. Vickory*, 1 Wend. 406.

120. It is always competent to shew by parol evidence that a deed was delivered as an *execrow*, or that the grantee obtained possession of it by fraud or in an unwarrantable manner. *Roberts v. Jackson*, 1 Wend. 478.

121. Evidence varying the terms of a written

instrument is inadmissible. So, also, evidence of mistakes by arbitrators in an award cannot be shown in a Court of law. *Efner v. Shaw*, 2 Wend. 567.

122. Parol evidence is not admissible to show the land intended to be granted by a deed, where the premises are described as *being all the land purchased by the grantor of A. B.*, and where without such description, the deed is incapable of location; the deed to the grantor must in such case be produced. *Jackson v. Parkhurst*, 4 Wend. 369.

123. It is a general rule of law, that in settling boundaries, natural or artificial objects are to control courses and distances, and this is true, though the course or distance be certain, and the natural or artificial object referred to in the deed uncertain. In such a case parol evidence is admissible to designate such object, and its location should be left to the determination of the jury. *Jackson v. Britton*, 4 Wend. 507.

124. Where a policy of insurance was executed in blank, thus: "A. B., on account of —, do — make insurance," &c.; it was held, that parol evidence of the usage of underwriters, and of mercantile understanding, for the purpose of giving construction and meaning to the policy, was inadmissible. *Turner v. Burrows*, 5 Wend. 541.

125. Where a promissory note is stated in a declaration to have been made by the *defendants*, proof that it was made by one of a firm, in the partnership name, supports the declaration. *Killett v. Parker*, 6 Wend. 815.

126. Parol declarations of a patentee, that his name was inserted in the grant for the benefit of a co-patentee, and that he had conveyed to him all his right in the tract, is not admissible in evidence to contradict the legal effect of the grant. *Jackson v. Miller*, 6 Wend. 228.

127. Such declarations might be admissible as secondary evidence of the existence and contents of a deed to a person who had left the country under an attain, and probably taken with him or destroyed the evidence of his title; but to enable a party to avail himself of such proof, he must first show that he has actually succeeded to the rights of the person to whom the deed is supposed to have been given. *Ibid.*

128. Where, in support of a plea of a *former action* for the same cause, and judgment for the defendant, a *docket* of a justice of the peace is produced, from which it appears that *judgment of nonsuit* only was entered, parol evidence is inadmissible to show that the cause was decided on the merits, and that the form of the judgment was in consequence of the supposition of the justice that no other judgment than that entered by him could properly be entered in such case. *Brintnall v. Foster*, 7 Wend. 103.

129. Parol evidence may be given of the existence, contents, and surrender or cancellation of a *power of attorney*, authorizing the sale and conveyance of lands under which a sale has in fact been had; and such evidence may consist of the admissions of the constituent. *Jackson v. Livingston*, 7 Wend. 136.

130. The introduction of such evidence does

not violate the rule of law that a fee cannot be divested by parol; the title passed by the written instruments, the power and the deed executed in pursuance thereof, and the nonproduction of a deed or written instrument being satisfactorily accounted for, evidence of the existence and contents of such paper is always admissible. *Ibid.*

131. A plaintiff in ejectment is not bound to call the *grantor* of the *defendant* as a witness, to show the existence of a deed in possession of such grantor; notice to the defendant to whom the title of such grantor has passed, to produce the deed *at the trial*, is sufficient, and will authorize parol proof of the contents of the deed. *Ibid.*

132. Where the *payee* of a note, after it was duly made and delivered, gave it to the *maker* to keep, until certain acts to be done by the maker were performed, who subsequently refused to redeliver it to the payee; it was held, that the circumstances under which the note came to the possession of the maker might be given in evidence in an action by the payee, to recover the amount thereof. *Garlock v. Geortner*, 7 Wend. 198.

133. In an action by the *endorsee* against the *maker* of a promissory note, which was sold by the payee at a rate of interest exceeding seven per cent. per annum, evidence of the declarations of the *payee*, who is *dead*, that the note was an *accommodation note* lent to him by the maker, thus rendering the negotiation which gave vitality to the note *usurious*, is not admissible. *Kend v. Wallon*, 7 Wend. 256.

134. Parol evidence that a deed absolute in its terms is, in fact, a mortgage, is admissible. *Roach v. Cosine*, 9 Wend. 227.

135. Evidence of recognition by a grantee, after the execution of the deed to him, of a parol lease of part of the premises from the grantor to a third person for an unexpired term, is admissible. *Rickert v. Snyder*, 9 Wend. 416.

136. The interest of such lessee is not affected by a conveyance of the property by his landlord. *Ibid.*

137. Where a justice's return on appeal states that *four* persons were impleaded as defendants, and joined issue in the cause, evidence on the trial in the Common Pleas is inadmissible to show that only *two* of the defendants were arrested and brought into Court. *Bates v. Conklin*, 10 Wend. 389.

138. A sheriff's deed conveying several parcels of land by virtue of several executions, (specially set forth,) and a rule had thereon, when set up by way of defence against a recovery in an action of ejectment, cannot be contradicted by parol proof that a portion of the premises conveyed by the deed was sold under only one of the executions specified in the deed. *Jackson v. Roberts' Executors*, 11 Wend. 422.

139. If, however, it appears on the face of the deed, or be shown by proof *aliunde*, that certain of the premises conveyed were sold by virtue of one or more of the executions, after such executions had been satisfied by the sale of other property, the deed as to such premises, so subsequently sold, is void and inoperative. *Ibid.*

140. The order in which premises, sold under one or more executions against the same defendant, are enumerated in a sheriff's deed, is not evidence that the premises were sold in that order. *Ibid.*

141. Parol evidence that the sum specified in the condition of a mortgage exceeds the amount of the debt justly due to the mortgagee is inadmissible; if a larger sum than is really due has been inserted, the mistake can be corrected only in equity. *Patchin v. Pierce*, 12 Wend. 61.

142. Parol evidence of an agreement to indemnify and save harmless a purchaser of personal property is admissible, although the agreement in respect to the sale is reduced to writing, and contain no such stipulation, if the parol agreement be made subsequent to the execution of the written agreement. *Brewster v. Countryman*, 12 Wend. 446.

143. Where a copy of a written instrument shown to have been destroyed was offered in evidence, and the party, instead of producing the copyist, or accounting for his absence, proved his handwriting; it was held, that the evidence was insufficient to authorize the admission of the copy. *Ibid.*

144. Evidence of usage in a particular trade is admissible for the purpose of showing the mode of effecting sales, and of annexing incidents to a written instrument, concerning which the instrument is silent. Thus evidence may be given to show that, according to the known usage of the cotton trade, the article is sold by sample; and then it may be shown by parol that a particular sale of cotton was a sale by sample, although the entry in the broker's book, the bought and sold note, and the bill of parcels are silent in that respect. *Boorman v. Jenkins*, 12 Wend. 566.

145. Where a contract is in writing, and without such writing the promise sought to be enforced would not be binding within the statute, parol evidence of the contents of such writing is inadmissible. *Northrop v. Jackson*, 13 Wend. 85.

146. The provision in the revised statutes, that the seal attached to a sealed instrument shall only be presumptive evidence of a sufficient consideration, does not change the rule of law, that parol evidence is inadmissible to contradict or vary a written instrument; it merely allows the introduction of evidence which previously to the statute was available only in a cross action, or in another forum. *M'Curtis v. Stevens*, 13 Wend. 527.

147. Parol evidence is inadmissible to vary the terms or legal import of a bill of lading free of ambiguity; and it was accordingly held, where a clean bill of lading, which imports that the goods are stowed under deck, was given, that parol evidence of an agreement by the vendor of goods that they might be stowed on deck could not legally be received, even in an action by the vendor against the purchaser for the price of the goods, although the goods were lost in consequence of their stowage on deck. *Creery v. Holly*, 14 Wend. 26.

148. It seems, however, that had it appeared in the bill of exceptions that the defendant had

insisted that the bill of lading was obtained by fraud, and that question had been submitted and passed upon by the jury, and a verdict found for the defendant, a judgment rendered upon such verdict would have been sustained. *Ibid.*

149. A party claiming lands by deed executed under an alleged power of attorney from the owner of the fee to the person executing the deed, thereby authorizing him to sell and convey the lands, may, in proof of the power, give in evidence the declarations of the owner of the land, the constituent of the power, made previous to the accruing of the interest of a defendant in ejectment who claims under such owner; that such power of attorney once existed; that its contents were as alleged in the deed; and that it had been subsequently cancelled, lost, or destroyed; and this under the rule of evidence that what may be proved by the parol testimony of third persons may, in like manner, be shown by the declarations of the constituent of the power. [So held by the chancellor and sixteen other members of the Court of Errors, in affirmance of the judgment of the Supreme Court; Senators *Edwards* and *Tracy*, and three other members of the Court, dissenting.] *Corbin v. Jackson*, 14 Wend. 619.

150. And in such case, the party alleging the existence of the power is not bound to call the constituent to the power to testify as a witness; but may rely upon his declarations. *Ibid.*

151. Parol evidence is inadmissible in an action of covenant, to show that the lands lost by a grantee in an action of ejectment against him are comprised within certain limits, designated by the grantor in the negotiation previous to the conveyance, as the boundaries of the lot, where the premises from which the plaintiff is evicted are not in fact embraced in the description of the premises contained in the deed. *Tynan v. Bates*, 14 Wend. 671.

152. Since the revised statutes, the consideration of a sealed instrument may be impeached where such instrument is relied on either to maintain an action or to establish a defence. *Russell v. Rogers*, 15 Wend. 351.

153. Neither parol evidence nor usage can be admitted as evidence to vary or contradict a deed or written instrument in which there is no ambiguity. *Parsons v. Miller*, 15 Wend. 561.

154. Since the statute declaring that the seal to a written instrument shall be only presumptive evidence of consideration, a failure of consideration may be proved, and, it seems, a defence may be set up which, previous to the statute, was not available at law; but the want of consideration, in whole or in part, of a sealed instrument created previous to the revised statutes, cannot be shown to defeat a recovery. *Mann v. Eckford's Executors*, 15 Wend. 502.

XI. Notice to produce papers.

154*. Counsel intrusted by his client with papers relating to an action depending in Court, is not obliged to produce them, nor can he be compelled as a witness to state their contents. *Jackson v. Denison*, 4 Wend. 558.

155. A party who, under a rule of Court granted on the application of his adversary seeking a discovery, has deposited his books of account in the clerk's office, is entitled to withdraw the same, after the books have been deposited a reasonable time. *Stow v. Betts*, 7 Wend. 536.

156. A party wishing to avail himself in

evidence of a paper in the possession of the attorney of his adversary, must give notice to produce it; he cannot have the benefit of the evidence by subpoenaing the attorney to produce it, and compelling him to testify, if it was delivered to him by his clients as supporting the action or defence. *McPherson v. Rathbone*, 7 Wend. 216.

157. Notice to produce a paper in evidence, given a few minutes before called for, is not sufficient, unless it be shown in Court. *Ibid.*

158. Reasonable notice must be given to produce books or papers in order to admit secondary evidence of their contents. What is such notice depends upon the circumstances of the case, and must be determined by the Court. *Ulrica Insurance Company v. Caldwell*, 3 Wend. 296.

159. A notice to produce a paper at the trial, in order to let in parol evidence, is not in season, unless served on the attorney previous to the circuit, when the party resides a distance from the circuit, (c. g. twenty miles,) and the paper is left at his residence. *Gorham v. Gale*, 7 Cow. 739.

XII. Presumptions.

160. A lease of a large tract of land, purporting to be the foundation for a conveyance by lease and release, being procured; with proof that the lease was found among the papers of the lessee at his death, and also proof of a corresponding possession of a small part of the premises for forty years, and of two other small parts for twenty years, and the release of a reat and reversion of another small part, by persons claiming under the lessee, with payment by rent; *held*, that this would warrant a jury in presuming a release; the possession and other acts, as far as they appeared, being in accordance with the lease. *Jackson v. Lamb*, 7 Cow. 431.

161. The understanding and opinions of witnesses are not received in evidence, except in matters of science and a few special cases resting upon peculiar circumstances. It is the business of witnesses to state facts, and it is the province of the jury, under the direction of the Court, to draw the necessary inferences or conclusions. *Gibson v. Williams*, 4 Wend. 320.

162. Where a tract of land had been granted upwards of fifty years, and within twenty years after the grant subdivisions of the tract were known by specific numbers, and a particular lot was called or known as the lot of one of the patentees, and there was no proof of any claim of a tenancy in common by the patentees for more than fifty years; *it was held*, that a partition might be presumed, and that the lot in question had fallen to the share of the patentee. *Jackson v. Miller*, 6 Wend. 220.

163. A manuscript book found in a county clerk's office, where it had remained at least seventeen years, purporting to be a register of sales made by a commissioner of forfeitures under the act relative to confiscated estates, and containing, among other entries, an entry of a sale of a particular lot to a certain individual, but not having the signature of the commissioner, containing no entry of a deed having

been executed to the purchaser, and unsupported by proof that it was deposited in the clerk's office by the commissioner, or found among his papers and deposited by some other person, is not such evidence as will warrant a jury to presume a conveyance to the purchaser. *Ibid.*

164. The presumption of payment arising from lapse of time is but evidence to the jury from which they may infer that the debt has been satisfied; when entirely unexplained, the jury are bound to draw that conclusion; but when there are circumstances repelling the presumption, they must be submitted to the consideration of the jury, and is the charge of the Court. *Jackson v. Sackell*, 7 Wend. 94.

165. A note referred to in a defence to a deed, as specifying the amount of indebtedness, will be presumed to be an unsealed note, unless the contrary be shown, especially when presumed to be in possession of the creditor, and not produced. *Ibid.*

166. A conveyance by a trustee will be presumed twenty-eight years after the creation of the trust. *Jackson v. Brooke*, 8 Wend. 487.

XIII. What may be proved by parol.

167. *It seems*, that communications made to an attorney at law, by one who has retained him to conduct a foreclosure by advertisement, under the act concerning mortgages, such communications, having relation to the business of the foreclosure, are to be considered as confidential communications between attorney and client; and, therefore, inadmissible in evidence against the client. *Wilson v. Troup*, 2 Cow. 195.

168. What one swore on a former trial cannot be given in evidence, unless he be dead. That he is beyond reach of process of subpoena, and cannot be found on diligent inquiry, will not render such proof admissible. *Wilbur v. Selden*, 6 Cow. 162.

169. To render what a witness swore on a former trial admissible, it must have been between the same parties, and the point in issue the same. *Ibid.*

170. The words of the witness must be given; not what is supposed to be the substance of his testimony. *Ibid.*

171. Bear-skins were received by the master of a vessel to transport from New Orleans to New York, and there to be delivered in good order and condition, *dangers of the seas excepted*. The skins being damaged by rats, in an action against the owners of the vessel upon the undertaking; *held*, that evidence of mercantile usage and understanding, at New Orleans and New York, that injuries by rats are considered and treated as perils of the sea, was inadmissible. *Aymar v. Astor*, 6 Cow. 266.

172. Proof that a ship's papers were seized with her, and delivered into the Court where she was condemned, but that a certain paper belonging to her could not be found there on search, is sufficient evidence of loss to warrant parol evidence of its contents. *Francis v. The Ocean Insurance Company*, 6 Cow. 404.

173. A written contract deposited by the parties with a witness in a foreign state, being out of the jurisdiction of the Court, may be proved by the depository on commission, and need not

be produced in Court. *Bailey v. Johnson*, 9 Cow. 115.

174. Evidence of usury is admissible in an action of *assumpsit* under the plea of the general issue, with notice of set-off. The defendant's notice does not preclude him from any defence which he could have made if no notice had been given. *Fulton Bank v. Stafford*, 3 Wend. 483.

175. In an action of *assumpsit* for the recovery of the price of an article sold at a stipulated sum, a defendant may give evidence showing the true value of the article sold, in case of a breach of warranty, in reduction of the claim, where he has offered to return the article to the plaintiff, who refused to receive it back. *M'Alister v. Reab*, 4 Wend. 483. Contra *Reynolds v. Culon et al.*, cited, 4 Wend. 486.

176. Refusal to produce books or papers, upon notice given, does not warrant the presumption, that if produced they would show the facts to be as alleged by the party giving notice; the only effect is, that *parol evidence* of their contents may be given; and if such secondary evidence be imperfect, vague, and uncertain as to dates, sums, &c., every presumption shall be against the party who might remove all doubt by producing the higher evidence. *The Life and Fire Insurance Company v. Mechanics Insurance Company*, 7 Wend. 31.

177. A party proving the contents of a lost deed, to which there are subscribing witnesses, cannot be required to produce the witness, unless it is shown that he knows who were the subscribing witnesses. *Jackson v. Vail*, 7 Wend. 125.

178. *Parol evidence* of the contents of a paper required to be produced on the trial of a cause cannot be given, until its genuineness be established by proof; if a paper is produced on notice, such proof is not necessary. *M'Pherson v. Rathbone*, 7 Wend. 216.

179. In a suit for the recovery of property purchased at a constable's sale, under execution on a justice's judgment, rendered in a cause commenced by *attachment*, evidence that a *copy of the attachment* was not left at the place of abode of the defendant is inadmissible. *Care v. Redfield*, 7 Wend. 398.

180. *Parol evidence* that an absolute assignment of a mortgage is a mere security for the performance of a contract is admissible. *Gilchrist v. Cunningham*, 8 Wend. 641.

181. In an action for a libel, it is competent for a plaintiff to prove that, subsequent to the publication, the libel was read in a public assembly by a third person, and comments made upon it in the hearing and presence of the defendant. *Rice v. Wilhens*, 9 Wend. 138.

182. So evidence may be given that the libel was posted in public places by persons unknown, the presumption of law being that such persons acted at the solicitation and by the procurement of the defendant. *Ibid.*

183. The fact that the defendant, at the time of the publication, asserts the matters charged as libellous to be true, furnishes no excuse; if true, the truth must be shown by proof. *Ibid.*

184. Evidence of what transpired on the trial of an ejectment suit is inadmissible, without

the production of the Circuit roll. *Cooper v. Watson*, 10 Wend. 202.

185. Proceedings in a cause before a justice may be proved by him by the production and verification of his docket, but he cannot be permitted to give *parol evidence* of what transpired before him. *Boomer v. Laine*, 10 Wend. 525.

186. Upon the question of the fraudulent conduct of a third person in covering up the property of a debtor, and placing it beyond the reach of his creditors, evidence is admissible of other and contemporaneous instances or transactions in relation to other portions of the debtor's property, in which the title was nominally in such third person, but the sale actually made by the debtor, and the consideration received by him. *Benham v. Cary*, 11 Wend. 83.

187. Upon questions of this description depending on various circumstances, a considerable latitude is indulged in the admission of evidence. *Ibid.*

188. Where notice before suit brought is the foundation of action, *parol evidence* of its contents cannot be given, until all proper measures have been fruitlessly taken to produce it; but when the notice relates merely to some collateral fact, *parol evidence* of its contents is admissible. *M'Fadden v. Kingsbury et al.*, 11 Wend. 667.

189. The nonattendance of a witness duly subpoenaed may be proved by *parol*; it is not necessary to produce evidence of his nonattendance by production of the records of the Court. *Cogswell v. Meach*, 12 Wend. 147.

190. Proof of a voluntary and deliberate destruction of a note, by a plaintiff, will not render admissible evidence of the contents of the note or of its original consideration. *Blade v. Noland*, 12 Wend. 173.

191. A total failure of the consideration of a note may be given in evidence under the general issue without notice; not so as to a partial failure. *The People v. Niagara Common Pleas*, 12 Wend. 246.

192. Where an action on the case is brought, and the damages actually sustained do not necessarily arise from the act complained of, and consequently are not implied by law, the plaintiff must state in his declaration the particular damage which he has sustained, or he will not be permitted to give evidence of it upon the trial. Where, therefore, a plaintiff declared in case, that the defendant had placed a quantity of sand, lime, and other building materials on the highway opposite to and adjoining his premises, so as to interrupt the free passage to his store, and that the dust and dirt of the materials blew into his store, and damaged his goods; it was held, that proof that customers were prevented from frequenting the store, and that a tenant who occupied it in consequence of the annoyance quit it, and that the store afterwards remained unoccupied, was inadmissible, because not alleged in the declaration as special damage. So also, it was held, that proof of injury sustained by the tenant was not available to the plaintiff the landlord. *Squire v. Gould*, 14 Wend. 159.

193. A *parol agreement*, by the owner of land, that another shall purchase it, and that he will surrender all claim to it, cannot be given in evi-

dence in a Court of law, in an action subsequently brought by such owner to recover possession of the land from such purchaser. *Jackson v. Post*, 15 Wend. 588.

XIV. Confessions and declarations.

194. The acts or admissions of executors are not evidence against heirs or devisees. *Osgood v. Manhattan Company*, 3 Cow. 612.

195. Thus a petition to the surrogate by executors for a sale of real estate of their testatrix, accompanied with a sworn account of the personal estate, is not evidence to show the insolvency of the ancestor at the time she conveyed the real estate in question to certain persons, in an action by a creditor against her heirs and devisees, seeking to show that such conveyances were voluntary and fraudulent, whereby the subject of them became assets in the defendant's hands. *Ibid.*

196. Even a judgment against executors is not evidence against the heirs. *Ibid.*

197. To make the confessions of one man evidence against another, they must have a joint interest in possession. *Ibid.*

198. The confessions of a grantor, or his executors after the grant, are not admissible in evidence to prejudice the rights of the grantee. *Ibid.*

199. It seems, that where A. contracts to convey land to B., on certain conditions being performed, and afterwards conveys accordingly, this is evidence that the previous conditions were performed by B. *Jackson v. Johnson*, 5 Cow. 74.

200. Parol evidence that a grantee in a deed of land acknowledged, that though the deed had been offered to him, he refused to accept the delivery, is inadmissible. *Jackson v. Chapin*, 5 Cow. 485.

201. Where an agent is authorized to receive money for his principal, or do any other thing, his drafts, receipts, account stated, or admissions relative to the subject of his agency, and especially when all these are offered in connexion, constitute a part of the *res gesta*, and are competent though not conclusive evidence against the principal. *Thalhimer v. Brinckerhoff*, 6 Cow. 90.

202. Where mortgages are assigned or conveyances executed, acknowledging the receipt of the consideration by the assignor or grantor, this is *prima facie* evidence that the consideration was actually paid as expressed, and this, too, although the assignor or grantor was at the time indebted to the assignee or grantee to the amount of the consideration expressed, the assignments or conveyances shall not for that reason be taken to have been in satisfaction of the debt. *Ibid.*

203. The declaration stated, that in consideration that H. would become surety for A., he (A.) would indemnify H. against being surety for B., and averred that H. did become surety for A.; the proof was that A. said to one witness that he had agreed to indemnify H. in consideration of his becoming bail; and to another witness and at another time, that in consideration that H. had become bail for him, he had agreed to indemnify H. as bail for B.; held, that the

first admission supported the declaration; and though both witnesses were H.'s, he might reject the second admission and rely on the first; and that A. could not avail himself of his own admission to the second witness, to contradict the admission to the first. *Habe v. Andrus*, 6 Cow. 925.

204. Parol declarations are inadmissible to prove or disprove title or a disclaimer of title to lands. *Jackson v. Miller*, 6 Cow. 781.

205. Where the maker, the defendant, sought to impeach a note, by showing the want of a valuable consideration; and the plaintiff answered by proving a pecuniary consideration, and the defendant replied by evidence of the plaintiff's declarations, that the consideration was not pecuniary, but the note was given upon a special agreement between the parties; held, that it should not be left to the jury to say whether the note was not sustained by the consideration stated in the plaintiff's declarations, as proved by the defendant. *Winchell v. Lathan*, 6 Cow. 682.

206. A party cannot give in evidence his written statement concerning a claim against his adversary, made before arbitrators, (e. g. a committee of the Chamber of Commerce,) though his claim has been answered there by his adversary; it not appearing that his statement was submitted to his adversary before his answer was put in. *La Farge v. Kneeland*, 7 Cow. 456.

207. The declarations or admissions of a vendor of personal property are not evidence against the vendee; but the vendor should be called as a witness. *Hurd v. West*, 7 Cow. 752.

208. Concessions or admissions made during the pendency of a treaty for compromising a suit are not admissible evidence against the party making them. *Williams v. Thorp*, 8 Cow. 201.

209. A witness told the plaintiff he was authorized by the defendant to call on him, and ascertain on what terms he would settle the suit. The plaintiff referred the witness to his (the plaintiff's) attorney, saying he (the attorney) was interested, as owning part of the demand in question, which was a promissory note payable to bearer. The attorney being called as a witness for the plaintiff, on the trial the statement of the plaintiff was offered in evidence, to show the interest of the attorney, and thus exclude him; held, that such testimony was inadmissible. *Ibid.*

210. The parol declarations of one in possession of lands, as to the nature and extent of his interest, no legal title being shown in him, are admissible against him as evidence, and against those who claim under him, unless it appear that there is higher testimony as to the matter sought to be shown by parol. *Jackson, ex dem. Swartwout, v. Cole*, 4 Cow. 587.

211. Where a state officer, e. g. the treasurer, does an act which would be a violation of his duty, unless certain terms or conditions had first been performed by an individual, as between the state and the individual, such performance shall be deemed *prima facie* to have taken place. *Ibid.*

212. The admissions of the mortgagee, that

the mortgage was not a lien, are evidence in ejectment by his assignee, unless it appear that a subsequent mortgagee was misled by the admission. *Jackson v. Jackson*, 5 Cow. 178.

213. W. sold and assigned his interest in some premises to S., which, as S. claimed, carried the title of the wheat still growing to him, and he cut and carried it away. But before the sale or assignment to him, and (a witness thought) at the time, W. stated that the wheat belonged to A. Held, that A. might recover of S. the value of the wheat, on the ground that W.'s declarations were evidence of a sale to A., and that A. might maintain trespass *quare clausum fregit*. *Austin v. Sawyer*, 9 Cow. 39.

214. The confession of a debt by one of several partners, after the dissolution of the partnership, is inadmissible evidence against the other partners. *Gleason v. Clark*, 9 Cow. 57.

215. The declarations of a trustee are competent evidence for the purpose of establishing a resulting trust. Such trust is not within the statute of frauds, and may be proved by parol testimony, although it is a dangerous species of evidence, and the payment of the money by the *cestui que trust* ought to be clearly and satisfactorily established. Proof of the declarations or confessions of parties is of a most unsatisfactory nature, unless corroborated by circumstances. *Makin v. Makin*, 1 Wend. 625.

216. Any act or declaration of either party connected with a transaction, whether prior or subsequent thereto, may be given in evidence, in order to show what the agreement was, but the mere impression or understanding of one of the parties, not communicated to the other, cannot be given in evidence to show the contract or agreement between them. *Murray et al. v. Belhune*, 1 Wend. 191.

217. A promissory note void in law may be used as evidence of an acknowledgment, to take a case out of the statute of limitations. *Ulrich Insurance Company v. Kip*, 3 Wend. 369.

218. The admissions of a party, under a misapprehension of his legal rights and liabilities, do not affect his interests. *Moore v. Hitchcock*, 4 Wend. 299.

219. In an action against the sheriff, by the plaintiff in the second execution, the declarations of the plaintiffs in the former execution are not admissible in evidence, where it is not shown that they had indemnified the sheriff. *Benjamin v. Smith*, 4 Wend. 332.

220. The acts and declarations of an agent at the time of a transaction for his principal are binding on him, not as his admissions, but as part of the *res geste*; but what the agent says at another and subsequent period is not evidence against his principal. *Thalhimer v. Brinkerhoff*, 4 Wend. 394.

221. The declarations of a third person referred to by a party are not evidence against such party, unless strictly within the subject-matter in relation to which the reference is made. *Duval v. Covenhoven*, 4 Wend. 561.

222. The declarations or admissions of a party showing title out of himself, or in the favor of the plaintiff in an action of ejectment, are inadmissible in evidence to divest him of his legal estate, where there is no proof of a

tenancy by such party in support of which his declarations can be applied, nor title shown in the party in whose favour the admissions are made, independently of such declarations. *Jackson v. Anderson*, 4 Wend. 474.

223. Evidence of confessions of a party should always be scrutinized and received with caution. *Law v. Merrilla*, 6 Wend. 265.

224. Evidence of admission by a party that he authorized another to give a note to a third person for a specified sum, does not warrant the reading in evidence of a note corresponding with the note thus authorized to be made, without proof of its having been duly made. *Affard v. Mead*, 7 Wend. 68.

225. An admission of one of several grantors as to the execution and contents of a deed is admissible evidence, where a party claiming under such a deed has entitled himself to give secondary proof on the ground of the deed being lost or destroyed. *Jackson v. Fisk*, 7 Wend. 125.

226. Where money is paid to an agent of a party, it is not necessary to produce such agent as a witness to prove his authority to receive the money, if the admissions of the party can be shown to support the charge of money paid. *Doyle's Administrators v. St. James' Church*, 7 Wend. 173.

227. The declarations of one of several partners cannot be given in evidence to prove a partnership; they are testimony only against the party making them. *M'Pherson v. Rathbone*, 7 Wend. 216.

228. The admissions of an agent not acting within the scope of his authority are inadmissible as evidence; the agent is a competent witness, and must be called to testify. *Webb v. Alexander*, 7 Wend. 281.

229. An account stated, and an unqualified admission of liability made by a party when called on for settlement, is not within the rule that admissions made by a party during a treaty of compromise shall not be given in evidence. *Hyde v. Stone*, 7 Wend. 354.

230. Where a bond for the faithful performance of the duties of a collector of tolls was given to the canal commissioners, bearing date June 1st, with a certificate of the sufficiency of the sureties endorsed thereon by a public officer, under date of June 25th; it was held, that the admissions of the canal commissioners, that they presumed that the bond was not delivered to, or accepted by them, until after the endorsement of the certificate of approval, was not sufficient to repel the legal presumption that the bond was delivered and accepted on the day of its date, when the admission was accompanied with the declaration, that they had no recollection as to the time when the bond was delivered. *Seymour v. Van Slyck*, 8 Wend. 403.

231. The recital in a bond to A., that the obligee had sold and conveyed to the obligor certain lands, is not evidence of such conveyance, where it is not shown that the bond was ever in the possession of the obligee; but a recital by an obligor in a bond executed by him, that he had conveyed certain premises, is sufficient evidence of the fact of conveyance. *Jackson v. Brooks*, 8 Wend. 437.

232. Evidence resting in records cannot be

supplied by proof of admissions, by the party sought to be affected by such evidence, of the existence of facts appearing by such records. *Welland Canal v. Hathaway*, 8 Wend. 480.

233. Admissions are competent evidence only where parol evidence of facts to be shown by such admission would be competent. *Ibid.*

234. In an action on a note payable to A. B. or bearer, transferred, and suit brought by the assignee, evidence of declarations or admissions made by the payee, while the holder and owner of the note, in discharge of the drawer, is inadmissible. *Whitaker v. Brown*, 8 Wend. 490.

235. The payee is a competent witness, and should be produced to prove the defence set up. *Ibid.*

236. A covenantor under a covenant of warranty is not permitted to show title in himself at the time of his conveyance, if he had due and reasonable notice of the suit against the grantee of the coveantee, so as to enable him to attend to the defence. *Cooper v. Watson*, 10 Wend. 302.

237. The acts of a party, operating by way of admissions, and also general representation, are evidence to prove his holding a particular office, as, for example, that of an overseer of highways of a particular district. *Benson v. Brown*, 10 Wend. 258.

238. In an action of ejectment, in which the plaintiff derives title from his grandfather, and which is brought subsequent to the death of his father and another, admissions made by the father and another during their lifetime, as to the existence and loss of a will alleged to have been executed by the grandfather, may properly be received in evidence. *Fetherley v. Waggoner*, 11 Wend. 595.

239. The admission of one of two payees of a note, of the transfer of his interest in it to the other payee, is competent evidence to divest him of all control over it, where such admission is made at the conclusion of a settlement between the parties, in reference to dealings and transactions of which the note in question formed a part. *Kimball v. Huntingdon*, 10 Wend. 676.

240. The parol declarations of a party, showing a deed of real estate held by him to be void for fraud, are admissible in evidence in an action of ejectment against his tenant, where such declarations are made while in possession of the property, although subsequently, and previous to the trial of the ejectment suit, the grantor of such party has assigned to a creditor the mortgage received by him, as the pretended consideration of the grant, and the grantee has authorized the creditor to receive rents from the tenant of the mortgaged premises. *Jackson v. Myers*, 11 Wend. 533.

241. The plaintiff in such suit is not bound to call the landlord of the tenant as a witness, but may avail himself of his declarations or admissions. *Ibid.*

242. The declarations of a competent witness cannot be given in evidence, but a party is not compelled to call a party in interest merely because he may do so. *Ibid.*

243. On a question of fraud on the sale of property, the declarations as well as the doings of the actors in the transaction are competent

evidence; the declarations give a character to the acts. *Crary v. Sprague*, 12 Wend. 41.

244. The parol admission of a plaintiff in ejectment, that the defendant is the owner of a moiety of the premises claimed, is competent evidence, where the plaintiff has succeeded in showing title to only one-half of the premises. *Jackson v. Leek*, 12 Wend. 105.

245. The declarations of the vendor of a chattel, made subsequent to the sale, are not admissible in evidence to affect the title of the purchaser. *Sprague et al. v. Kneeland*, 12 Wend. 161.

246. The admissions of the payee of a note, while owner thereof, cannot be given in evidence for the defendant in an action against the maker by a subsequent holder. *Bristol v. Dunn et al.* 12 Wend. 143.

247. The admission of a party long after the time when he ought to have had the deed, had one ever existed, that he did not own the land, rebuts the presumption of a conveyance, which might have been presumed otherwise from the payment of the consideration money, and from a possession consistent with such presumption. *Jackson v. Miller*, 6 Wend. 228.

248. In an action of ejectment for dower, the admissions of the husband, while living, are as competent evidence in bar of the title of his widow, as they would be in bar of the title of his heir or grantee. *Van Duzen v. Thayer*, 14 Wend. 233.

249. Evidence of the confession of a criminal, made to a magistrate previous to examination, on the declaration of the magistrate that it would be better for the accused to make a full confession, is not admissible. *Oakley v. Schoolmaster*, 15 Wend. 236.

250. Where a fraudulent combination is established, the acts and declarations of any one of the parties thereto may be proved against the others. But only such acts and declarations as constitute a part of the *res geste* ought to be so received. *Apthorp and others v. Chambeck and others*, 2 Paige, 462.

251. The admissions of the wife of the non-acceptor of her husband will not be received as evidence to bastardize her issue. *Cross v. Cross*, 3 Paige, 139.

252. It having been proved by the plaintiff in an action of *assumpsit*, that the defendant had offered him a certain sum to settle the controversy between them, the defendant produced a copy of a letter from himself to the plaintiff, explanatory of that offer. The writing was excluded by the presiding judge, but the defendant was permitted to prove the fact that he had made such a communication. *Held*, that the testimony thus offered by the defendant, being in effect his own declaration, was rightfully rejected. *Birkbeck v. Durrows*, 2 Hall, 51.

253. An arbitrator testified that when the parties were before him, a bill was presented specifying the accounts submitted; a copy of which he transmitted to the plaintiff; accompanied by the award; but the plaintiff denied that the account was received by him. *Held*, that the plaintiff was not thereby precluded from introducing other evidence as to the items of his claims, unless the defendant could show that

the account came into his possession, or under his control. *Ibid.*

254. A *joint assumption*, against two defendants cannot be supported without evidence, expressed or implied, that both have assented to the contract. If one of the defendants is liable to the plaintiff, and the other admits a joint liability with him, such admission (although conclusive as to the party making it) is not sufficient to charge upon the first defendant a *joint* liability with the second. To permit the confessions of the latter to implicate the former might be to make a contract for him to which he never assented, and its practical effect might deprive him of an important witness. *Mitchell v. Roulstone*, 2 Hall, 361.

XV. Hearsay and general reputation.

255. Hearsay evidence of *siding* the body and burial of one supposed to be dead is inadmissible; though otherwise as to the fact of his death. *Jackson v. Elz*, 5 Cow. 314.

256. That one was missing at a particular time, with a report and general belief of his death, is, *it seems*, *prima facie* evidence of his death. *Ibid.*

257. General reputation, merely, is inadmissible to prove who are officers of a corporation; though, *semble*, it may be received in connexion with their acts, performed as officers. *Litchfield Iron Co. v. Bennett*, 7 Cow. 234.

258. General character is the estimation in which a person is held in the community where he has resided, and ordinarily the members of that community are the only proper witnesses to testify as to such character. Evidence of character is founded on opinion, and a witness testifying as to the general character of another must have the means of knowing such general character. A witness who goes to the place of the former residence of a party, to learn his character, will not be allowed to testify as to the result of his inquiries. *Douglas v. Tussy*, 2 Wend. 334.

XVI. Witness: (a) Who are competent witnesses, either generally or as to particular facts.

259. Where a judge at the trial receives the testimony of a witness who is objected to as incompetent, upon the facts already proved, reserving the question of competency, the testimony of the witness thus sworn *de bene esse* is not to have any weight in determining his competency; but this must be referred exclusively to the other evidence given in the course of the trial. *Mott v. Hicks*, 1 Cow. 515.

260. One who believes in the existence of a God, who will punish him if he swears falsely, is a competent witness. *Butts v. Smartwood*, 2 Cow. 431.

261. Within this definition, a Universalist, who believes future punishment not to be eternal, is a competent witness. *Ibid.*

To this point see also, *The People v. Matteson*, Cor. *Watworth*, chief judge, 9 Cow. 432, n. (a); and *Anon.* Cor. *Williams*, chief judge, supplement to that note, at page 572, in which opinions is considered the question whether one is a competent witness who believes in a future punishment in this life only.

262. One who held a note endorsed in blank, and sold it to another without endorsing it, is, after the execution of the note is proved, a competent witness for the holder, in an action by him against the endorser. *Williams v. Matthews*, 3 Cow. 252.

263. The fees of a witness attending from a foreign state are fifty cents a day. *Nichols v. Doty*, 3 Cow. 352.

264. One whose name appears upon negotiable paper may, notwithstanding, be a witness to prove that it was void in its inception, for usury or other cause. (*Winton v. Seidler*, 3 John. cas. 185.) Contra is not law. *Stafford v. Rice*, 5 Cow. 23.

265. An interested person and even a party are competent to prove the death of a subscribing witness to a lease, in order to let in secondary proof of its execution. *Jackson v. Davis*, 5 Cow. 123.

266. The general rule as to the competency of witnesses is, that every person not interested in the event of the suit, nor incapacitated by his religious tenets, nor by the conviction of an infamous crime, is a competent witness. All other circumstances affect his credit only. *Bank of Union v. Hilland*, 5 Cow. 163.

267. The maker or other person whose name appears upon a promissory note is, within this rule, a competent witness, to show that it was void in its creation for usury, or other cause. *Ibid.*

268. A witness whose name has been forged is a competent witness on the trial of an indictment for forgery. *People v. Dean*, 6 Cow. 27.

269. A party in interest, e. g. the plaintiff's *cestui que trust*, cannot be compelled to testify without his consent. *Moran v. Lamb*, 7 Cow. 174.

270. The party on record cannot be compelled to testify. *Ibid.*

271. Whether a witness can be compelled to answer a question, the answering of which may tend to subject him to a civil suit? *Quare. Ibid.*

272. A broker who lends money, and takes a check for his principal, including his commission in the check, is yet a competent witness for his principal in an action against the drawer on the check. *Ibid.*

273. A co-trespasser with the defendant is a competent witness in his favour. A recovery in favour of one trespasser is not evidence for his co-trespasser. *Marsh v. Berry*, 7 Cow. 244.

274. A residuary legatee is not a competent witness in favour of the personal representative of the testator. *Campbell v. Tussy*, 7 Cow. 64.

275. On motion to set aside the report of referees against parties, whose firm was dissolved before the suit brought, the affidavit of one of the firm, admitting the report to be just, is inadmissible. *Hopkins v. Banks*, 7 Cow. 550.

276. On such a motion, no evidence can be in general be heard, except what was submitted to the referees. *Ibid.*

277. Such partner may be sworn before the referees by mutual consent. *Ibid.*

278. One in possession, though of a party only of the premises in ejectment, is not a competent witness for the defendant. *Jackson v. Hills*, 8 Cow. 290.

379. Any co-debtors not sued are competent witnesses for the plaintiff against the debtor sued. *Gay v. Cary*, 9 Cow. 44.

380. It is the nature of the crime, not the punishment, which determines whether a convict is an admissible witness. *People v. Whipple*, 9 Cow. 707.

381. A conviction of treason, felony, or any species of the *crimen falsi*, render the convict incompetent to testify. *Ibid.*

382. But to render him incompetent, the judgment as well as the conviction must be proved. *Ibid.*

383. The principal is a competent witness against the accessory. *Ibid.*

384. So an accomplice is admissible as a witness against his copartners in the crime. *Ibid.*

385. But an accomplice is admissible or not in the discretion of the Court; and when admitted, on his making a full disclosure, is entitled to a recommendation for pardon. *Ibid.*

386. A motion should be made, for the admission of an accomplice to testify by the public prosecutor; and the Court, under the circumstances of the case, will admit or disallow the evidence, as may most effectually answer the purposes of justice. *Ibid.*

387. *Seemle*, what an accomplice states under oath against his associates would be inadmissible evidence against himself, on account of the implied promise of the Court to recommend him to mercy. *Ibid.*

388. A grantor, with covenant of warranty, is a competent witness for his grantee, in an action of ejectment brought by him for the recovery of the possession of the premises conveyed; the liability of the grantee attaching only in case of an eviction after possession obtained. *Jackson v. Rice et al.* 3 Wend. 180.

389. If the bailee of a chattel sell it, his wife is a competent witness in an action by the bailor against the vendee. *Marshall v. Davis*, 1 Wend. 109.

390. The defence that the note of a firm has been given by one partner, for his individual debt, without the assent of his copartner, is admissible under the general issue. *Williams v. Walbridge*, 3 Wend. 415.

391. The maker of the note is a competent witness to prove such defence. *Ibid.*

392. A person in no way connected with the counsel, present at a communication made to him by a client, is bound to testify. *Jackson v. French*, 3 Wend. 337.

393. Where A. had executed a usurious mortgage with covenants of warranty, and subsequently sold and conveyed the mortgaged premises by deed with warranty to a third person, taking back a mortgage to secure the consideration money, and assigned the same; it was held, that in an action of ejectment by the assignees of the second mortgage against a purchaser under a foreclosure of the usurious mortgage, A. is a competent witness to prove the usury. *Jackson v. Packard*, 6 Wend. 415.

394. A person who has guaranteed the payment of a debt becomes a *competent witness* on the delivery to him of the guarantee, with permission to destroy it, and its subsequent de-

struction. *Merchants' Bank v. Spicer*, 6 Wend. 443.

295. Where such delivery is made by counsel on the trial of a cause, it will be inferred that they act by the authority of their client. *Ibid.*

296. Creditors of the obligor, where the defence is lunacy, are *competent witnesses* to prove the obligor incapable of managing his concerns at the time of the execution of the bond; if a direct and certain interest appears, it seems that they would not be considered competent; as in this case, where a judgment was already entered for the plaintiff, had it appeared that the witnesses were *judgment creditors*, having liens upon the same property, they would have been declared incompetent. *Hart v. Deamer*, 6 Wend. 497.

297. In *assumpsit* against two defendants, where one of them is misnamed in the *capias*, which is returned as to him *non est inventus*, and the suit is proceeded in against the other defendant, who pleads to issue, the defendant as to whom the misnomer has happened, although nominally not a party to the suit, is not a competent witness for his co-defendant. *Vankorder v. Striker et al.* 9 Wend. 286.

298. One of several defendants, in whose favour a verdict is found in a Justice's Court, is not competent to testify as a witness for the other defendants, on an appeal by them to the Common Pleas. *Bates v. Conklin*, 10 Wend. 369.

299. From the necessity and hardship of the case, Courts have allowed parties to be a competent witness to prove the loss or destruction of papers preliminary to the introduction of secondary evidence. *Blade v. Noland*, 12 Wend. 173.

300. A mere request to a party to become a surety of a third person for the costs of a suit, without an offer to indemnify against risk, is not enough to render the person making such request an incompetent witness, though such suretiship be assumed. *Mulheran's Executors v. Gillespie*, 19 Wend. 349.

301. It is inconsistent with the spirit of the constitution to compel a party to be a witness against himself in a case where the effect of the disclosure which he is required to make will subject him to a penalty or a forfeiture. *Livingston v. Harris*, 3 Paige, 528.

302. A stevedore, employed by the master to stow the cargo, is a competent witness to prove that it was properly stowed. *Rankin v. The American Insurance Company*, 1 Hall, 619.

303. A factor, who has made advances for his principal, although he has a general lien on the goods and the proceeds of the goods of his principal in his hands, as a security for his advances, is nevertheless a competent witness for his principal, unless he has a specific claim upon the subject-matter of the controversy. *Baldwin and Forbes ads. Mildeberger*, 2 Hall, 176.

(b) How a witness is to be examined.

304. Proceeding to examine *de bene esse*, viz. affidavit, order and notice under statute. (Sess. 36, ch. 31, 1 R. L. 455, and sess. 38, ch. 150.) *Jackson v. Hooker*, 1 Cow. 586.

305. Where the party, receiving a notice of examination under this statute, attends accordingly, but no one comes to examine on the other

side, and consequently no examination takes place, the Court will not order the costs of attendance to be paid upon motion. *Ibid.*

306. The statute makes no provision for the costs. *Ibid.*

307. After a question has been repeatedly asked, and answered without objection, in the course of a trial, it is too late to object to its repetition, on the ground that the answer is, in itself, inadmissible. *M'Kee v. Nelson*, 4 Cow. 355.

308. After the regular examination of witnesses upon a trial is through, and the counsel for the defendant has commenced summing up, it is in the discretion of the judge whether he will hear further evidence. *Jackson, ex dem. Johnson, v. Tullmudge*, 4 Cow. 450.

309. A witness may be asked a question, the answer to which will criminate him; and if he has no objection, may answer it. *Southard v. Rexford*, 6 Cow. 254.

310. His privilege is personal only; but it is the duty of the Court to advise him of it. *Ibid.*

311. And where, in an action for breach of promise of marriage, the defendant asked his witness if he ever knew of any person having criminal connexion with the plaintiff; and the judge would not suffer the question to be put, but himself told the witness he might, if he pleased, state any improper intercourse, if there had been any, between the plaintiff and him; held, that this was not a violation of the rule. *Ibid.*

312. Where a witness is introduced by a party, and is interrogated as to a particular fact, and the opposite party, on cross-examination, asks him generally if he ever communicated that fact to any one, and to whom, and he answers that he communicated it to the party calling him; this does not entitle the party calling him to pursue the inquiry as to his own reply, and other conversation with the witness, at the time of the communication. Otherwise, if the witness be asked on cross-examination, specifically, whether he made the communication to the party calling him. *Winchell v. Latham*, 6 Cow. 689.

313. A witness introduced by a party, and sworn generally, though interested to testify against him, may be cross-examined at large, in support of the rights of the opposite party. *Jackson v. Vanick*, 7 Cow. 238.

314. The party introducing him cannot question either his competency or credibility. *Ibid.*

315. Great latitude is allowed on the cross-examination of witnesses. *Bower v. Winters*, 7 Cow. 263.

316. Thus, when a witness stated that the character of one of the defendant's witnesses was bad in point of truth and veracity; held, that he might be inquired of, by the defendant, as to the particular persons he had heard impeach the character of the witness. *Ibid.*

317. A witness liable to lose by the determination of the cause against the party calling him, is yet competent, if he be fully secured, and indemnified against the loss. *Chaffee v. Thomas*, 7 Cow. 358.

318. Before arbitrators, or on a trial of a

cause, one oath to a witness is enough, though he be examined on different matters and at different times; and though the time for the award (in case of arbitration) be enlarged after he is sworn, yet he may be examined on his first oath after the enlargement. *Bulluck v. Koon*, 9 Cow. 30.

319. Where a Court, in charging the jury, recapitulates the testimony of a witness, and the counsel for one of the parties insists that the Court misunderstood the testimony of the witness in a material part, and proposes to call him, in order to explain, it is discretionary with the Court whether he shall be called for that purpose; but if the Court err in the exercise of that discretion, a writ of error will be sustained for that cause. *Merrill v. Law*, 9 Cow. 65.

320. Where a person, who is directly interested in favour of the plaintiff in a cause, is called by the defendant to prove a particular fact, and is sworn as a witness, the plaintiff has a right to examine him generally as to the merits of the cause. *Farist v. Jackson*, 2 Wend. 166.

321. Where a witness has been sworn in chief, the opposite party may not only cross-examine him in relation to the point which he was called to prove, but he may examine him as to any matter embraced in the issue; and the party who originally called such witness, and availed himself of his testimony, cannot subsequently object to him on the ground of interest any more than he can impeach his general character. *Fulton Bank v. Stafford*, 2 Wend. 483.

322. A written memorandum may be referred to by a witness to refresh his memory; but he must swear to the truth of the facts; or his statement is not evidence. *Lawrence v. Barker*, 5 Wend. 361.

323. A witness may, on his examination, recur to a written memorandum to refresh his memory as to facts to which he is called to testify. *Hulladay v. Murel*, 3 Wend. 142.

324. A question to a witness is leading, which puts into his mouth the words to be echoed back, or plainly suggests the answer which the party wishes to get from him. Putting a question in the alternative form, as whether or not a party did a certain act, specifying it, does not remove the objection to its being leading. *The People v. Barker*, 4 Wend. 229.

325. It is not allowable, even on a cross-examination, to put a question which assumes a fact proved which is not. *Ibid.*

326. If a question relate to introductory matter, and be designed only to lead the witness with the more expedition to what is material to the issue, it may be put, though it be leading. *Ibid.*

327. If it be apparent that the witness is in the interest of the adverse party, it is proper to permit the direct examination to take the character of a cross-examination. *Ibid.*

328. It rests in the discretion of the Court before whom a trial is had, whether or not to permit the re-examination of a witness after the lapse of a day, and after the examination of other witnesses. The Supreme Court will not interfere with the exercise of such discretion but in a very flagrant case. *Ibid.*

329. When the direct answer to a question will disgrace a witness, and fix a stain of infamy upon his character, he is not bound to answer; and that whether the question be material or not to the merits of the cause in which he is examined. But the Court must see that the answer may in some way criminate. *Ibid.*

330. The proper question to be put to a witness called to impeach another is, whether he would believe him on oath. The opposite party may then go into a cross-examination to ascertain the grounds of the unfavourable opinion, the means of knowledge of the character of the witness impeached, and the source, extent, and duration of the unfavourable reports. *Ibid.*

331. Where a witness is competent in chief, he must be sworn generally in a cause, though his examination may be confined to a particular or incidental fact. *Ibid.*

332. A witness cannot be cross-examined to a distinct collateral fact, for the purpose of afterwards impeaching his testimony by contradicting him; but there may be cases, arising from the disposition, temper, and conduct of witnesses, where great latitude of examination would be permitted, which can be regulated only by the discretion of the Court, and for which it is difficult to lay down a precise rule. *Lawrence v. Barker*, 5 Wend. 301.

333. On an inquest at the Circuit, the defendant may cross-examine the plaintiff's witnesses to overthrow what has been testified to on the direct examination; but he cannot, by the plaintiff's witnesses, establish a defence defeating the right to recover. *Hartness v. Boyd*, 5 Wend. 563.

334. A person owning a part of a cargo of a vessel, standing by and permitting another who owns the residue to sell the same, agreeing to look to such other for payment, and subsequently being paid for the same, is a competent witness to prove the contract of sale. *Outwater v. Dodge*, 6 Wend. 397.

335. Evidence preliminary to the introduction of a deposition taken *de bene esse*, that the party offering it believed that the witness was absent from the state, that the witness told the party at the time of the examination that he expected to leave the state that previous to his examination the party was in the habit of seeing him, but since had not seen him, was held to be sufficient; it appearing that the witness was a journeyman carpenter, without a fixed habitation, and in pursuit of employment. *Guyon v. Lewis*, 7 Wend. 26.

336. Evidence received by a judge on the trial of a cause, as preliminary to the introduction of other evidence, is not to be submitted to the jury; it is the province of the judge, and not of the jury, to pass upon its sufficiency; accordingly where proof of the admissions of an alleged partner were offered to be shown; it was held, that it was the province of the judge, and not of the jury, to pass upon the fact, whether he was such partner or not. *Harris v. Wilson*, 7 Wend. 57.

337. A witness cannot be examined as to a distinct collateral fact, for the purpose of impeaching his testimony, by contradicting him; but if a question relative to such fact be put

and answered, evidence cannot afterwards be adduced for the purpose of contradiction. *Ibid.*

338. A witness who has preferred a complaint for felony, and who, on the prisoner being brought before the magistrate, was examined, and his examination reduced to writing, is not bound, when testifying on the trial, to answer as to the evidence given by him on making his complaint, and on his examination before the magistrate. *Bellinger v. The People*, 8 Wend. 695.

339. An examination of a witness, taken before a magistrate, on a prisoner's being brought before him, is not admissible in evidence, until duly proved by competent testimony that it is the same as when sworn to. *Ibid.*

340. A witness is not bound to answer as to how he testified on a former trial relative to the matters in question, if he objects to the inquiry. *Mitchell v. Hinman*, 8 Wend. 667.

341. A defendant, who has procured the testimony of a witness residing abroad to be taken under a commission, is not bound on the trial of cause, upon the requisition of the plaintiff, to call the witness who is then in Court, and examine him *vis-à-vis* *ecce*, but may read his deposition as taken under the commission; the plaintiff, however, may have the witness sworn and examined, although he omitted to join in the commission. *Phenix v. Baldwin*, 14 Wend. 62.

342. Where a witness, in advance of a question put to him by the party who calls him, states a fact requiring explanation, the Court before whom the trial is had may, in its discretion, permit the party to examine into the grounds of the statement of the witness. *Bakeman v. Rose*, 14 Wend. 105.

343. Proof that a witness is a public prostitute is inadmissible for the purpose of impeaching her. *Ibid.*

344. Whether the provision of the statute that a physician or surgeon shall not be allowed to disclose information acquired in attending a patient in a professional character, which information was necessary to enable the physician or surgeon to prescribe or act for the patient, is the privilege of the witness or of the party, and whether testimony thus given can be rejected by the Court unless objected to by the party? *Quere. Johnson v. Johnson*, 14 Wend. 637.

345. Where a person called to prove the testimony of a deceased witness, given on a former trial, produces in Court minutes of such testimony taken by him at the time, and states that he intended to take down the words of the witness, and all that he deemed material, but could not say that he had taken his precise words or every word of the testimony; and that he could not swear to the testimony, except from his minutes; it was held, that such evidence was admissible to prove the testimony of the deceased witness. *Clark v. Force*, 18 Wend. 193.

346. A witness may be re-examined by the party calling him, even after a cross-examination, as well for the introduction of matter new in itself as for the purpose of explaining the expressions or the motives of the witness, where the omission to examine him as to such new

matter, when first called, arose from inadvertence or other cause, to be approved by the Court. *Ibid.*

347. Where the testimony of a witness is impeached, his examination, taken by a magistrate on the institution of a prosecution for a criminal offence against another person, may be read in evidence to support his testimony; it may also be read to invalidate the testimony of the magistrate, in the account given by him of the facts testified to by the witness on such examination. *The People v. John Moore*, 15 Wend. 419.

348. An examination of a witness, sworn to have been taken pursuant to the statute, will be presumed to have been read to or by the witness before it was signed by him, although the magistrate does not recollect that it was so read; the examination of a prisoner must be proved to have been read. *Ibid.*

349. A party may impeach a witness, although he has cross-examined him, unless on such cross-examination he has attempted to establish a matter wholly disconnected with the direct examination; as to such matter, he makes him his own witness, and cannot subsequently discredit him. *Ibid.*

350. Where a witness, after leaving the stand, declares that what he has testified to was a fabrication, such declaration may be given in evidence to impeach his credibility. *Ibid.*

351. A witness cannot be asked, *it seems*, whether from his personal knowledge of an impeached witness, he would believe him under oath. The true rule is, to inquire of the impeaching witness his means of knowing the general character of the witness impeached, and whether from such knowledge he would believe him under his oath. *Fulton Bank v. Benedict*, 1 Hall, 480.

352. If a witness's character is declared by an impeaching witness to be bad from some particular cause, an inquiry may be made, *it seems*, into the origin of that opinion, for the purpose of enabling the jury to estimate it properly. *Ibid.*

353. If evidence, competent at the time it is offered, be objected to, and the objection overruled, become incompetent by subsequent proof, the objection must be renewed, or the party making it will be deemed to have waived his right of excepting. *Mitchell v. Roulstone and Stickney*, 2 Hall, 351.

XVII. *When a witness is incompetent on the ground of interest: (a) When a witness's interest will be sufficient to exclude his testimony.*

354. In ejectment, one who has delivered possession of the premises in question to the defendant, upon his parol agreement to purchase, must be a witness. *Jackson v. Slackhouse*, 1 Cow. 123.

355. In ejectment for land conveyed expressly in trust, to support an infant child, the mother is not a competent witness in behalf of the child; for the trust estate may be applied by the parents in support of the child. *Jackson v. Cadwell*, 1 Cow. 623.

356. Where a witness is called, and on objection to his competency, is put on his *voir*

dire, and answers generally that he is interested, he should be rejected. If the party calling him wishes to show the nature of the interest, as that it is ideal, or such as will not exclude the witness, he should follow up the examination with particular questions. *Williams v. Matthews*, 3 Cow. 259.

357. A father built a grist-mill, and made a parol gift of it to his sons, who took possession, and sued the owners of a mill below for flowing the water back, so as to injure the mill of the sons; *held*, that the father was a competent witness for his sons. *Stiles v. Hooker*, 7 Cow. 366.

358. *Held*, also, that the miller who attended the son's grist mill, and received half the toll as a compensation, was a competent witness for them. *Ibid.*

359. A witness is never holden incompetent merely on the ground that the fact he is called to prove is of such a nature that he cannot be convicted of perjury, should he swear falsely. *The People v. Ferguson*, 8 Cow. 103.

360. A third person liable to contribute to a defendant towards the amount of the plaintiff's recovery, is not a competent witness for the defendant; but the defendant may release him, and thus make him competent. *Ransom v. Keyes*, 9 Cow. 128.

361. A release to one liable to contribute to the recovery against a defendant must, in order to make him a competent witness for the defendant, be directly from the defendant himself to whom the witness is liable. It is not sufficient that it be from his co-defendant, who is surety for the defendant for the demand in question; for the witness is not liable to an action at the suit of the surety. There is no privity between them. Thus, where the action was on a limit bond against one of two defendants and the surety of the one, for his escape from the *ca. sa.* issued on a judgment against him and his partner; *held*, that his co-defendant, the partner was not releasable by the surety in the bond, from liability to contribute to the principal in the bond. *Ibid.*

362. Where, on a trial of a cause in *assumpsit* on a promissory note against several defendants, the jury were instructed to pass upon the liability of one of the defendants, and a verdict was rendered in his favour, he is not a competent witness in favour of his co-defendants. *Griswold v. Sedgwick*, 1 Wend. 126.

363. The wife of the special bail is an incompetent witness for a defendant. But the defendant may avail himself of such testimony by substituting and justifying new bail on the trial. *Leggett v. Boyd*, 3 Wend. 376.

364. A debtor, whose title to lands acquired under a judgment and execution against him is sought to be recovered by a purchaser, is not a competent witness for such purchaser. *Jackson v. Peck*, 4 Wend. 300.

365. A party to a bill of exchange discounted by a bank, who has paid in the amount of the bill as a deposit, and indemnified the bank against the costs of a suit prosecuted in its name against the acceptor, is not a competent witness, although he has released to the bank all interest in the subject-matter of the suit, and

the bank has released him from his engagement to indemnify. *Ontario Bank v. Worthington*, 12 Wend. 493.

366. Where, in a suit on contract against two defendants, one of them dies after the commencement of the suit, the son of the party dying is not a competent witness, although the death be not suggested on the record. *Shepard v. Ward*, 8 Wend. 512.

(b) *When the witness will not be excluded.*

367. Where a note was made by a corporation payable to J. H. or order, who as agent endorsed it to M.; and one W. H. agreed with M., that if he would endorse to R., he (W. H.) would, on receiving certain glass of the maker, deliver the same to M. to hold as an indemnity for his (M.'s) endorsement, and M. endorsed accordingly, and the note was protested; and R. recovered of M. as endorser in a suit by M. against W. H. upon the guarantee; *held*, that J. H., not being liable as endorser, was a competent witness for the plaintiff; but if J. H. had been liable as endorser, he would not be a competent witness. H. would not, in such case, be indifferent between M. and W. H., as being liable to one of them at all events, upon the ground that W. H., being a surety, might be entitled to stand in the place of M. on paying the debt; for W. H. would be liable only upon the condition of first receiving the glass as a fund for the payment, which would bar a recovery by him against J. H. *Mott v. Hicks*, 1 Cow. 513.

368. The grantor in a quit-claim deed is a competent witness for the grantee, in ejectment brought by the latter for the land conveyed. *Jackson v. Hubble*, 1 Cow. 613.

369. A party charged as combining with others in a fraud, against which relief is sought, and who, therefore, is made a defendant, but against whom no particular relief is prayed, may, though liable for costs, be a witness for his co-defendants. *McDonald v. Neilson*, 2 Cow. 139.

370. He comes within the exception to the general rule, excluding a witness on account of interest, viz. that where the interest is contingent or uncertain, the witness is nevertheless competent, and the objection shall be confined to his credibility. *Ibid.*

371. In ejectment by the heir at law against a devisee, a co-devisee, and tenant in common with the defendant, not in actual possession, may be a witness for the defendant. *Jackson v. Nelson*, 6 Cow. 248.

372. And this, especially, if he say on his *voir dire* that he does not know that he is interested. *Ibid.*

373. In trespass *quare clausum fregit* against one, other trespassers on the *locus in quo*, or in other places the title to which depends on the same question as that to the *locus in quo*, may be witnesses for the defendant; for the verdict will not be evidence for or against them. *Gould v. Jones*, 6 Cow. 369.

374. Where a witness is interested against the party calling him, he is competent. *Hurd v. West*, 7 Cow. 750.

375. The widow of a grantor of land with warranty, he having died insolvent, is an admis-

sible witness in support of the title of the grantee, on being released by him, and without her releasing her interests in her husband's personal estate. *Jackson, ex dem. Howell, v. Delancey*, 4 Cow. 427.

376. The grantor in a quit-claim deed is a competent witness in support of the grantee's title. *Ibid.*

377. The inhabitants of Lloyd's Neck claimed, by prescription, an exclusive right of fishing for oysters opposite their respective farms in an arm of the sea. In an action of trespass by one of them, for a violation of this claim, another interested as a remainder-man in a farm adjoining the *locus in quo* at Lloyd's Neck, was offered as a witness for the plaintiff; *held*, that he was admissible. *Gould v. James*, 6 Cow. 369.

378. The inhabitants of H. claimed that the *locus in quo* was a free fishery for them. The defendant, however, an inhabitant of H., justified by plea on the ground that it was a free fishery for all the citizens of this state; *held*, that the other inhabitants of H. were competent witnesses; and that, too, though they had fished at Lloyd's Neck, and were liable to an action if the plaintiff should succeed in establishing his right. *Ibid.*

379. These witnesses had an interest in the question merely, not in the event of the cause. *Ibid.*

380. A commoner cannot be a witness to support the right of his fellow commoner; but one may be a witness to support a right by prescription, in respect to another's estate, though the witness claim to prescribe, in respect to his own estate, upon the same facts he is called to establish. *Ibid.*

381. A citizen of this state is a competent witness to establish a public right of fishery in all the citizens of this state. *Ibid.*

382. An inhabitant of a particular place cannot be a witness to prove a prescriptive right common to all the inhabitants of that place. *Ibid.*

383. It is no objection to the competency of a witness, in an action by a moneyed institution, that a few days before the trial he had sold out his stock, although he stated that he supposed he could purchase it back if he chose; he testifying that the transfer by him was without any agreement, either express or implied, that the stock should be recovered. *Utica Insurance Company v. Caldwell*, 3 Wend. 296.

384. A person having no fixed legal interest in the event of a cause is a competent witness, although he declares himself bound in honour to share in the loss which may be incurred by the party calling him. *Moore v. Hitchcock*, 4 Wend. 292. *S. P. Frost v. Hill*, 3 Wend. 386. *Watson v. Smith*, 13 Wend. 51.

385. A promise of an order, for the amount in controversy when recovered, made to a witness, will not render him incompetent. *Ten Eyck v. Bill*, 5 Wend. 55.

386. An attorney prosecuting a suit in the name of plaintiffs residing abroad, though for the benefit of a resident here, not being indemnified against his liability to the defendant for costs, is not a competent witness. *Jones v. Savage*, 6 Wend. 668.

387. A tenant by the courtesy is a competent witness for the plaintiff, in an action of ejectment by the heir at law. *Jackum v. Brooks*, 8 Wend. 427.

388. Where a promise is made to the assignee of a chose in action, such assignee is a competent witness to prove the making of the promise, if before the trial of the action, although commenced by his direction, he parts with his interest by assignment to a third person; and it is no objection to such action, that it is brought in the name of the last assignee; and not of the person to whom the promise was made. *Smulder v. Van Rensselaer*, 9 Wend. 293.

389. The liability of such first assignees for the defendant's costs of the action, in case of a verdict for the defendant, is too remote and contingent to exclude him as a witness on the ground of interest. *Ibid.*

390. Where a person who is a material witness for another subsequently becomes the surety of such other, and thus interested in the transaction and incompetent to testify, his competency may be restored by the party who has an interest in his testimony depositing in his hands a sum of money sufficient to indemnify him, and by the surety releasing the party from all claims on account of his suretyship. *Manchester Iron Manufacturing Company v. Sweeney*, 10 Wend. 162.

391. Evidence that a creditor took security from a material witness of his debtor with the view of excluding his testimony, is admissible to rebut the objection to the competency of the witness. *Ibid.*

391*. Where two attorneys transact business together as partners, and a suit is brought in the name of one of them against a client for the recovery of the taxable costs of a suit prosecuted in the name of the plaintiff alone as the attorney on record, the plaintiff's partner is a competent witness for him, on the record, after a release by the witness of all his interest in the costs in question. *Ward v. Lee*, 13 Wend. 41.

392. In a suit against the corporation of a city, the mayor is a competent witness for the defendants, although named in the suit as a constituent member of the corporation. *Van Wormer v. Corporation of Albany*, 15 Wend. 262.

393. The necessity which authorizes the calling of an interested witness must be general in its nature, embracing a large and definite class of cases, and such as arises in the natural and usual course of human affairs. A teller in a bank comes within the rule, and is a competent witness for the bank, although he has given a bond with sureties for the correct discharge of his duties. *United States Bank v. Stearns*, 15 Wend. 314.

394. The mortgagor of a vessel is a competent witness for the mortgagee, who is sued as owner, to show the nature of the transfer, and to prove that a conveyance, apparently absolute, was in fact conditional. His interest in the suits is balanced, and as the mortgagee, if liable at all, is liable either as owner, or as mortgagee in possession, the mortgagor would not be responsible to him for costs, it being the duty of the mortgagee, under such circumstances, to pay for the repairs in the first instance without suit. *Ring v. Franklin*, 2 Hall, 1.

395. One who borrows money as the assumed agent of another, drawing a bill upon his pretended principal for the amount, which is protested for nonacceptance, is not a competent witness for the lender, in an action by him against such principal for the money lent. *Shiras v. Morris*, 8 Cow. 60.

396. The principal is liable, if such money

came to his use, and he recognise the loan by telling the agent he will pay it; though borrowed, in the first instance, without his authority. *Ibid.*

397. An agent contracting to buy goods for his principal is a competent witness for the principal, in an action against the vendor, for the nondelivery of the goods, though he did not disclose his agency at the time. *Sewall v. Fitch*, 8 Cow. 215.

(d) Release of a witness's liability.

398. The Court of Common Pleas, on motion, at the trial are bound to discharge a surety for the prosecution of an appeal, and substitute other competent security, so that the first may be a witness for the appellant. *Tompkins v. Curtis*, 3 Cow. 251.

399. One who has transferred a check or note is an incompetent witness for the holder in an action upon it, on the ground that he impliedly warrants his title and the genuineness of the paper; but if he be discharged from his debts, under the insolvent act, subsequent to the transfer, this renders him competent. *Murray v. Judah*, 6 Cow. 484.

400. Where two persons are jointly liable to the payment of a sum of money, a release by one to the other renders the party released a competent witness for the releasor, in a suit against him alone by the creditor. *Bagley v. Osborn*, 2 Wend. 527.

401. Where, on the examination of a witness in chief, it is discovered that he is interested in the event of the cause, his interest may be removed by a release, after which he may be re-examined. *Tallman v. Dutcher*, 7 Wend. 180.

402. The grantor of the plaintiff, in an action of ejectment, is a competent witness for the plaintiff when duly released, although the deed executed by him may be void (under the statute to prevent champerty and maintenance) as to third persons. *Van Hoesen v. Benham*, 15 Wend. 164.

(e) Default of witness.

403. A witness duly subpoenaed to attend a circuit is bound to make extraordinary efforts to obey the writ; nothing but extreme poverty and utter inability to attend, or sickness of himself or family, conclusively proved, will excuse his non-attendance. *The People v. Davis*, 15 Wend. 602.

404. Unless the contempt is purged, the witness will be fined not only the costs of the attachment, but to the full amount of the costs of the circuit incurred by the party who subpoenaed him, if the trial was put off in consequence of his nonattendance. *Ibid.*

XVIII. Credibility of witnesses, and how impeached.

405. A Court as well as jury ought to decide according to evidence, and neither have a right to disregard the testimony of a witness upon the sole ground of being satisfied that he is biased in favour of the party calling him. *Newton v. Pope*, 1 Cow. 109.

406. A seeming conflict of evidence should be scrutinized strictly, to see if it is susceptible of explanation, or incapable of being reconciled. *Woodcock v. Bennet*, 1 Cow. 711.

407. If it is intrinsically of a negative cha-

racter, it does not necessarily destroy what is testified affirmatively. *Ibid.*

408. And if one fact is not wholly inconsistent with another, it may well be considered that each witness has spoken truly. *Ibid.*

409. Where there is no circumstance to make a strong impression on the mind of a witness, little reliance can be placed on his recollection of particular dates several years before he testifies. *Ibid.*

410. Evidence is inadmissible to support the testimony of a witness by showing the consistency between his former declarations and his evidence on the trial, unless he is first impeached. *Jackson v. Eitz*, 5 Cow. 314.

411. The rule is, that a witness cannot be supported by evidence in chief; but if he is impeached, it may be heard in reply. *Ibid.*

412. That one is reputed to be an Irishman, and has the accent or brogue of an Irishman, and is reported to be an Irish deserter, is *prima facie* evidence that he is an Irishman. *Ibid.*

413. Bad terms or want of good understanding between a witness and the party against whom he is called to testify, or the endorsee of that party, is matter of credit, to go to the jury. *Merrill v. Law*, 9 Cow. 65.

414. The testimony of a witness, who has the means of knowledge, whether a written instrument has been altered or not, outweighs the evidence of a dozen witnesses, who speak only from an inspection of the paper. *Malin v. Malin*, 1 Wend. 625.

415. Evidence that a witness has been indicted for perjury and forgery, he not having been tried and convicted, is inadmissible to impeach his credibility. *Jackson v. Osborn*, 2 Wend. 555.

416. A party cannot impeach his own witness, by showing him to be unworthy of belief on the score of bad character; but if he calls a witness to prove a particular fact, and fails in establishing it by him, he may prove the fact by another witness, or show that the account given by the first witness is incorrect. *Lawrence v. Barker*, 5 Wend. 301.

417. Evidence that a witness has, on previous occasions, given the same relation of facts to which he testifies when examined on the trial of a cause, is admissible, where the witness is impeached either by adverse testimony or upon cross-examination, or even upon direct examination, as where he admits that he was an accomplice in the crime of which he proves another to have been guilty. *The People v. Vane*, 12 Wend. 78.

XIX. Evidence in particular cases, and under particular issues.

418. Any thing which goes in discharge of a promise is admissible in evidence under the general issue. *Edson v. Weston*, 7 Cow. 278.

419. In an action of *assumpsit* against two partners, (under the statute authorizing proceedings against joint debtors, where only one has been taken on the process,) where a submission to arbitration under *seal* and an award were offered in evidence for the purpose of disproving an item in an account rendered, and the submission had been executed only by the defendant,

who had been taken, in his own name, and as attorney for his partner, without a power of attorney for that purpose; *it was held*, that, though parties may submit a single item of a long account to arbitration, the award in question was inadmissible in evidence, whether offered directly or collaterally; since if admitted at all, it would affect the rights of a person not a party to it, and to whom the law affords a protection from its consequences. *McBride et al. v. Hagan et al.* 1 Wend. 326.

420. In an action by the assignee of an insolvent debtor, in which the plaintiff declares as assignee for a cause of an action existing prior to the assignment, the plaintiff must prove, on the trial, the character in which he sues, although no other plea than the general issue is interposed. *Best v. Strong*, 2 Wend. 319.

421. Where an insurance was effected upon a steam saw mill, and subsequently to the policy being underwritten, the boiler, which was placed on the outside of the mill, was enclosed by a frame building, and covered over by a roof; *it was held*, that evidence of the opinions of underwriters who had not seen the premises, and had no particular science in the construction of such buildings, was not admissible to show that the risk was materially increased by such additional building; whether the risk was thereby increased, being simply a question of fact, which the jurors were as competent to decide as the witnesses. *Jefferson Insurance Company v. Cotheal*, 7 Wend. 72.

422. Persons of skill are allowed to give their opinions in evidence only in cases where, from the nature of the subject, facts disconnected from such opinions cannot be so presented to a jury, as to enable them to pass upon the question with the requisite knowledge and judgment. *Ibid.*

423. Where a mason who had contracted to do certain work for another in the building of a house at stipulated prices, the owner having agreed to furnish the necessary materials, quit the job, after having done part of the work, in consequence of the neglect of the owner to furnish the materials in season; *it was held*, in an action for the work done, that the plaintiff was confined to the contract prices, and could not give evidence of the value of the work; *it not appearing* that the work was rendered more expensive to the plaintiff than was contemplated when the contract was made, or than otherwise it would have been in consequence of the neglect of the defendant, or that the plaintiff was obliged to do the work at a less favorable season, or at an additional expense. *Koon v. Greenman*, 7 Wend. 121.

424. In *slander*, where the charge is *felony*, and the defendant has neither pleaded or given notice of *justification*, evidence that the charge related to a transaction, in which, if the defendant was an actor, it by no means followed that he was innocent of the crime imputed to him, is inadmissible. *Laine v. Wells*, 7 Wend. 175.

425. So, also, where there is no ambiguity in words charging a *felony*, the question whether the plaintiff was guilty of a *felony* or only a *trespass* in the transaction alluded to, is not a proper subject of consideration for the jury, u.

less the transaction manifestly shows that in relation to it a felony could not have been committed. *Ibid.*

426. In an action for *seduction*, evidence of *promise of marriage* is inadmissible; and although the judge instructs the jury not to consider the damages arising from the breach of the promise of marriage, where such evidence has been received, the verdict will be set aside. *Gillet v. Mead*, 7 Wend. 193.

427. The utmost latitude of inquiry is, that the female may be asked whether the defendant paid his addresses in an honourable way. *Ibid.*

428. Where a sheriff is sought to be charged for the avails of property sold, and it is uncertain what the property did in fact bring, evidence on his part that the interest of the defendant in the execution in the premises sold was of little or no value, is competent and admissible. *Every v. Edgerton*, 7 Wend. 259.

429. In a suit by a corporation on a promissory note, if the general issue be pleaded, the plaintiffs must show that they are a body corporate. *Williams v. Bank of Michigan*, 7 Wend. 539.

430. In an action of *ejectment* by the people for the recovery of lands, proof that the premises claimed were vacant and unoccupied within the period necessary to be shown to establish an *adverse possession* against the people, is *prima facie* sufficient to entitle the plaintiff to recover. *Wendell v. The People*, 8 Wend. 183.

431. In an action of trespass against an officer who justifies under a justice's execution, evidence that the same officer fraudulently served the original process is not admissible; the remedy of the party must be direct, either by action for a false return or by writ of error; he cannot collaterally impeach the proceedings. *Allen v. Martin*, 10 Wend. 300.

432. Where, in an account presented in a Justice's Court, as part of the plaintiff's declaration, the defendants are described as belonging to a particular association, *e. g.* The Pilot Line, the plaintiff is not precluded from proving his account against the defendants, as belonging to an association known by the name of The Erie Canal Transportation Company, notwithstanding the misdescription in the account of the name or style of the association. *Benson v. Brown et al.* 10 Wend. 258.

433. In an action against a party who, on the adjournment of a cause, has given a bond to render himself in execution, or to pay the judgment, if the plaintiff proves that judgment was obtained, execution issued and returned *non est inventus*, evidence that the defendant in the execution had sufficient property to satisfy the same is inadmissible. *Boomer v. Laine*, 10 Wend. 525.

434. The alienation of the land during the lifetime of the husband, and its value at the time of such alienation, *it seems*, cannot be given in evidence on the trial of the action of ejectment to recover dower, but must be shown to the commissioners appointed to make admeasurement. *Yates v. Paddock*, 10 Wend. 528.

435. Evidence of the judgment and execution was in this case held to be admissible, although only the general issue had been

pleaded, the plaintiff in his declaration having charged the defendant with turning out his property to be sold on execution. *Ingaits v. Sperage*, 10 Wend. 674.

436. Evidence of the value of the services of an attorney, in getting rid of an illegal arrest, is not admissible in an action of false imprisonment brought for such arrest, where such expenses are not specially laid in the declaration. *Strang et al. v. Whitehead*, 12 Wend. 64.

437. In an action of replevin by the owner of property seized for a violation of the provisions of the statute relative to the Onondaga salt works, brought against the officer who made the seizure, the declarations of a third party in possession of the property at the time of the seizure, although not the authorized agent of the owner, tending to show that he was removing a quantity of salt before it had been inspected and the duties thereon paid, are admissible in evidence. *Matthews v. Whitney*, 12 Wend. 296.

438. In an action on a charter party to recover the price agreed upon for the use of the vessel, the defendant may give evidence of fraudulent representations by the plaintiff, as to the burthen or capacity of the vessel, in mitigation or satisfaction of the plaintiff's demand. *Johnson v. M'lin*, 14 Wend. 195.

439. Such evidence does not infringe the rule of law, that a written contract cannot be varied or enlarged by parol proof. *Ibid.*

440. A contract in writing and under seal, so executed as not to be binding upon either party, but which has been acted upon by them, may be given in evidence, in an action of *assumpsit* to recover the balance of an account, for the purpose of showing the terms on which one party made advances, and the other performed services. *Gouverneur et al. v. Elliott and wife*, 2 Hall, 211.

441. The plaintiff, by a contract in writing, agreed to "make and complete" for the defendant a steam-engine, which he warranted against "ordinary wear," for the space of sixty days. After the engine was delivered, repairs were made upon it by the plaintiff, for which he brought an action of *assumpsit*. At the trial the defendant set up an *award* in his defence, and insisted that *all* matters in controversy between himself and the plaintiff had been submitted to an arbitrator. The award was not accompanied by any *submission*, and the plaintiff was permitted to call the arbitrator to prove that the submission did not embrace the claims for which *this* action was brought. *Held*, that as the submission was by *parol*, and as the award did not in terms cover *all* matters in controversy between the parties, the evidence of the arbitrator, to show what the matters submitted were, was rightfully admitted. *Birkbeck v. Burrows*, 2 Hall, 51.

EXECUTION.

I. *When and in what order executions may be issued.*

II. *Fieri facias*: (a) *What may be sold under a fieri facias*; (b) *Levy and sale, and herein*

of the redemption of the lands sold; (c) Sheriff's deed; (d) Title of the purchaser of property sold under execution, and how he may obtain possession; (e) Application of the money.

III. *Capias ad satisfaciendum.*

IV. Service and return of executions.

V. When an execution, and the proceedings under it, will be set aside.

VI. Priority of executions.

I. When and in what order executions may be issued.

1. As between the parties, &c., a *fi. facias* relates to the tests; otherwise as to purchasers. *Center v. Billingshurst*, 1 Cow. 33, 2 S. P. 31, note (a).

2. An execution may be issued immediately on judgment being perfected, subject to be defeated by a writ of error, filed in four days thereafter. There are four clear juridical days, excluding Sunday. *Blunt v. Greenwood*, 1 Cow. 15.

3. It may be issued after the plaintiff's death, if tested before. *Center v. Billingshurst*, 1 Cow. 34, note (b).

4. Judgment for the penalty of a bond payment by instalments. Execution issues, and is returned satisfied for all, except last instalment before it falls due. More than a year after it is due, execution goes for this without *scire facias*. *Holden* well, for the first execution may be continued down on the roll. *Mayor of Albany v. Everett*, 1 Cow. 36.

5. Execution tested after the plaintiff's death may be amended. *Center v. Billingshurst*, 1 Cow. 33.

6. Though one of two joint judgment debtors die, yet execution may issue against the survivor, or against his personal property. *Woodcock v. Bennet*, 1 Cow. 711.

7. A judgment survives as to the personalty. *Ibid.*

8. Execution should issue against both defendants by name, so as to correspond with the judgment. *Ibid.*

9. But can be enforced against the survivor alone. *Ibid.*

10. The personal estate of the deceased debtor is in such case discharged at law. *Ibid.*

11. But these rules in relation to execution do not apply as to the reality. *Ibid.*

12. Against the real estate, execution cannot issue nor be enforced without a *scire facias* against the survivor, and the heirs or terretenants, &c. of the deceased, to show why the money should not be levied of their respective lands, without mentioning goods. *Ibid.*

13. If it issue without a *scire facias*, it is void, and may be set aside, and an innocent purchaser under it will not be protected. *Ibid.*

14. It is thus void, and a sale under it is a nullity, even as to the lands of the survivor. *Ibid.*

15. *It seems*, that process void in a material part cannot be good as to the residue. *Ibid.*

16. The judgment does not survive as to the reality. *Ibid.*

17. It is a general rule, that where any new

person is to be better or worse by the execution, there must be a *scire facias*. *Ibid.*

18. An execution cannot be said to be voidable merely, unless there is a party living who can avoid it. *Ibid.*

19. Where he is living, he may by motion arrest the sale upon a voidable execution. *Ibid.*

20. If he suffer the sale to take place, and the land be sold to a *bona fide* purchaser, the sale will be valid, though the execution be afterwards set aside. *Ibid.*

21. Irregularity may be either in the process itself, or in the mode of issuing it. *Ibid.*

22. What is meant by the process being irregular on its face. *Ibid.*

23. It does not mean that the irregularity should be stated in the writ; but it may be by reference to extrinsic circumstances; as the terms of the Court, or the death of the party. *Ibid.*

24. If a defendant die, the plaintiff cannot have execution without a *scire facias*, even against the person or personal property, unless the execution be tested in the defendant's lifetime. *Ibid.*

25. On judgment being affirmed in the Court of Errors, execution may issue from this Court at any time on filing the *remittitur*, of course, and without the entry of any rule for that purpose. *Lyon v. Burnett*, 2 Cow. 510.

26. After a *fi. fa.* has been levied, the plaintiff cannot withdraw it, and issue a *ca. sa.* *Culler v. Culver*, 3 Cow. 30.

26*. A record *fi. fa.* cannot issue, until the first (if levied) be returned, unless it be to a county other than that to which the first issued. *Dorland v. Dorland*, 5 Cow. 417.

26†. One execution being issued and returned, another may go more than a year after without a *scire facias*. *Thorp v. Fowler*, 5 Cow. 448.

27. *It seems*, that a second execution cannot be issued within the statute, (1 R. L. 426, s. 24,) on the ground that the defendant has escaped, unless the escape continue till the time of its issuing. *Sharp v. Caswell*, 6 Cow. 65.

28. The escape must be such as will charge the sheriff. *Ibid.*

29. At any rate, on so grave a question, the plaintiff should proceed by *scire facias*. *Ibid.*

30. A second execution may be allowed by the Court where the first was issued, by mistake, for an amount less than the judgment. *The People v. The Judges of Chataque*, 1 Wend. 73.

31. Leave to issue a new execution, where the first is lost, after levy and sale of real estate, will not be granted, but upon notice to the defendant. *Douw v. Burt*, 1 Wend. 89.

32. A plaintiff issuing an execution, and directing an amount less than the whole sum to which he is entitled to be levied, cannot subsequently issue another execution for the balance. *The People v. Onondaga Common Pleas*, 3 Wend. 331.

33. An execution cannot issue until after the record of judgment is filed. *Marvin et al. v. Herrick*, 5 Wend. 109.

34. In an action of debt on a bond conditioned for the payment of an annuity, it is necessary, after judgment, to have a *scire facias* to warrant an execution for subsequent arrears. *Wood v. Wood*, 3 Wend. 454.

35. A suit will not be stayed until the costs of a former suit for the same cause of action be paid, where the plaintiff is in execution for such costs. *Eaton v. Wyckoff*, 4 Wend. 803.

36. Where A., having a judgment against B.,

sets it off in a suit subsequently brought by B. against A., and a balance is certified in his favour, for which he takes judgment in the second suit, such set-off is an extinguishment of the first judgment only to an amount equal to the demand of B. in the second suit, and for the residue A. may issue an execution on the first judgment. *Doty v. Russell et al.* 5 Wend. 129.

37. An action on the case lies against a party who wrongfully and willfully sues out an execution on a judgment which he knows to have been paid and satisfied, whereby the property of the defendant is taken and sold; and to support the action, it is unnecessary to allege or prove actual malice. *Brown v. Feeter*, 7 Wend. 301.

38. A second *fi. fa.* cannot issue until after the return of a previous execution. *Cumpton v. Field et al.* 3 Wend. 383.

39. Two writs of *fi. fa.* may issue on the same judgment into different counties at the same time. *Hammond v. Mather*, 2 Cow. 456.

II. *Fieri facias*: (a) *What may be sold under a fieri facias.*

40. A chose in action cannot be taken in execution; as a promissory note. *Ingalls v. Loyd*, 1 Cow. 240.

41. And where a constable received a promissory note as security, and afterwards sold it, the transaction was held illegal. *Ibid.*

42. The exemption of certain property from execution, by the statute, (sess. 38, ch. 227.) is a personal privilege, of which the owner alone can take advantage. *Mickles v. Tousey*, 1 Cow. 114.

43. Right of tenant by the courtesy initiate sold, on execution. *Schermerhorn v. Miller*, 2 Cow. 439.

44. By the seisin of the wife in fee, of one undivided third part of certain premises, and the birth of a child alive, the husband became tenant by the courtesy initiate; then his interest was sold to R. G. on execution; then the whole premises were sold to R. G. under the statute of partition. On application by R. G. before the expiration of fifteen months from the first sale, the Court ordered one-third of the proceeds of the sale to be put at interest by the clerk, to be disposed of by the Court, at the expiration of the fifteen months, according to the rights of the parties at that time. *Ibid.*

44*. Lands in a defendant's possession when judgment is obtained against him, may be sold by execution, though at the time of the sale they are held adversely to him. *Jackson v. Tuttle*, 9 Cow. 233.

45. A naked claim to be the owner of a lot, unaccompanied by possession, does not constitute a right, title, or interest which can be sold by execution; nor can a purchaser under an execution avail himself of a subsequent title acquired by the defendant. *Hagaman ad.* *Jackson*, 1 Wend. 502.

46. The interest in lands of a *cestui que use* may be sold by execution. *Jackson v. Walker et al.* 4 Wend. 462.

47. A *rent charge*, that is, a rent reserved upon a lease in fee, containing a clause to *enter and distrain* for the rent, is an *interest in land* which is bound by a judgment, and may be sold on execution as real estate, and forms a specific portion of the premises on which it is charged; a *rent seek* is not such an interest. *The People v. Hawkins*, 7 Wend. 463.

48. Lands cannot be sold on an execution issued after the death of the defendant, although the execution bears date as of a day previous to the death of the defendant. *Ibid.*

49. The interest of a person in possession of land, under a subsisting contract for the purchase thereof, cannot be sold on an execution at law; but in all other cases the bare possession of the defendant in the execution, although it be a mere tenancy at will or on sufferance, or a possession without colour of right, is such an interest as may be sold on the execution. *Tulbet v. Chamberlain*, 3 Paige, 219.

(b) *Levy and sale, and herein of the redemption of the lands sold.*

50. Whether, on a sale by execution upon a senior judgment, a junior judgment creditor may redeem so as to divest the right of an intermediate mortgage? *Quæro.* *Van Rensselaer v. Mayor of Albany*, 1 Cow. 63.

51. *Et semble*, he may, but the point was not finally decided. *Ibid.*

52. Where a sale of lands was made, and a certificate thereof given under two executions, one of which was afterwards set aside, and the moneys ordered to be applied on the other; notwithstanding which, the sheriff, by mistake, made and recorded a deed to the purchaser under both, but which had not been actually delivered; and he afterwards executed a deed, as under the valid execution, to the same purchaser; upon motion, upon due notice to the defendant, it was ordered that the first deed be set aside. *Bay v. Gilliland*, 1 Cow. 220.

53. But the Court refused a rule declaring the second deed valid, as this follows from setting aside the first. *Ibid.*

54. Where land is sold upon a *fi. fa.* pursuant to the act in addition to the act concerning judgments and executions, the several junior creditors, coming to redeem, do not take preference according to the time of redemption, but according to the priority of their respective liens. *Rosekrans v. Hughson*, 1 Cow. 428.

55. Accordingly, where A. redeemed from the purchaser; B., who had a judgment older than A.'s, was afterwards allowed to redeem, upon paying to the sheriff the original purchase money and interest, without also paying A.'s judgment. *Ibid.*

56. Neither the defendant nor his grantee can redeem lands sold upon execution pursuant to the act in addition to the act concerning judgments and executions, after one year from the time of sale. *Van Rensselaer v. Sheriff of Onondaga*, 1 Cow. 443.

57. But within that time, he or his grantee have the exclusive right of redemption. *Ibid.*

58. The right of creditors to redeem does not attach till after the year has elapsed; from which time for three months they have the exclusive right of redeeming. *Ibid.*

59. The defendant or his grantee redeeming is in no case bound to pay more than the money bid at the original purchase, with ten per cent. interest. *Ibid.*

60. An assignee of a judgment is a judgment creditor within the meaning of the act, and may redeem; and this though he purchase

the judgment after the sale of the land by the sheriff. *Ibid.*

61. A judgment obtained at any time within fifteen months after the sale is a lien, and entitles the creditor therein to redeem. And though the judgment be confessed voluntarily, with a stipulation to stay execution thereon for a year, yet this does not preclude the creditor therein from redeeming immediately. *Ibid.*

62. A judgment creditor, coming to the sheriff to redeem pursuant to the act, may produce an exemplification of his judgment, or a certificate thereof from the clerk, either of which will be sufficient evidence to the sheriff that he is entitled to redeem. If he be an assignee, it is proper that he should also give notice to the sheriff of the assignment. *Ibid.*

63. Where A. obtained judgment against B. prior to April 9th, 1811; *held*, that the lien upon the lands of B. ceased, as against a subsequent judgment creditor, at the expiration of ten years from that time. *Dickerson v. Gilkland*, 1 Cow. 481.

64. A sale under the judgment as late as July 3d, 1821, and a sheriff's deed after the lapse of fifteen months, will not do away the lien of a creditor whose judgment is intermediate the 9th April, 1811, and the time of sale, unless A.'s lien has been kept alive by an execution actually issued and delivered to the sheriff prior to the 3d April, 1821, (sess. 44, ch. 238, s. 3.) in which case it lies with him to show this affirmatively; for it will not be intended from the mere circumstance of a sale having been made by virtue of an execution on the judgment, on the 3d July, 1821, or any day intermediate that time and the 9th April preceding. *Ibid.*

65. Whether the extension of the lien for three months, by the act of April 3d, 1821, is to be computed by calendar or lunar months? *Quære. Ibid.*

66. Where D. obtained a judgment against G., which bound all his lands, and G. afterwards sold and conveyed one parcel of his land to P., and another parcel to K., and then B. and P. obtained another judgment against G., which bound the residue of his lands, and then G.'s lands were all sold by execution upon D.'s judgment in separate parcels, and purchased by D. at distinct sums for each parcel, and the parcels sold by G. to P. and K. were set up separately, and bid off by D. at distinct sums; *held*, that P. and K. might respectively redeem the parcels purchased by them of G., on paying the sum bid therefor, &c., and were not bound to pay the sum bid for all, or any other of the lands sold upon the execution; for it is the same as if each of the parcels had been sold to separate purchasers. *Ibid.*

67. *Held*, also, that B. and P. might, as judgment creditors, redeem according to the extent of the lien created by their judgment, viz. on paying the amount bid, &c. for the lands, exclusive of those sold to P. and K., but that they had no right to redeem the lands sold by G. to P. and K., because their judgment was not a lien thereon. Yet the circumstance of paying the money bid, and taking a deed therefor of the

sheriff, together with the other lands which they had a right to redeem, would not vitiate the deed as to the latter. *Ibid.*

68. A junior judgment creditor, in order to redeem the lands from a purchaser upon execution, according to the third section of the act in addition to an act concerning judgments and executions, must within fifteen months from the time of sale pay the amount bid by the purchaser, together with interest thereon, at ten per cent. per annum, from the time of the sale, or he is not entitled to a deed; nor can the sheriff dispense with the payment of that sum, or any part thereof; and if he give a deed without receiving the money, it will be void, for he is a special agent, and must prove his authority strictly. *Ibid.*

69. If less than the ten per cent. be paid to the sheriff, though the deficiency be paid to him by the judgment creditor after the fifteen months, it will not vary the case; for the payment of the money at ten per cent. within the fifteen months is a condition precedent; nor does it make any difference, that both the sheriff and the creditor suppose seven per cent. to be enough, by reason whereof payment is made at that rate within the fifteen months, and after that time, and after the deed is given, on discovering the mistake, the deficiency is immediately paid. *Ibid.*

70. It is a mistake of the law, against which the Court cannot relieve. *Ibid.*

71. Whether they would relieve had it been a mere mistake of fact, as a misaddition? *Quære. Ibid.*

72. *It seems they would. Ibid.*

73. Whether the fifteen months allowed by the statute to a junior judgment creditor, for redeeming, are to be computed as lunar or calendar months? *Quære. Ibid.*

74. The orders of this Court on summary application are not *res judicata*; but, on motion, it is their duty to direct and control their officers in their official acts; and accordingly where one has purchased lands upon execution, which are not redeemed within fifteen months, they will, by a rule, order the sheriff to give him a deed of conveyance. *Ibid.*

75. But they will not make any order touching a deed of the same lands from the sheriff to another, given under pretence that he had redeemed as a junior judgment creditor; whereas, in fact, he had not redeemed, but had merely attempted to redeem; for the deed being void of itself, an order is unnecessary, and a rule directing the sheriff to convey to the purchaser answers him every requisite purpose. *Ibid.*

76. Form of this rule. *Ibid.*

77. The act in addition to the act concerning judgments and executions is a remedial statute, and should be so construed as to suppress the mischief intended thereby to be avoided, and advance the remedy proposed. *Van Rensselaer v. Sheriff of Albany*, 1 Cow. 501.

78. It was intended for the benefit of the debtor, by preventing a sacrifice of his real property; and of the junior judgment creditor, by giving him a chance to redeem the land sold upon a senior judgment. *Ibid.*

79. If a junior judgment creditor become a purchaser of real estate on execution, he must bid the amount of the execution and his own lien, if he mean to secure himself out of the property sold. *Ibid.*

80. On a sale by execution of real estate bound by a mortgage younger than the judgment upon which the estate is sold, if the mortgagee mean to save himself, he must bid to the amount of his mortgage. *Ibid.*

81. A mortgagee, or the assignee of a mortgagee, as such, is not a grantee within the meaning of the act, and has no power to redeem; and upon such sale, a creditor by judgment younger than the mortgage may redeem from the purchaser, and is entitled to a conveyance, and may thus obtain a preference to the mortgagee, though the lien of the latter be the oldest; for the creditor redeeming it in under the purchaser takes all his rights. *Ibid.*

82. Where W. had a judgment, then L. had a mortgage, then V. had a judgment, all against the same man, and which were a lien on the same real estate; upon a sale on execution upon W.'s judgment, L., the mortgagee, purchased; and V. then claimed to redeem by paying the purchase money with ten per cent., &c., but L. gave notice to the sheriff not to convey till his mortgage was first paid; *held*, that the sheriff was bound to convey to V. And a rule for a *mandamus* was granted to compel him to give a deed. *Ibid.*

83. Form of this rule. *Ibid.*

84. The act does not invert the order of liens, but merely withholds a remedy from the mortgagee, which it grants to a judgment creditor. It violates no right therefore, and is not in this particular unconstitutional; for before the statute, a sale on an elder judgment divested all junior liens. *Ibid.*

85. It is enough to entitle a judgment creditor to redeem, that his judgment is a lien when he comes to redeem. It need not be a lien at the time of the sale. The sale does not divest the title of the debtor till the fifteen months' time for redeeming has expired; and a judgment obtained against the debtor at any time within the fifteen months is therefore a lien. *Ibid.*

86. Where the debt for which a junior judgment is confessed is well secured otherwise than by the judgment, the judgment creditor ought not to be permitted to redeem to the prejudice of a mortgage lien, intermediate the senior judgment on which the sale took place, and his own judgment on which he seeks to redeem. But the proper remedy of the mortgagee in such a case is in a Court of equity; and this Court will, notwithstanding, compel the sheriff by *mandamus* to convey to such junior creditor. *Ibid.*

87. But they will, on request of the counsel for the mortgagee, make the rule for a *mandamus* expressly, without prejudice to the rights of the mortgagee in any future litigation. *Ibid.*

88. A stipulation not to take out execution against the body or personal property of the defendant, in consideration of his confessing a judgment, does not prevent the judgment operating as a lien upon his real estate. *Ibid.*

89. The particular cause may, therefore, be shown in evidence, as that the *fi. fa.* issued after a year and a day, without a previous *sci. fa.* *Woodcock v. Bennet*, 1 Cow. 711.

90. An execution, issuing after a year and a day without a previous *sci. fa.*, being *erroneous* and *voidable* merely, not *void*; a sale under it would be valid, though it be afterwards set aside. *Ibid.*

91. And the party aggrieved must take his remedy against the party at whose suit the *fi. fa.* issued. *Ibid.*

92. The statute (1 R. L. 504, s. 11.) which gives remedy to a purchaser under an irregular execution, or for want of title in the person against whom it issues, is not in affirmance of the common law, but it gives a remedy which did not exist previously. *Ibid.*

93. The purchaser was already protected at common law, in case of a reversal or setting aside a judgment or execution for error. *Ibid.*

94. But the word *irregularity* in the statute refers to *void*, not *voidable* proceedings, and gives a remedy in Chancery. *Ibid.*

95. The fifteen months' redemption from a sale on execution allowed by the statute are calendar, not lunar months. *Snyder v. Warren*, 2 Cow. 518.

96. In computing the time, the creditor is allowed full fifteen months from the day of sale. *Ibid.*

97. A judgment creditor has no right to redeem under the third section of the act of April 12, 1820, (sess. 43, ch. 184.) unless his judgment be a lien on the land which he seeks to redeem. *In the matter of Hand*, 3 Cow. 35.

98. It cannot be a lien where the land of the debtor is sold and conveyed, either by the debtor or by the sheriff, before the judgment of the creditor claiming to redeem is docketed. *Ibid.*

99. And though it be insisted that the sale was fraudulent and void as to creditors, the Court will not try this question on motion. *Ibid.*

100. Land passes by a general assignment under the insolvent act, and a creditor whose judgment against the insolvent is perfected after the assignment has no lien, and therefore cannot redeem within the act. (Sess. 43, ch. 184, s. 3.) *In the matter of Marsh*, 3 Cow. 69.

101. A deputy sheriff who is plaintiff in, or assignee of a judgment, may purchase under an execution thereon directed to his principal. *Jackson v. Collins*, 3 Cow. 89.

102. A sheriff who advertises for sale on but one execution cannot sell under that and another execution, coming subsequently to his hands, by virtue of the same advertisement. *In the matter of Mascraft*, 3 Cow. 334.

103. On a sale of lands, the whole purchase money should be inserted in the certificate of sale. *Ibid.*

104. A judgment debtor holding a deed of lands is seized as to his creditor, though his deed be not recorded pursuant to the statute. Hence, a conveyance or mortgage *bona fide* by him, intermediate the judgment and a sale on a *fi. fa.*, will not defeat the latter sale, for

this relates to the time of docketing the judgment. *Jackson v. Winslow*, 9 Cow. 13.

104^a. S., owning property, pointed it out to a constable as belonging one-fifth of it to B., against whom the constable had an execution, and was inquiring of the property with a view to the levy. The constable levied. S. receipted the property to the constable, and B.'s right was afterwards sold and bid off by a third person, *bona fide*, under the execution. S. then sold the property; and in an action by the purchaser for the avails, would have shown that B. had no title, inasmuch as he had not fulfilled a certain contract on which the one-fifth was to vest in him. *Held*, inasmuch as notice was not given of the contract to the purchaser, he had a right to purchase upon the faith of S.'s admissions, who should be estopped, under the circumstances, to deny B.'s interest; and that S. should account to the purchaser for the value of the one-fifth. *Stephens v. Baird*, 9 Cow. 274.

104^b. Where several parcels of property are sold under an execution at one bid, though the sale might have been fairer, and the property brought more in separate parcels, yet a third person, not a creditor, has no right to object to the manner of sale. The title passes by such a sale as to a stranger. *Ibid*.

105. Where fifteen months from the day of sale of lands under an execution expired on Sunday, an offer made by a creditor on the next day to redeem (under the statute) was held to be too late. *The People v. Luther*, 1 Wend. 42.

106. Where a sheriff, misconstruing instructions which he has received from a plaintiff, relinquishes a levy which he has made upon goods of the defendant, he may, after the return day of the execution, retake the property, though in the mean time it has been transferred by the defendant for pre-existing debts to certain of his creditors, but without delivering to them possession of the goods. The payment of the sheriff's fees on such execution does not render the relinquishment valid, as the sheriff had no right to discharge the execution without satisfaction of the judgment. *Cotton et al. v. Camp*, 1 Wend. 385.

107. A variance in the amount of recovery between an execution and the judgment on which it issues will not affect the sale, the execution being amendable as well after as before the sale. *Jackson v. Walker*, 4 Wend. 462.

108. On foreclosure of premises mortgaged to the state, a part owner of the premises sold is entitled to redeem within the time allowed by the statute. *Ex re Erastus Willard*, 5 Wend. 94.

109. A *bona fide* purchaser at a sheriff's sale under such judgment is not bound to go beyond the transcript filed in the clerk's office, to prove the right of the sheriff to sell the property. *Tuttle v. Jackson*, 6 Wend. 213.

110. A sheriff's sale was set aside as fraudulent, where real estate worth \$10,000 was sold to satisfy a judgment of \$100, and where the premises were so situated, that a portion, which would probably have brought more than enough to satisfy the judgment, could conveniently have been sold separately. *Groff v. Jones*, 6 Wend. 522.

111. Where a sheriff had two executions, on which he sold four distinct parcels of land, and the two first parcels described in his deed brought an amount more than sufficient to satisfy the older execution; it was held, notwithstanding that the junior execution was inoperative by reason of a *lis pendens*, that the two last parcels were legally sold, and passed by the sheriff's deed to the purchaser, the sheriff stating in the deed that the seizure and sale were by virtue of both executions. *Jackson v. Roberts*, 7 Wend. 63.

112. Where a sheriff levied upon personal property worth \$500, subject at the time to a mortgage of \$100, which became absolute in sixteen days after the levy: it was held, that the sheriff was not chargeable with neglect of duty in omitting to sell the property previous to the foreclosure, it not appearing that at the time of the levy he had notice of the existence of the mortgage. *Smith v. Dumming*, 7 Wend. 135.

113. Personal property pledged by way of mortgage may, after forfeiture, be levied upon by virtue of an execution against the mortgagee, although it remains in the hand of the mortgagor. *Ferguson v. Lee*, 9 Wend. 258.

114. The provision of the revised statutes, by which a creditor, whose judgment is a lien on a specific portion only of any lot, tract, or parcel of land sold, may redeem the whole, applies as well to sales made before as since those statutes went into operation. *People v. Haskins*, 7 Wend. 463.

115. Where a plaintiff and a deputy sheriff were deceived, as to the locality of the real estate of a defendant, by the representations of the defendant, and in consequence thereof the plaintiff bid much more than its value for a portion of the property, and the property was struck off to him, a resale was ordered. *Mulka v. Allen*, 12 Wend. 253.

116. To constitute a levy, the sheriff must not only have a view of the goods, but must assert his title to them by virtue of the execution; he must do enough to render himself chargeable as a trespasser but for the protection of the process in his hands. *Wadswell v. Pinckney*, 14 Wend. 123.

117. A levy by virtue of an execution upon real estate is not a satisfaction of a judgment. *Shepard v. Rowe*, 14 Wend. 260.

118. The fleeces, or the yarn or cloth manufactured from fleeces of ten sheep, are exempted from execution while in the hands of a householder, whether he be or be not the owner of the sheep. *Heall v. Penney*, 11 Wend. 45.

119. A redemption of lands by trustees, under the absconding debtor act, does not entitle the trustees to a deed of the property sold, or authorize them to direct the execution of the deed to a third person; its effect is the same as would be a redemption by the debtor himself, and not otherwise. *Phyfe v. Riley*, 15 Wend. 248.

120. A purchaser is not bound to accept the amount of his bid from a person who has no right to redeem, and may insist that the deed be executed to him in pursuance of the sale; but if he accepts the money, though paid by a stranger, his right to a deed is gone. *Ibid*.

(c) Sheriff's deed.

121. A deed given by a sheriff upon a previous sale on execution relates back to, and in judgment of law is executed at, the time of sale. *Jackson v. Ramsay*, 3 Cow. 75. See *Everten v. Sawyer*, 2 Wend. 507.

122. Where there are divers acts concurrent to make a conveyance, estate, or other thing, the original act shall be preferred; and to this the other act shall have no relation. *Ibid*.

123^a. If the recital of executions in a sheriff's deed of land describe them correctly in several particulars, but add others which are inaccurate, the latter may be rejected as surplusage; all that is necessary is, that the deed show that the sheriff acted under the authority of the executions, even admitting a recital to be important. *Jac'ron v. Jones*, 9 Cow. 182.

123^b. A variance in the description of premises sold, between the certificate of sale and the sheriff's deed, does not affect the title. *Jackson v. Pugh*, 4 Wend. 658.

(d) Title of the purchaser of property sold under execution, and how he may obtain possession.

124. It seems, a *bona fide* purchaser of lands on an execution issued upon a judgment which has been paid, but on which no satisfaction is entered of record, nor an execution returned satisfied, will be protected in his purchase. *Jackson v. Cadwell*, 1 Cow. 622.

125. But it is otherwise if he have notice of the payment, either actual or presumptive. *Ibid*.

126. If the party to the execution purchase, he will not be protected, for he is chargeable with notice. *Ibid.*

127. So if one afterwards purchase of him, with notice that the defendant whose property was sold claims it, and the latter purchaser takes an indemnity from the first, he will not be deemed a *bona fide* purchaser. *Ibid.*

128. To constitute a *bona fide* purchaser, it is not enough to show a conveyance good in form, but payment of the consideration must be made out. It must be actually paid; not merely secured to be paid; for otherwise the purchaser would not be hurt. *Ibid.*

129. That one is a *bona fide* purchaser is a defence generally confined to a Court of equity. *Ibid.*

130. It is used to defend one's possessions; but is not a ground for relief. *Ibid.*

131. Knowledge that another has claim to land is enough to put the party on inquiry, and charge him with presumptive notice; which is, where the law imputes to a purchaser the knowledge of a fact of which the exercise of common prudence and ordinary diligence must have apprized him. *Ibid.*

132. A conveyance to defraud creditors is valid as between grantor and grantee, but void as to creditors. *Ibid.*

133. But to enable a creditor to contest the validity of the conveyance, he must have a judgment in full force. *Ibid.*

134. If it be paid, a sale under it and a purchase by the plaintiff would itself be a fraud, and confer no right. *Ibid.*

135. A *bona fide* purchaser at sheriff's sale upon execution not absolutely void, but voidable only, acquires a good title. *Ibid.*

136. A sale of land under a *fi. fa.* will not be avoided, though the judgment be afterwards reversed for error. *Woodcock v. Bennet*, 1 Cow. 711.

137. So of an erroneous *fi. fa.*, as if it issue after the year and day, without a previous *sci. fa.* *Ibid.*

138. Otherwise as to a *fi. fa.* which is irregular. *Ibid.*

139. An erroneous execution is valid to the time of sale under it. *Ibid.*

140. Otherwise of an irregular execution, which, when set aside, is considered a nullity from the beginning. *Ibid.*

141. And this, even against a *bona fide* purchaser under it. *Ibid.*

142. When a rule sets process aside for irregularity, without saying more, and the particular cause is not shown in evidence, the process will be denied to have been irregular and void from the beginning. *Ibid.*

143. This is the usual form of the rule, whether the process be voidable or void. *Ibid.*

144. A sheriff's deed to a person not a creditor, given for land sold under an execution with the consent of a creditor, who has regularly redeemed it, is valid. The defendant in the execution cannot question the regularity of the proceedings, as between creditors, in relation to such redemption, those proceedings as to him being *res inter alios acta*. *Merritt ads. Jackson* 1 Wend. 46.

145. A variance between the judgment and execution, being amendable, cannot be taken advantage of on a trial for the recovery of land sold by virtue of the execution. *Jackson v. Walker*, 4 Wend. 462.

146. Where the real estate of a defendant in an execution was sold in August, 1829, and the fifteen months given to a creditor to redeem of course expired in November, 1830, after the revised statutes went into operation, and the creditor omitted, on paying the amount bid and the interest thereof, to produce to the sheriff a certified copy of the docket of his judgment, in compliance with the requirements of the revised statutes; it was held, that the creditor was not entitled to succeed to the rights of the purchaser, by having a deed executed to him of the premises sold. *The People v. Livingston*, 6 Wend. 526.

147. If a deed has been improvidently executed to the purchaser, and a sheriff is subsequently directed to execute a deed to a redeeming creditor, the Court will not direct the first deed to be cancelled, but leave the creditor to enforce his rights as he shall be advised. *People v. Haskins*, 7 Wend. 463.

148. Where waste is committed upon the real estate purchased under execution between the sale and the expiration of the time allowed for redemption, the purchaser, if the premises are not redeemed, is entitled to the proceeds of the waste in the hands of the judgment debtor, or of any other person who may have received the same without consideration, or with full knowledge of the equitable rights of such purchaser. *Boyd v. Hoyt*, 5 Paige, 65.

(e) Application of the money.

149. A deputy sheriff may complete an execution by sale and conveyance after the sheriff goes out of office, provided the execution was levied before. *Jackson v. Collins*, 3 Cow. 89.

150. On a sale of real estate under a senior execution, a junior judgment creditor is entitled to the surplus moneys. *Van Nest v. Yeomans*, 1 Wend. 87.

151. Where, on an execution in an action of debt on judgment, sufficient is levied to satisfy the original judgment, the plaintiff must apply the money levied in satisfaction of such judgment, although there be not enough to discharge the costs as well as the debt recovered by the second judgment. *Harvey et al. v. Wood*, 3 Wend. 221.

152. A grantee of real estate, sold under an execution against the grantor, on a judgment entered previous to the conveyance, is entitled to the surplus. *Every v. Edgerton*, 7 Wend. 259.

III. Capias ad satisfaciendum.

153. A *ca. sa.* executed is a satisfaction of the debt, except in certain cases provided for by statute. *Bigelow v. Cooper*, 1 Cow. 56.

154. So that a judgment upon which the defendant is in execution will not be set off against another judgment in his favour. *Ibid.*

155. Arrest of the body on execution from a Court of law satisfies a judgment; otherwise as to a Court of equity. *Ibid.* note (a).

156. A *ca. sa.*, with a term intervening be-

tween its teste and return, is irregular. *Gibbons v. Larcom*, 3 Wend. 303.

157. A counsellor actually attending Court for the purpose of making a special motion, if arrested on a *ca. sa.* during his attendance, will be discharged from the arrest. *Humphrey v. Cumming*, 5 Wend. 90.

158. The application for the discharge is *ex parte*, and notice need not be given to the attorney of the party suing out the execution; after the privilege ceases, the same writ may be served, or a new execution issued. *Ibid.*

159. A plaintiff in a judgment, who has taken notes as collateral security for the payment thereof, cannot maintain an action upon the notes, if after the taking of the same he issues execution, and imprisons the defendant in the judgment. *Wakeman v. Lyon*, 9 Wend. 241.

160. A complainant in Chancery, against whom there is a decree for costs, cannot be imprisoned on an execution for such costs, where the bill is founded on a contract, and the complainant prays for general relief, as well as a specific performance, and the circumstances of the case are such, that upon proof of the contract, there might have been a decree against the defendant for damages for the nonperformance of the contract. *Ex parte Beatty*, 12 Wend. 229.

IV. Service and return of executions.

161. The sheriff has not the power to discharge an execution, even by returning it satisfied, unless he proceed and execute it in due form of law. *Bank of Orange County v. Wakeman*, 1 Cow. 46.

162. His taking the defendant's negotiable note, receipting it as payment in full, and returning the execution satisfied, will not operate as a legal discharge of the execution, even though the defendant afterwards pay such note to a third person, to whom it has been transferred. *Ibid.*

163. After a levy made under a *fi. fa.*, if the officer discover that a previous execution has been levied on the property to an amount sufficient to exhaust it, he may return the *fi. fa. nulla bona*, and a *ca. sa.* will be regular. *Champerois ads. White*, 1 Wend. 92.

164. Where the plaintiffs in an execution directed a stay of proceedings from March until July, and the sheriff delayed proceedings until December, in consequence of a conversation with them in August, which induced him to expect further directions before proceeding to close the execution; it was held, to be fraudulent as against a subsequent execution which came to the hands of the sheriff in October. *Benjamin v. Smith*, 4 Wend. 332.

165. It is not necessary, on the return to an execution by virtue of which lands have been sold, particularly to describe the land sold; the identity of the property may be shown by parol. *Jackson v. Walker*, 4 Wend. 462.

166. An officer who has returned on a *capias ad satisfaciendum* that he has received the amount of the execution in full, will not be allowed to impeach the return by showing that what he received were notes, and that they were taken, not in payment of the execution, but for his indemnity against a threatened pro-

secution for an escape. *Townsend v. Olin*, 5 Wend. 207.

167. Where a sheriff sold real estate on an execution for an amount more than sufficient to satisfy it, and instead of applying the surplus in satisfaction of a second execution in his hands, paid the same over to a grantee of the defendant in the execution to whom the property was conveyed, subsequent to the first, but previous to the rendition of the judgment in the second suit, and returned the second execution *nulla bona, &c.*; it was held, that if an action would lie, case for a false return, and not *assumpsit* for money had and received, was the most appropriate remedy. *Every v. Edgerton*, 7 Wend. 259.

168. An officer may return process on the morning of the day of its return, and is not responsible, although he might subsequent to the return have executed the process. *Hinman v. Borden*, 10 Wend. 369.

169. It is the duty of a sheriff to proceed on an execution regular upon its face; and it is no excuse for his omission, that the sum specified in it varies from the amount for which judgment was rendered. *Parmelee v. Hitchcock*, 13 Wend. 96.

V. When an execution, and the proceedings under it, will be set aside.

170. In an action on a bond for the performance of covenants, and an assignment of breaches, the execution will not be set aside for a mere informality of the verdict in not assessing damages for the breach, but referring the damages to the detention of the debt. *Uptegroff, Matter of*, 3 Cow. 31.

170. The Common Pleas may set aside, or otherwise control an execution issued by the county clerk on a judgment rendered by a justice of the peace, transcribed and docketed by the clerk of the county. *Ex parte Cand A. Thompson*, 5 Cow. 31.

171. Where on the sale of property under a *fi. fa.* a plaintiff inadvertently bids a sum less than the amount of his execution, the sale on his application will be set aside, and a resale ordered. *Ordario Bank v. Lansing*, 2 Wend. 260.

172. A perpetual stay of execution will be ordered on the application of a *bona fide purchaser* of lands bound by judgment, where it appeared that an execution had been issued, and personal property of the defendant in the execution levied upon to an amount sufficient to satisfy the judgment, although the Court, under the circumstances of the case, had refused to set aside the execution on the application of the defendant. *Wood v. Torrey*, 6 Wend. 562.

173. An execution, the collection of which is delayed, will not be deemed fraudulent as against a junior execution, unless the delay is caused by the interference or directions of the plaintiff in the senior execution. *Benjamin v. Smith*, 12 Wend. 404.

VI. Priority of executions.

174. Two judgments, one larger and one smaller, were docketed at the same time, against the same defendant, in favour of different plaintiffs. Executions were simultaneously issued, delivered to the sheriff, and levied on personal property, which was sold under both, and purchased by each plaintiff, at bids differing in amount; held, that the moneys were to be equally divided between the two executions,

till the smaller one was satisfied, the residue to be applied upon the larger. *Campbell v. Ruger*, 1 Cow. 215.

175. The execution first delivered binds the goods. *Lemon v. Heirs of Staats*, 1 Cow. 592.

176. And, it seems, the Court will inquire into the fractional parts of a day to determine the preference. *Ibid.*

177. If the sheriff sell goods on the execution last delivered, he is liable to the plaintiff in the first. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

- I. *Administration and administrator.*
- II. *Payment of debts.*
- III. *When executors and administrators are personally liable.*
- IV. *Actions by and against executors and administrators.*
- V. *When executors and administrators shall pay, and when recover costs.*
- VI. *Authority of an executor, or administrator.*
- VII. *Action on the administration bond.*

I. *Administration and administrator.*

1. A bond by an administrator to convey real estate of his intestate, in contemplation of a sale under a surrogate's order, is void. *Herrick v. Grov et al.* 5 Wend. 579.

2. An administrator in New York is bound to take measures for the collection of a demand due the estate he represents from a debtor residing in an adjoining state, either by obtaining himself, or by employing an agent there to obtain letters of administration, and instituting proceedings by virtue thereof. *Schultz v. Pulver*, 11 Wend. 361.

3. It seems, that even more than ordinary diligence and attention will be exacted from an administrator in the execution of his trust. *Ibid.*

4. All debts in the inventory of the effects of a decedent, not designated as desperate, will be accounted assets in the hands of the executor or administrator; and in order to escape such accountability, he must show that they are desperate, or at least must show a demand and refusal. *Ibid.*

5. Where letters of administration, with the will annexed, are granted, and the will, having been made in a foreign country, remains as a record in some public office there, the proper course is to annex an authenticated copy of the will to the letters of administration. *Van Rensselaer and others v. Morris*, 1 Paige, 13.

II. *Payment of debts.*

6. It is a general rule that if a creditor appoint his debtor his sole executor, or one of his executors, and the debtor accept the trust, this operates as a release or extinguishment of the debt. *Marvin v. Stone*, 2 Cow. 781.

7. But a qualification universal as the rule is, that where there is a deficiency of assets to pay debts, the debt due from the executor is

not discharged, but shall be considered a part of such assets. *Ibid.*

8. In the latter case, it has, in judgment of law, been paid to the debtor executor, and is considered as money in his hands. *Ibid.*

9. Choses in actions are generally not deemed assets till actually received by the executor. *Ibid.*

10. But if he release the debt, it is assets, and he shall be adjudged to have received it. *Ibid.*

11. The appointment by a creditor of his debtor an executor is considered in the nature of a specific bequest to him of the debt, and as such must give way to creditors. *Ibid.*

12. But a specific bequest takes preference of general legacies, and, as such, the bequest of the debt will be preferred. *Ibid.*

13. On a deficiency of assets to pay debts, all the general legacies must abate proportionably; but a specific legacy is not to abate at all, unless there be a deficiency without. *Ibid.*

14. Whenever, from the whole will, it appears that the testator did not intend to discharge the debt by making his debtor an executor, the latter is a trustee to the amount of the debt for the legatees or next of kin. *Ibid.*

15. But making a judgment debtor executor with others, and in the will bequeathing all judgments that may be in the hands of his executors to others, does not show such intention. *Ibid.*

16. The debt, when assets for legatees, &c., would be considered money in the hands of the debtor executor. *Ibid.*

17. An executor may be holden to bail in a case of *devastavit*. But a refusal to apply assets to the payment of debts does not amount to a *devastavit*; and a declaration of an intention to leave the country, and not to return, is not enough to justify an order to hold to bail. *Hartness ads. Purcell*, 1 Wend. 303.

18. An administrator or executor cannot be compelled to pay debts of the deceased, until six months have elapsed from the granting of letters testamentary, or of administration; nor can the payment of legacies or distribution be decreed until twelve months after such period. *Nichols v. Chapman*, 9 Wend. 452.

19. The personal property of a testator must be first exhausted in the payment of his debts before his real estate can be resorted to for that purpose. But where there is a specific lien on the land devised, as in case of a mortgage; or where the land is devised upon condition of paying the debts; or where the debts are directed to be paid out of the estate devised; in these cases the real estate will be first resorted to, to discharge the debts. So where it is apparent from the will that the testator's intention was that the legacies should be paid entire, and the debts discharged out of other funds, the Court will carry such intention into effect. *Pritchard v. Hicks*, 1 Paige, 270.

20. Where the will of the testator contains no directions as to the payment of debts, chattels specifically bequeathed must be applied to the payment of a judgment against the testator before resort is had to the real estate devised. *Ibid.*

21. Personal property of the testator, which is not legally and effectually disposed of by his will, is the primary fund for the payment of debts, although he has directed the debts to be paid out of the rents and profits of his real estate; unless it is evident from the terms of the will that the testator contemplated the event of his dying intestate as to some of his personal estate, and intended to exempt it from the payment of debts, for the benefit of those who might be entitled to it under the statute of distributions. *Hawley v. James*, 5 Paige, 318. S. P. *Rogers v. Rogers*, 3 Wend. 503.

22. The mere charging of a secondary fund with the payment of debts does not exempt the primary fund, or postpone its application, unless the intention of the testator to exonerate it for the benefit of the residuary legatee, or some other person, is manifest; and when an intention is manifested by the testator to exonerate the primary fund for the benefit of the residuary legatee, a lapse of the residuary bequest restores the residuary fund to its primary liability for the payment of debts. *Ibid.*

III. When executors and administrators are personally liable.

23. An administrator who purchases land upon a judgment or decree in favour of his intestate holds it as a trustee, and may be compelled to account for the land itself to his *cestuis que trust*. *Fellows v. Fellows*, 4 Cow. 682.

24. Any person receiving from an executor the assets of his testator, knowing that such disposition of them is a violation of the executor's duty, is to be adjudged conniving with the executor to work a *devastavit*, and is accountable to the person injured by such disposition directly on a bill filed by him. *Coll v. Launier*, 9 Cow. 320.

25. *E. g.* where the executor, being one of a trading firm, with the knowledge of the firm, mixed the funds of his testator's estate with those of the firm, and they were thus employed in trade; *held*, that the firm were liable for these funds to a legatee of the testator. *Ibid.*

26. And this even admitting that the funds had been carried to the account of the executor, and the account as to them closed on the partnership books. *Ibid.*

27. It is the duty of trustees and guardians to keep the money belonging to the trust estate properly invested. *De Peysler v. Clarkson et al.* 2 Wend. 77.

28. If they neglect to make investments, they are chargeable with the interest of the unemployed funds, commencing six months after the receipt of the moneys. *Ibid.*

29. Administrators who have given a note for the debt of their intestate cannot be made personally responsible for the payment thereof, unless it be shown that they have assets, or that forbearance was the consideration of the note. *Bank of Troy v. Topping*, 9 Wend. 273.

30. Where it was not proved that forbearance was the consideration of the note, the Court will not infer such consideration from the mere fact that the note is payable at sixty days after date. *Ibid.*

31. If debts collectable are not collected

within a reasonable time after the granting of letters testamentary of administration, an executor or administrator is personally responsible for the amount of such debts to creditors, or to those entitled to the proceeds of the estate in the order of distribution, although the debts have not been lost by the delay, and no improper motives are imputable to the executor or administrator. *Shultz v. Pulver*, 11 Wend. 361.

32. An administrator appointed in New York who neglected to take measures for the collection of a debt due from a solvent debtor in Pennsylvania, on sealed notes, against which there was no presumption of payment from lapse of time, was *held* personally responsible, and decreed to pay the amount of such debt to the persons entitled to distribution, although less than six years had elapsed since the granting of the letters of administration. *Ibid.*

33. If executors retain money in their hands belonging to infants for several years, without any good reason for so doing, they will be charged with the interest which they might have received thereon. *Stephens and others v. Van Buren and Wyckoff, Executors, &c.* 1 Paige, 479.

34. An executor who is a debtor to the estate is chargeable with the amount of the debt due by him, as assets in his hands for the payment of the debts of the testator. *Decker v. Miller*, 2 Paige, 149.

35. Where a creditor of an intestate sued the administrator at law, and the latter pleaded *plene administravit*, and the creditor thereupon confessed the plea and took judgment of assets *in futuro*, and afterwards filed a bill in this Court against the administrator for the satisfaction of his judgment; *held*, that the creditor was estopped from alleging that the defendant had any assets at the time the plea was put in by him in the Court of law; and that the defendant was not liable for any part of the assets which had been lost previous to that time by his neglect. *Orcutt v. Orms*, 3 Paige, 459.

36. Where the intestate resided in this state at the time of his death, and administration was granted upon his estate here, by virtue of which the administrator obtained notes due to the estate of the decedent against a debtor who resided in Pennsylvania, and had sufficient property there to pay his debts, and who was afterwards in this state, with the knowledge of the administrator, and might have been arrested here; *held*, that the administrator was answerable for the amount of such notes, with interest. *Shultz v. Pulver*, 3 Paige, 182.

37. Previous to the revised statutes, a surrogate was not authorized to decree costs against an administrator, upon a proceeding to compel him to account and pay over the balance in his hands. *Ibid.*

38. *It seems*, that an executor or administrator who has taken probate of the will, or obtained administration of the estate of the decedent within the jurisdiction where he was domiciled at the time of his death, and by virtue thereof obtained possession of the securities against debtors residing in an adjoining jurisdiction, is bound to use reasonable diligence in collecting such debts, although the debtors are not within

the state where the decedent was domiciled, and have no property there. *Ibid.*

39. If an administrator sells leasehold property belonging to the estate of the intestate upon credit, without taking proper security, he will be liable for a loss arising from the insolvency of his purchaser. *Orcutt v. Orms*, 3 Paige, 459.

40. From a principle of convenience, the Court of Chancery has adopted the rule that the personal representatives of the testator or intestate shall have one year, after his death, to collect in the assets, and to liquidate and pay off the debt and prepare for a distribution of the estate, or to invest the same in the manner directed by the will, except in those cases where other directions are given by the testator. The interest or income of the estate, for that year, may therefore be applied in the payment of debts, under a direction contained in the will, and in exoneration of the principal of the estate, without violating either the letter or the spirit of the statutory provisions against accumulations. *Hawley v. James*, 5 Paige, 318.

IV. Actions by and against executors and administrators.

41. An administrator, who goes to trial upon a plea of payment, though in good faith, and not knowing the effect of a finding against him upon that plea, on verdict against him, will not be relieved by being let in to plead *plene administravit*, although he swear that he has a good defence upon this plea. *Martin v. Sarles*, 4 Cow. 24.

42. A judgment against executors or administrators by confession is conclusive proof that they have assets sufficient to satisfy it. *The People v. The Judges of Erie*, 4 Cow. 445.

43. The plaintiff may, after issuing a *fi. fa. de bonis testatoris vel intestatoris*, and a return of a *devastavit* by the sheriff, issue a *fi. fa. de bonis propriis*, of course, and without the formality of a *scire fieri* inquiry, or an action of debt suggesting a *devastavit*. *Ibid.*

44. The different forms of judgment against executors and administrators, considered according to the different pleas which they interpose, and the forms of execution upon these. *Ibid.*

45. The rule on this head in *Lansing v. Lansing* (18 John. 503.) explained and qualified. *Ibid.*

46. If on a *fi. fa. de bonis intestatoris*, issued upon a judgment by confession against an administrator, he do not produce assets, this justifies the sheriff in returning a *devastavit*. *Ibid.*

47. The confession by an executor of a debt due from his testator is not admissible as evidence in a suit for the debt, against his co-executors, to establish his original demand. *Hammon v. Huntley*, 4 Cow. 493.

48. Otherwise, to take it out of the statute of limitations. *Ibid.*

49. One taking possession of the personal estate of a deceased person, without being administrator or lawful executor, is chargeable as executor *de son tort*. *Campbell v. Thousey*, 7 Cow. 64.

50. And may be sued as executor generally. *Ibid.*

51. And this, though he be lawfully appointed executor in a neighbouring state. *Ibid.*

52. An executor or administrator appointed in

a neighbouring state cannot be sued as such here. *Ibid.*

53. But if he collect the effects of his testator or intestate, and bring them here; and, beside, collect effects here; he may be sued as executor *de son tort*, and shall be chargeable for all assets which he has not applied in the due course of administration, either under his foreign appointment or in this state, whether received abroad and brought here or received here. *Ibid.*

54. One sued as executor *de son tort*, who pleads *ne unques executor*, if it is found against him, is liable for the debt *de bonis propriis*, the same as any other executor. *Ibid.*

55. The Courts of this state cannot take notice of letters testamentary or of administration granted by a neighbouring state for the purpose of the persons appointed under them being parties here; though *semble*, that the application of assets in the due course of administration, under such appointments, will be allowed. *Ibid.*

56. On the plea of *plene administravit*, and no assets to be administered; the *onus* lies with the plaintiff, who is bound to show assets. *Bentley v. Bentley*, 7 Cow. 701.

57. An administrator *de bonis non* may maintain a writ of error on a judgment against the previous executor or administrator. *Dale v. Roosevelt*, 8 Cow. 333.

58. And he may bring his suit as the sole plaintiff in error, though the judgment was against the previous representatives in the usual form, without any defence being made on the ground of a want of assets. *Ibid.*

59. On assigning errors, he should strictly make profert of his letters as on declaring; but where he omitted this in the Court of Errors, on motion by the defendant in error, he was ordered by rule to produce his letters in four days, or that the writ of error be dismissed. *Ibid.*

60. An order of the Court of Chancery that letters of administration should issue on a certain condition, is not, *per se* evidence, that they actually had been issued. *Ibid.*

61. In an action against the administrators of a deceased partner, the surviving partner is a competent witness to prove the partnership. *Grant v. Shuster et al.* 1 Wend. 148.

62. Where a promissory note is given by an executor or administrator, it is *prima facie* evidence of assets, because they are the legal consideration upon which the promise ought to be, and is presumed to be founded. *Bank of Troy v. Topping*, 13 Wend. 557.

63. In an action against an administrator, a creditor is not concluded by the appraisement in the inventory filed, but he may show that the goods inventoried are of greater than their appraised value. *Willoughby et al. v. M'Cluer et al.* 2 Wend. 609.

64. An action will not lie against the executors of a sheriff for the default of his deputy in returning process, for the omission to return which, an action of *assumpsit* is given by statute. *The People v. Gibbs*, 9 Wend. 99.

65. When the cause of action arises *ex delicto*, an action cannot be sustained against the representatives of the party who would have been liable, although the action be given by statute,

and is in form *ex contractu*, unless the estate of such party was benefited by the act complained of, as where property was tortiously taken and sold, or remains in specie in the hands of the representatives. *Ibid.*

66. An administrator may bring trover in his own name for the goods of his intestate, converted previous to the granting of administration, and need not declare in his representative character. *Valentine v. Jackson*, 9 Wend. 302.

67. An administrator appointed abroad may maintain a suit here in his own name on a note payable to his intestate or bearer; especially when the question, whether or not he be a *bona fide* holder, is submitted to the jury, and there is no pretence of a set-off or other defence, as against the payee. *Robinson v. Crandall*, 9 Wend. 425.

68. Where suits, not affected by the provisions of the revised statutes relative to the limitation of actions and bringing suits by executors and administrators, abate by the death of the plaintiff before judgment, an executor or administrator may bring a new suit, although at the death of the plaintiff the statute of limitations has attached, in case that the suit which has abated was brought before the time limited for bringing the action had expired, and that the new suit be commenced within a reasonable time. *Huntington, Administrator, v. Brinckhoff*, 10 Wend. 278.

69. Such reasonable time is generally one year after the death of the plaintiff, unless there be special causes shown to and approved of by the Court. *Ibid.*

70. Under the revised statutes, it seems, if the time limited has not expired within the year after the death of the plaintiff, the new action may be brought at any time before the expiration of the time limited by statute for the bringing of the action, although after the year. *Ibid.*

71. A replication, showing the commencement of a new action after two years from death of plaintiff, is bad. *Ibid.*

72. A plea of *actio non accrevit*, and that the new action was not commenced within one year after the abatement of the first, is bad. *Ibid.*

73. In the certificate of a circuit judge, that the demand of a plaintiff has been unreasonably resisted by executors, the fact need only be stated without the evidence. If the evidence did not warrant the certificate, application must be made to this Court to set it aside. *Foot et al. v. Gumaer's Executors*, 12 Wend. 695.

74. Proof of proceedings had before a surrogate, for the sale of all the real estate of the testator or intestate, a sale had in pursuance thereof, and a distribution of the proceeds among the creditors, is not competent evidence to establish the fact that the executor or administrator had fully administered the assets of the estate. *Bank of Troy v. Topping*, 13 Wend. 557.

75. The limitation in the act concerning the duties of executors and administrators, requiring a suit to be commenced within six months, where a claim is disputed or rejected by the executor or administrator, being highly penal, is strictly construed. *Elliot v. Cronks, Administrator*, 13 Wend. 35.

76. An administrator is entitled to maintain

an action for the penalty given by statute for the omission to file, within ten days after the sale of property taken as a distress for rent, the landlord's affidavit and the warrant of distress, when such property was taken out of the possession of the administrator. *Holbrook v. White*, 13 Wend. 591.

77. The recovery of a judgment by executors in their representative character is conclusive evidence of their right to sue, in that character, in a subsequent suit founded on such judgment. *Rogers v. Rogers*, 3 Paige, 379.

78. The provisions of the revised statutes, that an executor of an executor shall have no authority to commence or prosecute an action relating to the estate of the original testator, did not abate a suit properly commenced by such substituted executor before the revised statutes went into effect. But the right to continue the suit is suspended until administration *de bonis non* is granted; when the Court, upon a proper application, will make an order that the suit proceed in the name of the administrator so appointed. *Campbell v. Bowne*, 5 Paige, 34.

V. When executors and administrators shall pay, and when recover costs.

79. An executor declared upon a promissory note, and for money lent, &c., in the lifetime of his testator, laying a promise to himself as executor, after his testator's death. Being nonsuited upon the trial, held, that he should not pay costs. *Ketchum v. Ketchum*, 4 Cow. 87.

80. So of an *instimul computasset*, with him, touching accounts of the testator. *Ibid.*

81. The general rule is, that if the executor sue as such, when he might have sued in his own name, if he fail, he shall pay costs; otherwise, if he necessarily sue as executor. *Ibid.*

82. And this depends on the inquiry, whether the cause of action accrued wholly after the testator's death, or wholly or partially before. If wholly after, the executor pays costs on his failure, as in trover upon his own possession, or *assumpsit* for money had and received to his use, or debt for an escape upon his own judgment and execution as executor. Otherwise, if the demand accrued wholly or partially before, as in *assumpsit* upon a promise to the testator. So, if this be followed by promise to the executor in his representative character. And so of debt, for an escape from his testator's judgment and execution, though the escape was after his death. *Ibid.*

83. Where an administrator goes for money had and received to his use after the letters of administration granted, he may sue in his own name; and if he recover less than \$50, must pay costs to the defendant, which may be set off against the damages. *Chamberlin v. Spencer*, 4 Cow. 550. See *Ouylers v. Kniffin et al.* 2 Wend. 243.

84. An executor is not liable to pay costs for not going to trial, if he show any diligence to be prepared for trial, but fail without his fault; as where he has sought to subpoena a material witness, but failed by reason of his keeping out of the way. *Morse v. M'Coy*, 4 Cow. 551.

85. Other cases in which an executor shall pay, or be excused from costs. *Ibid.*

86. Executor allowed to discontinue without costs, on motion, after having stipulated to try, and noticed his cause for trial, but omitting to try it, because he discovered at the circuit that he could not succeed; it also appearing that the action was commenced in good faith. *Purdy, Executor, v. Purdy*, 5 Cow. 14.

87. A cross motion for judgment as in case of nonsuit denied, without costs. *Ibid.*

88. In trover by executors, on a conversion after the testator's death, if they be nonsuited, &c. at the trial, they must pay costs. *Baker v. Baker*, 5 Cow. 267.

89. For they may declare in their own right. *Ibid.*

90. Where executors may declare in their own right, they shall pay costs on nonsuit, &c. *Ibid.*

91. In *assumpsit* by executors brought in the Supreme Court, and referred, they recovered less than \$50. *Held*, that they should not recover costs. *Preuty's Executors v. M'Dougal*, 6 Cow. 612.

92. *Held*, also, that being executors, they were not liable to pay costs. *Ibid.*

93. *Held*, also, that they were bound to pay the referees' fees, within the statute, (1 R. L. 517.) which imposes this upon the prevailing party. *Ibid.*

94. The pleas of *non-assumpsit*, and *non-assumpsit infra sex annos*, plead by executors or administrators, though found against them, are not technically false pleas, so as to subject the defendants personally to costs. *Evans et al., Administrators, ads. Pierson*, 1 Wend. 30.

95. An executor or administrator is liable to costs, on a motion for judgment, as in case of nonsuit, unless he has shown diligence in the prosecution of the suit. *Taylor ads. How, Administrator*, 1 Wend. 34.

96. Where an executor or administrator pleads the general issue, coupled with the plea of *plene administravit*, he is not liable to costs, though the former plea is found against him, if the latter is admitted by the plaintiff. *Pope, Administrator, ads. Delavar et al.* 1 Wend. 68.

97. An executor or administrator is liable for costs in error, only in cases where he would be subjected to costs in the Court below. *Gleason et al. v. Clark, Administrator*, 1 Wend. 303.

98. Costs cannot be recovered in a suit against executors and administrators, unless it be made to appear that the demand on which the action was founded was presented within the time prescribed by statute, and that its payment was unreasonably resisted or neglected, or that the defendants refused to refer the same according to the provisions of the statute. *Potter v. Eitz et al.* 5 Wend. 74. And see *Palmer v. Palmer*, 5 Wend. 91, and *Wooden v. Bayley*, 13 Wend. 453.

99. Where there is a trial, the facts relied on to entitle the party to costs in such cases must be certified by the circuit judge. *Ibid.*

100. To subject an administrator to costs, it must appear that the demand of the plaintiff was unreasonably resisted or neglected. *Nicholas v. Showerman*, 6 Wend. 554.

101. In a reference under the statute for the recovery of a demand due from a testator or intestate, the creditor or claimant is not entitled

to costs, although he obtain a report in his favour, unless the payment of the demand has been unreasonably resisted or neglected; the rule is the same in the case of a reference as when a suit is prosecuted. *Robert v. Ditman*, 7 Wend. 522.

102. Executors and administrators are not liable to costs unless they are guilty of a violation of duty. *Ibid.*

103. When the demand of the claimant is reduced by the referees, or a set-off allowed which the claimant would not allow, the resistance will not be deemed unreasonable. *Ibid.*

104. In a suit by an administrator for a debt created since the death of the intestate, the defendant cannot set off a debt due to him from the intestate. *Fry v. Evans*, 8 Wend. 530.

105. An administrator or executor may join in the same declaration, counts on promises to himself with counts on promises to the intestate or testator; the rule being, that the counts may be joined whenever the money when recovered will be assets. *Ibid.*

106. In a suit against an administrator who suffers a default, costs cannot be taxed without leave of the Court; nor can an execution issue until an account is rendered by the administrator, or an order for execution obtained from the surrogate. *Winne v. Van Schoick*, 9 Wend. 448.

107. On motion to set aside a judgment for costs irregularly entered, the Court will not hear an affidavit of unreasonable delay, &c.; such facts must be shown before entry of the judgment. *Ibid.*

108. Executors and administrators are not liable to costs in suits necessarily prosecuted by them in the right of their testator or intestate, unless the Court shall, upon special application, award costs against them for wantonly bringing any suit, or unnecessarily suffering a nonsuit or nonpros, or for bad faith in bringing or conducting the cause. *The People v. Judges of the Albany Mayor's Court*, 9 Wend. 486.

109. But where they unnecessarily sue in their representative character, as for a cause of action accruing subsequent to the death of their testator or intestate, they are personally liable to costs. *Ibid.*

110. A special application to the Courts for costs is not necessary, where the executor or administrator is personally liable; and in such case an execution may issue, although no account has been rendered of the administration to the surrogate, and no order made by him for execution. *Ibid.*

111. A party asking costs against an executor must bring himself strictly within the statute; it is not enough to show that the executor refused to arbitrate, he must refuse to refer. *Swift v. Blair's Executor*, 12 Wend. 278.

112. It seems, that when costs are granted against an executor, they must be paid out of his own funds. *Ibid.*

113. A judgment for costs in a suit against executors is not erroneous, although it does not appear on the face of the record that the costs were specially awarded by the Court, and a direction given whether they should be levied

de bonis propriis or de bonis testatoris. *Mulke-
ran's Executor v. Gillespie*, 12 Wend. 349.

114. If an executor or administrator commences a suit in Chancery in good faith, upon probable grounds of right, and to enforce a supposed claim of the testator or intestate, he will not be charged with costs. *Manny, Administrator, &c. v. Phillips*, 1 Paige, 479.

115. But if he brings a suit merely to aid a defence at law, he cannot, in case of failure, be excused from costs here, in a case in which costs would be given against him in a suit at law. *Ibid.*

116. Where an executor upon sufficient grounds applies to the Court for direction, he will be permitted to retain the costs of the application out of the property of the testator not specifically bequeathed. *Ibid.*

117. Where executors or administrators, without any sufficient excuse, refuse to pay over to the general guardian funds belonging to infants, they may be personally charged with costs. *Stephens and others v. Van Buren and Wyckoff, &c.* 1 Paige, 479.

118. Where an executor has commenced a wrong suit by mistake, or has ascertained that it would be useless to proceed in consequence of facts subsequently discovered, he will be permitted to discontinue without the payment of the costs. *Arnoux v. Steinbrenner and others*, 1 Paige, 82.

119. Where executors who have no interest in the question are made defendants in Chancery, they are entitled to their costs out of the fund. *Delefield and others v. Cullen and others*, 1 Paige, 139.

120. And if there is a fair question for litigation, and an executor or administrator does nothing more than his duty in attending to the interests of the legatees, he will be allowed his costs out of the fund belonging to them. *Pritchard v. Hicks, &c.* 1 Paige, 270.

121. A creditor may file a bill in Chancery against the personal representatives of his deceased debtor, at any time after they have accepted the trust. But as they have one year for the settlement and adjustment of claims, and for the collecting of debts, and the getting in of the estate, so as to enable them to make a proper distribution according to the statute, the complainant will not be allowed his costs in a suit commenced within that time, unless such suit was necessary for the preservation of the estate. *Butts v. Geyung*, 5 Paige, 254.

VI. Authority of an executor or administrator.

122. A contract by an administratrix to convey lands of her intestate, when a surrogate's order for that purpose shall be obtained, does not vest an interest, though an order be afterwards obtained. *Bridgewater v. Brookfield*, 3 Cow. 299.

123. Such a contract is void, and incapable of being enforced either at law or in equity, both because the administratrix has no interest, and as being contrary to the policy of the act authorizing administrators to sell the real estate of their intestate. *Ibid.*

124. An administrator has no interest in or control over the real estate of his intestate; and

though, after a contract to sell land when a surrogate's order shall be obtained for that purpose, an order be actually obtained, the administrator takes no beneficial interest which can enure to make the contract binding, even if it were not contrary to the policy of the law. *Ibid.*

125. The cases which hold that where one conveys without title, and afterwards becomes owner, this shall enure to the benefit of the grantee, mean that the grantor must acquire a beneficial interest in the premises sold, not a mere naked authority to sell. *Ibid.*

126. A release of irregularity in a judgment by the administrator of a defendant cannot affect the right of heirs; on whose motion the judgment may be set aside, notwithstanding the release. *Spraker v. Davis*, 8 Cow. 132.

127. Executors are esteemed but one person in law, and acts done by one of several, relating to the delivery, sale, or release of the testator's goods, are the acts of all. *Wheeler v. Wheeler*, 9 Cow. 31.

128. Thus one of two executors may assign a note belonging to the estate of their testator. *Ibid.*

129. So he may pledge such note, or assign it as collateral security for a judgment obtained against the estate of the testator. *Ibid.*

130. A release of a debt by two of three administrators, without the concurrence of the other, is good, notwithstanding his dissent. *Murray v. Blatchford et al.* 1 Wend. 563.

131. A release of a debt on a compromise with the debtor, executed by the administrators, though contrary to the wishes of one-third of those entitled to distribution, will not be set aside where there is no fraud or collusion shown between the debtor and the administrators. *Ibid.*

132. An administrator cannot as against creditors retain money remaining in his hands unadministered, to apply on a contract made for the sale of land to the intestate, where the contract has been annulled and cancelled by the vendors. *Harmon v. Durham*, 3 Wend. 367.

133. An executor by virtue of his office becomes a trustee for the devisees and creditors of the testator, when it is ascertained that the personal property of the estate is insufficient to pay the debts of the testator; and in such a case he will not be permitted to sell the real estate of the testator under a judgment held by himself, and to become the purchaser. *Rogers v. Rogers*, 3 Wend. 563.

134. An executor is entitled, in the settlement of his accounts, to be allowed the reasonable charges paid by him to an agent employed in the management of the estate of which he is executor, if the circumstances of the estate rendered the employment of such agent proper and justifiable; and that, whether the employment of an agent is authorized by the will or not. *M'Whorter v. Benson*, 1 Hopk. 98.

135. How far the admissions or acts of one administrator, in reference to the acknowledgment or liquidation of demands against the estate which he represents, are obligatory upon his co-administrator and binding upon the estate, discussed and considered, and various cases

cited and commented upon. *M'Intyre v. Morris's Administrators*, 14 Wend. 90.

136. Where executors are authorized by the last will and testament by which they are appointed, to sell the real estate of the testator, and one or more of the executors neglect or refuse to take upon themselves the execution of the will, a sale by the residue of the executors, who do take upon themselves its execution, is equally valid as if all had joined. *Ibid.*

137. Where a testator directed his executors to pay to one of his sons annually \$200, and also one-fifth of his estate, in case of his reformation from vicious habits; it was held, that the executors acted correctly in not paying over the one-fifth of the estate, until they were satisfied of the son's complete reformation. *Duslan v. Duslan*, 1 Paige, 509.

138. And where a suit to compel such payment had been pending some time, and the executors in their answer expressed a desire and willingness to pay over the money, under the direction of the Court, it was referred to a master to inquire and report whether a permanent reformation had taken place. *Ibid.*

139. And where the executors, not being satisfied of such reformation, had refused to pay over the one-fifth of the estate, they were allowed the costs of defending the suit commenced to compel such payment. *Ibid.*

140. Executors who do not prove the will are superseded by the grant of letters testamentary or of administration to others; and they cannot dispose of any part of the estate until they appear and qualify as executors. *Ogden v. Smith*, 2 Paige, 195.

141. Where a part only of the executors qualify and accept the trust, those who qualify will have full authority, without the others, to execute a power to convey real estate, which is by the will conferred on the executors named therein. *Ibid.*

142. An executor is entitled, out of the assets in his hands, to retain a debt due him by the testator in preference to other creditors of the same degree. *Decker v. Miller*, 2 Paige, 149.

143. He is also entitled to the same preference in applying the assets in the hands of his co-executor to the satisfaction of his debt. *Ibid.*

144. An executor who is indebted to the estate may refuse to pay, out of such debt, a demand claimed against the estate by his co-executor, until he is satisfied that the other assets are insufficient to discharge such demand of his co-executor. *Ibid.* See *Rogers v. Rogers*, 503.

145. Where such executor has a right to ask the aid and protection of the Court, in paying over the debt due by him to the testator, he will be entitled to his costs out of the fund. *Ibid.*

146. So, if the executor who was the creditor of the estate had a right of preference over other creditors, and was compelled to come into Chancery to obtain such preference, his costs will be paid out of the fund. *Ibid.*

147. Where the power to sell given to executors by the will is special, it can only be exercised in the mode prescribed by the testator.

Pendleton and wife v. Fuy and others, 2 Paige, 202.

148. Where an executor was authorized to sell the real estate at public vendue, to pay off the legacies to the children of the testator as they became of age, and he sold the property at private sale to raise money for his own use before the legacies became payable, the sale was held to be void. *Ibid.*

149. An executor or guardian may employ a clerk or agent, and charge the estate with the expense, where, from the peculiar nature or situation of the property, the services of such clerk or agent will be beneficial to the estate. *Van Derheyden v. Van Derheyden*, 2 Paige, 267.

150. But for his own services, the executor or guardian must be confined to the allowance by way of commissions as fixed by law. *Ibid.*

151. An agreement by an administrator to convey the real estate of the intestate previous to obtaining the surrogate's order of sale, and in anticipation thereof, is illegal and void. *Bolt v. Rogers*, 3 Paige, 154.

VII. Action on the administration bond.

152. Where two actions were brought upon an administration bond, under the statute, (vide 1 R. L. 447.) to recover two several claims in favour of the same plaintiff, the Court ordered them to be consolidated. *People v. McDonald*, 1 Cow. 189.

153. And in such an action, assigning for breach the not filing an inventory, &c. within six months, where it is not shown that the relator suffered any injury from the omission, is improper; and such an assignment was ordered to be stricken out of the declaration. *Ibid.*

154. The relator being within the jurisdiction of the Court, proceedings on his part will not be stayed till security for costs is filed. *Ibid.*

155. The collection of the costs against him may be enforced by attachment. *Ibid.*

156. To sustain an action upon an administrator's bond, put in suit for the benefit of a creditor, it is necessary to show not only an order of the surrogate directing the prosecution of the bond, but also a decree made by him for the payment of the debt, and the omission of the administrator to comply with the decree. *The People v. Burnes et al.* 12 Wend. 492.

EXTINGUISHMENT.

1. A judgment in a Justice's Court is not extinguished by a judgment subsequently obtained upon it in another Justice's Court; the general principle governing such cases is that a security of a higher nature extinguishes inferior securities, but not securities of an equal degree. *Andrews v. Smith*, 9 Wend. 53.

See PAYMENT.

FALSE IMPRISONMENT.

1. Where a party made oath and demanded an execution of a justice, under the third proviso to

the fourteenth section of the fifty dollar act, (sess. 47, ch. 233, p. 287.) and the justice, by mistake, issued it against the body, and the defendant was arrested thereon without the plaintiff's knowledge; who, as soon as he knew of the mistake in the execution and of the arrest, ordered the defendant to be discharged; *held*, that the defendant could not maintain false imprisonment against the plaintiff. *Taylor v. Trask*, 7 Cow. 249.

2. A party in a Justice's Court is not accountable for the issuing of process, unless he direct or sanction it. *Ibid*.

3. Otherwise, as to process issued by his attorney in a Court of record. *Ibid*.

4. *Semble*, that a warrant for the examination of a pauper, under the statute, (1 R. L. 281, s. 7.) may be directed to any constable of the county where the pauper resides. But it cannot be executed by a constable of any other town than that where the pauper resides. *Reynolds v. Orvis*, 7 Cow. 269.

5. Where justices issued such a warrant, directed and delivered by them to a constable of another town, who arrested and brought the pauper before one of them and another justice; and these two justices examined the pauper, and made an order of removal, which was executed; *held*, that the proceedings were *coram non-judice* and void, though no objection was made by the pauper to the informality. *Ibid*.

6. *Held*, that false imprisonment would lie, in such case, against the justices who issued the process, and delivered it to the constable. *Ibid*.

7. Otherwise, had the pauper appeared voluntarily, and submitted to an examination. *Ibid*.

8. Where a statute requires that a certain person shall execute process, and it is executed by another, such a proceeding is void. It gives no jurisdiction; and all the subsequent proceedings upon it are *coram non-judice* and void. *Ibid*.

9. A warrant issued from a Justice's Court, against "John Doe, the person carrying off the cannon," intended of Levi Mead, who was, when it issued, in the act of carrying off a cannon, and for whom it was intended. Being arrested under it, *held*, that Mead might maintain trespass against the persons concerned in the arrest. *Mead v. Haws*, 7 Cow. 332.

10. The arrest of a person by a wrong name cannot be justified, though he was the person intended, unless it be shown that he was known as well by one name as the other. *Ibid*.

11. In false imprisonment, brought by a defendant in ejectment against a lessor of the plaintiff in the ejectment suit, for an arrest on a *ca. sa.*, on the ground of the judgment having been subsequently set aside for irregularity, it is not sufficient to sustain the action, that an arrest was made on a *ca. sa.* in favour of the nominal plaintiff in the ejectment suit against the defendant. There must be some collateral evidence to connect the execution with the judgment, and the lessor with the execution. The coincidence between the sum of the judgment and execution does not sufficiently connect them; and it should be shown that the lessor, or his attorney, issued the execution, or

that one of them was in some way privy to it, or had recognised it. *Brown v. Dermont*, 9 Cow. 263.

12. Where an offender, arrested under a warrant endorsed in pursuance of the act "for the better apprehending of felons and other offenders," was taken into the county where the magistrate resided who issued the warrant, which was not the county where the offence was committed; *it was held*, that an action for false imprisonment was properly brought, the officer having neglected to comply with the requirements of the statute. *Green v. Ramsey*, 2 Wend. 611.

13. False imprisonment will lie against an officer and a complainant in a criminal prosecution, where by operating upon his fears they extort money from the party accused, though he be in the custody of the officer under a valid warrant. *Holley v. Mix et al.* 3 Wend. 350.

14. In an action for false imprisonment against two, where several damages are given, the plaintiff may cure the irregularity by entering a *nolle prosequi* against one, and taking judgment against the other. *Ibid*.

15. A misnomer in a warrant of the person arrested subjects those who execute it to an action for false imprisonment. *Scott v. Ely and White*, 4 Wend. 555.

16. False imprisonment will not lie against a plaintiff who insists in a Justice's Court that he is entitled to a general judgment against a defendant, notwithstanding an insolvent discharge exempting the body of the defendant from execution, obtains such judgment, and procures an execution to be issued, on which the defendant is arrested. *Brown v. Crowl*, 5 Wend. 298.

17. Although the judgment be erroneous, the point having been discussed and judicially decided, the plaintiff is protected by the judgment. *Ibid*.

18. Where a resort is had to management or artifice to deprive a defendant of the benefit of exemption from execution against his body, *it seems* the action will lie. *Ibid*.

19. In a warrant issued under the act to suppress immorality, it is not necessary to state the circumstances which gave the magistrate jurisdiction; they may be shown *aliunde* in an action against him for false imprisonment. *Atchinson v. Speneer*, 9 Wend. 62.

20. In an action for false imprisonment, on the assessment of damages by writ of inquiry after a default, evidence denying the cause of action, or tending to show that no right of action exists, is inadmissible in mitigation of damages. *Foster v. Smith et al.* 10 Wend. 377.

21. Damages in such case must be assessed on the assumption that the trespass complained of has been committed. *Ibid*.

22. In an action for false imprisonment for an arrest on a *ca. sa.*, set aside as irregularly sued out previous to the issuing of a *ft. fa.* in a bailable action; *it was held*, that the plaintiff was not bound to show that notice of bail in such action had been regularly given. *Chapman v. Dyett*, 11 Wend. 31.

23. It is no defence to such action that the

plaintiff has assigned his interest in the same to a third person. *Ibid.*

34. Whether such cause of action is assignable? *Quære. Ibid.*

FENCES.

1. In what cases and against what animals the owner of a close is bound to fence, at common law, by statute, by agreement, by prescription. 1 Cow. 79, note (a).

2. Whether the cattle, &c., may lawfully run at large on the highway by virtue of a town law? *Quære. Ibid.*

3. Without such law, they may not. *Ibid.*

4. The law of partition and other fences considered. *Ibid.*

5. Where cattle are rightfully feeding upon commons, either such as belong to the town or such as are thrown up to common feeding, under the act, (3 R. L. 133, s. 17.) the owner of crops is bound to make fences against such cattle, or he cannot maintain trespass. *Holladay v. Marsh*, 3 Wend. 142.

6. Cattle can be thus rightfully feeding only in pursuance of a regulation adopted in town meeting. *Ibid.*

7. Where a party removes a division fence, without having previously given three months' notice, the party injured thereby is not limited to a suit for the recovery of actual damages sustained in consequence of such removal, but may, after a month's notice, make the fence anew, and recover the expense thereof, by action. *Richardson v. M'Dougall*, 11 Wend. 46.

8. If actual damages are sustained, as the loss of a crop for instance, caused by the removal of the fence, an action for the recovery of such damages, as well as a suit to recover the expense of making the fence, may be sustained. *Ibid.*

9. The rule is not invariable that a crooked fence will be regarded as a boundary fixed, and acquiesced in by the owners of adjoining lands, although it has been continued for thirty years. If such fence divides but a small portion of the possessions; if there be a fence on the true line dividing another portion; if for nearly half the length of the line between the adjoining owners there be no fence or actual occupation on either side; and if there be no agreement to abide by the crooked fence as a boundary, the party deprived of his land by the crooked fence is not concluded from showing the true line, especially if after such lapse of time the other party, by his declarations and acts, admits that such fence is not a fixed and settled boundary. *Lamb v. Cove*, 15 Wend. 642.

FISHERIES.

1. One may prescribe for an exclusive right of fishing in an arm of the sea where the tide ebbs and flows. But such prescription must be clearly proved. Every presumption is against it. *Gould v. James*, 6 Cow. 369.

2. A several fishery, in an arm of the sea

where the tide ebbs and flows, may be derived from a grant or prescription. *Ibid.*

3. *Prima facie*, the fishery in navigable rivers is public; and if any one has an exclusive right, he must show it. *Ibid.*

4. The patent to the inhabitants of Oyster Bay conveyed all the lands under water within the bounds of that grant, together with the exclusive right of fishing in the waters within the same. *Ibid.*

5. Such right is the common property of the town, and may be regulated by rules adopted in town meeting, but so as not to occasion a common annoyance to the passage of ships or boats, and subject also to the laws for the conservation of fish or fry. *Ibid.*

6. By the common law, the king has the property of the soil in all rivers which have the flux and reflux of the sea, and not the lord of the manor adjoining, without grant or prescription; and every arm of the sea or navigable river, so high as the sea flows and reflows, belongs to the king; but by grant or prescription, a subject may have the interest in the water and soil of navigable rivers. The king may grant fishing within a creek of the sea, or within some known precinct that hath known bounds, even within the main sea. The sixteenth chapter of *Magna Charta*, though restricting the king as to the occupancy of rivers for his pleasure, did not prohibit him from granting the lands under the rivers and navigable waters in his realm at his will and pleasure. *Rogers v. Jones*, 1 Wend. 237.

7. Oysters planted by an individual in a bed clearly designated and marked out in a bay or arm of the sea, which is a common fishery to all the inhabitants of the town in which the bay is situated, are the property of him who planted them, and for any interference with them by another, trespass lies. *Fleet v. Hegeman*, 14 Wend. 42.

8. It seems, that if a bed thus planted interfered with the exercise of the common right of fishing, or if the oysters were undistinguished from others in the public waters, the interest of the owner in them would be subservient to the enjoyment of the public use. *Ibid.*

FORCIBLE ENTRY AND DETAINER.

1. The same circumstances of violence of terror which will constitute a forcible entry, will amount to a forcible detainer. *People v. Rickert*, 8 Cow. 226.

2. *E.g.* threats of bodily hurt to the former possessor, if he shall return, though he make no attempt to re-enter. *Ibid.*

3. The defendant, having entered peaceably, said to the former possessor, "It will not be well for you, if you ever come upon the premises again by day or night." It was left to the jury whether this was a threat of personal violence, and so a forcible detainer within the statute. They found it was; and, on motion for a new trial, it was refused. *Ibid.*

4. The title of the defendant is not in question on the trial of an indictment for a forcible entry or detainer. *Ibid.*

5. Under an indictment for a forcible entry and detainer, the jury may find the defendant guilty of a forcible detainer only. *Ibid.*

6. A party in actual peaceable possession of lands at the time of a forcible entry, or in the constructive possession thereof at the time of a forcible holding out, is entitled to proceed under the statute of forcible entries and detainers, although he is neither seized of a freehold, nor possessed of a term of years in the premises. *The People v. Van Nostrand*, 9 Wend. 51.

7. Proof of actual possession is sufficient to support the allegation in the inquisition, that the complainant was possessed in fee simple. *Ibid.*

8. On an application for process under the act relative to forcible entries and detainers, an affidavit that the complainant was lawfully and peaceably possessed of the premises in question as tenant thereof, under the executors of A. B. deceased, who was the owner of the same, without setting forth the nature of the estate by virtue of which such possession was held, is sufficient within the provisions of the statute upon objection taken after an inquisition finding the complainant to be tenant at will. *The People*, ex rel. *M'Inroy*, v. *Reed*, 11 Wend. 157.

9. A mere intruder or trespasser could not institute proceedings under the statute relative to forcible entries and detainers, and be restored to the possession which he held unlawfully; but any person having lawfully any right to the possession, and forcibly excluded from such possession, is entitled to its benefit. *Ibid.*

10. The complainant's interest, under the act relative to forcible entries and detainers, should be truly stated; but if a lawful possession is averred, it is sufficient, unless the want of precision in the statement of the complainant's right is objected to before the judge previous to the taking of the inquisition. *Ibid.*

11. The defendant is entitled to produce witnesses before the jury of inquiry, to cross-examine the complainant's witnesses, and to sum up the evidence to the jury. *Ibid.*

12. A provision in the statute, that the judge before whom such complaint shall be made may, at the request of either party, issue his *subpoena* requiring any person to appear and testify before him, is to be construed as if the word *shall* had been used. *Ibid.*

13. In an indictment under the act to prevent forcible entry and detainer, (1 R. L. 96,) the defendant may be convicted of forcible detainer only. *The People v. Godfrey*, 1 Hall, 240.

14. In a prosecution of this nature, the title to the premises as between the defendant and the relator cannot be inquired into, although the latter is bound to set forth his title, so far as to show himself to be within the provisions of the act. That title may be controverted by the defendant, but he cannot set up his own as a substantive matter of defence, because the question of title cannot be tried in this action. *Ibid.*

FOREIGN SENTENCE.

1. In an action on a policy of insurance, upon a British ship, by an American underwriter,

with a warranty against seizure for illicit trade, the defence was, that she was seized in a British port, and condemned by a Court of Admiralty there, for illicit trade; *held*, that the condemnation was not conclusive against the assured. *Francis v. The Ocean Insurance Company*, 6 Cow. 404.

2. A citizen or subject of a country is not to be deemed a party to a sentence of confiscation in its Courts, and therefore concluded by it as his own act. *Ibid.*

3. And so, it seems, of a statute, or any other public authoritative act of his government; as an embargo. *Ibid.*

4. It seems, that a foreign sentence of condemnation is *prima facie* evidence that the causes of condemnation mentioned in it exist, and of the authority of the Court to pronounce sentence; and throws it upon the party who denies the existence of the causes or the jurisdiction of the Court, to do them away by evidence on his part. *Ibid.*

5. So of the regularity of the proceedings. *Ibid.*

6. Any government may lawfully provide for the seizure of vessels, or property belonging to its own subjects, for a breach of its municipal regulations, either on the high seas or within its own territorial limits; and so of their subjects themselves. *Ibid.*

7. And so, it seems, of vessels belonging to foreigners. *Ibid.*

8. Where a seizure and condemnation was, in terms, for breach of some or one of the British laws relating to trade and navigation; *held*, that the party who would avail himself of the sentence, must not only show the proceedings of the Court, but the existence of the law under which the condemnation took place, by the usual evidence. *Ibid.*

9. The libel and sentence are not evidence of the statute law upon which they are founded. *Ibid.*

FORGERY.

1. Where the instrument forged was in possession of the party at the time he uttered and published it, is *prima facie* evidence that it continues under his control at the time of the trial. *People v. Kingsley*, 9 Cow. 522.

2. Certain coal being consigned to P. of New York, arrived there, and was claimed by another of the name of P., who resided in the same city, but was not the true assignee; and he, knowing this, obtained an advance of money, on endorsing the permit for the delivery of the coal, with his own proper name; *held*, that this was forgery, and not the merely obtaining goods upon false pretences. *People v. Pascoch*, 6 Cow. 72.

3. The forgery of a writing purporting to contain a mere naked promise to pay a sum of money in labour, expressing no consideration, and being connected with no consideration by averment in the indictment, is not an indictable crime. *People v. Shall*, 9 Cow. 778.

4. Forging any instrument or writing which, it appears on the face of the indictment, would

have been void if genuine, is not an indictable crime. *Ibid.*

5. Where an order for the delivery of goods was accepted, paid, and returned to the drawer, and the date of the paper subsequently altered by him with a fraudulent intent; such alteration is not forgery at common law. *The People v. Fitch*, 1 Wend. 198.

6. The cutting out a brand mark is an alteration within the meaning of the act. *Smith v. Brown*, 1 Wend. 231.

7. Where, in an indictment for forgery, two distinct offences requiring different punishments are alleged in the same count, as where the forging of a mortgage and of a receipt endorsed thereon, are both charged in the same count, and the defendant be convicted, the judgment will be arrested. *The People v. Wright*, 9 Wend. 193.

8. In charging the forgery or felonious alteration of a mortgage, with the intent to defraud the mortgagor, it must be averred that there are in fact such lands as are described in the instrument, and that the mortgagor had an interest or right in the same. *Ibid.*

9. A check on a bank, charged in an indictment for forgery to be addressed to the cashier thereof, is correctly described where the check is in the form of a letter, addressed on the back thereof to the cashier, although in the inside of the letter there be no direction whatever. *The People v. Gumaer*, 9 Wend. 272.

FRANCHISE.

1. For the invasion of a franchise or mere incorporeal right, the remedy is by action on the case; but when the visible, tangible, corporeal property of a party is injured, if the injury be direct, immediate, and wilful, trespass is the proper form of action, although the property injured may be connected with, or be the means by which the incorporeal right is enjoyed. *Wilson v. Smith*, 10 Wend. 327.

2. Where the injury is direct and immediate, proceeding from the wilful and intentional act of the defendant, the action must be trespass; but if the injury be attributable to negligence, though it be immediate, either case or trespass may be brought. *Ibid.*

3. Where case is brought when the action should be trespass, if the objection be taken on the trial, the plaintiff will be nonsuited. *Ibid.*

FRAUDS.

I. Of frauds, and how they are relieved against.

II. Consequences of lands, sales of chattels, judgments, executions, and other acts to defraud creditors and purchasers at common law, and under the statute.

III. Leases, &c. by parol only; assignments, grants, or surrenders of interests in land, &c.

IV. (a) What writing is sufficient; (b) Promise to answer for the debt, default, or miscarriage of another person; (c) Contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning them; (d) Agreement not to be performed within a year.

V. Contracts for sale of goods.

VI. What will take a case out of the statute.

I. Of frauds, and how they are relieved against.

1. A specialty (e. g. a lease under seal) cannot be impeached at law, on the ground of fraud or misrepresentation as to its consideration or the motives of its execution. *Jackson v. Hills*, 8 Cow. 290.

2. The distinction between jurisdiction of fraud at law and in equity is, that in the former Court it must be proved, and cannot be presumed; whereas in the last it may be presumed. Per *Woodworth, J. Gallatin v. Cunningham*, 8 Cow. 361.

3. It is a proper head of equitable jurisdiction to relieve against fraudulent deeds. *Comstock v. Aphorpe*, 8 Cow. 386.

4. An answer, denying all knowledge and belief of the alleged fraud, is not sufficient whereon to dissolve an injunction against ejectments prosecuted on such deed. *Ibid.*

5. An injunction is, in such case, properly auxiliary to the relief sought; as the Court of Chancery takes the whole controversy into its hands, to prevent double litigation, and give more effectual relief than can be done at law. *Ibid.*

6. It is the practice of the Court of Chancery to order deeds and other papers, contested as false and fraudulent, to be brought into Court for inspection. *Ibid.*

7. In an action at law on a specialty, fraud in relation to its consideration is no defence. *Dak v. Roosevelt*, 9 Cow. 307.

8. But relief may be had in equity. Per *Viele*, Senator. *Ibid.*

9. If a judgment is taken for a larger amount than is actually due for the purpose of defeating another creditor, the plaintiff is liable to the penalty given by the statute of frauds. *Wilder et al. v. Pondy et al.* 4 Wend. 100.

10. The motives of a party in entering judgment upon a bond and warrant where he has no security besides the judgment cannot be questioned; but where he has other security, and takes the only fund against which the rest of the creditors can proceed, his motives may be submitted to the consideration of a jury. *Ibid.*

11. The statute of frauds reaches fraudulent executions as well as fraudulent judgments. An execution for the full amount of a *bona fide* judgment, where the whole or a part of the judgment is satisfied, is within the operation of the statute. *Ibid.*

12. There is no such thing as fraud in law as distinguished from fraud in fact; what was formerly considered as fraud in law, or conclusive evidence of fraud, is now held to be but *prima facie* evidence, to be submitted to, and passed upon by a jury. *Jackson v. Timmerman*, 7 Wend. 437.

13. Under the act of 1825, "to prevent fraudulent bankruptcies by incorporated companies," an action prosecuted by receivers in the name of a corporation, may be maintained against a bank director for the penalty incurred by paying

out a portion of the capital stock of the company to a stockholder, although it be admitted by the pleadings that the bank had been insolvent for one whole year, had during that time neglected to redeem its notes, and had suspended the ordinary business. In the declaration, however, it must be averred that the suit is prosecuted by the direction of the receivers. *The Bank of Niagara v. Johnson*, 8 Wend. 645.

14. Such suit may be brought in the name of the corporation, although the act declares that any company violating its provisions shall be deemed to have surrendered its rights, &c., and shall be deemed to be dissolved; the surrender and dissolution spoken of in the act is but *quasi*; the company remain *in esse* until formally adjudged to be dissolved. *Ibid*.

15. Since the revised statutes, the receiver in such cases is authorized to bring actions in his own name. *Ibid*.

16. A debtor proceeded against by warrant, under the act to abolish imprisonment for debt and to punish fraudulent debtors, cannot be committed, but is entitled to be discharged, if he tender a bond that he will not remove any property that he then has out of the jurisdiction of the Court, and will not assign or dispose of his property with the intent to defraud his creditors, although the officer issuing the warrant be satisfied that the allegations of the complainant charging the debtor with fraud be substantiated, and such charges be as broad as the cases enumerated in the act. *Townsend v. Morrell*, 10 Wend. 577.

17. Where an officer under this act erroneously commits a debtor to jail, the remedy of the party, it seems, is by *certiorari*, and not by *mandamus*. *Ibid*.

18. After commitment, if the debtor complies with the requirements of the act, and the officer refuses to discharge him, it seems a *mandamus* would lie. *Ibid*.

19. An officer before whom a debtor is brought, under the act to punish fraudulent debtors, must commit such debtor, notwithstanding the debtor makes and delivers an inventory of his estate for the purpose of assigning his property, if the judge is satisfied that the proceedings on the part of the debtor are not just and fair. *Clarke v. Wright*, 10 Wend. 584.

20. If a defendant arrested on a warrant under the act to punish fraudulent debtors does not, when brought before the officer, controvert the facts and circumstances on which the warrant issued; and verify his allegations by his own affidavit, or by proof, it is the duty of the officer to commit him. *Spencer v. Hilton*, 10 Wend. 608.

21. The complainant is not bound to produce proof to substantiate his charges until after the same have been controverted by the defendant's affidavit, or by proof. *Ibid*.

22. Where the officer improperly discharges the complaint, the remedy is by *certiorari*, and not by *mandamus*. *Ibid*.

23. An assignee of a chose in action will be protected in a Court of law against the acts and declarations of the assignor subsequent to the assignment. *Kimball v. Huntingdon*, 10 Wend. 675.

II. Conveyances of lands, sales of chattels, judgments, executions, and other acts to defraud creditors and purchasers at common law, and under the statute.

24. Where F. purchased of R. a tract of land on the bank of the Ohio river, R. representing and believing that it contained a valuable coal mine; and besides paying to R. \$4400, F. covenanted to pay him an annuity of \$1000 for ten years; which annuity was to cease, if, after the mine was faithfully worked by F., it should not yield a certain quantity of coal; and the land was accordingly conveyed by R. to F. It turning out in fact that there was not such a coal mine as was represented by R., a perpetual injunction was granted to restrain R. from prosecuting at law for the annuity, though it did not appear that R. had been guilty of fraud. *Roosevelt v. Fulton*, 2 Cow. 129.

25. *Held*, also, that as there was no such coal mine in the land as was represented, F. need not work the mine in order to determine the quantity of coal. *Ibid*.

26. The nondelivery of property on sale is only one circumstance in proof of fraud, and may be explained. *Butts v. Smartwood*, 2 Cow. 431.

27. Chancery may relieve against deeds or judgments obtained by fraud or imposition, or where, if regularly obtained, there are circumstances of extraordinary hardship, or great inadequacy of consideration; but the party asking equity must do equity, and he must not on his part have been guilty of fraud or chicanery. The hardship should not be the consequence of his own misconduct, nor should he delay coming for relief till the situation of the parties is so far changed, that they cannot be reinstated in their original right. *McDonald v. Neilson*, 2 Cow. 139.

28. The possession of goods continuing in the vendor after sale is not conclusive, but only *prima facie* evidence of fraud as to creditors, and may be explained. *Bissell v. Hopkins*, 3 Cow. 166.

29. It is a sufficient explanation that the sale was *bona fide*, and for a valuable consideration, and that the possession of the vendor was in pursuance of some agreement not inconsistent with honesty in the transaction; as where a tenant sells oxen to his landlord, in payment of rent, upon an agreement that the former should retain them to work his farm. *Ibid*.

30. So where D. mortgaged a mare and various other personal chattels to H. to secure an honest debt, but retained possession of the mare with H.'s consent, in order to settle and close D.'s business as constable, he having no other horse, and also retained possession of the other articles to carry on his business; *held*, a sufficient explanation, and that this was not fraudulent as to creditors. *Ibid*.

31. A bill of sale of chattels, declaring that it is to secure a debt, and providing that on payment of the debt by the articles or otherwise, the surplus and remaining articles shall be released to the vendor, is a mortgage; and possession of the chattels continuing in the mortgagor is not evidence of fraud. *Ibid*

33. Merely leaving property levied upon in the possession of the defendant in the execution, though with the plaintiff's consent, is not *per se* fraudulent, either as against subsequent creditors or purchasers. *New v. Barber*, 3 Cow. 272.

33. Otherwise, where the sheriff is directed to delay the execution or sale. *Ibid.*

34. W., a man seventy-four years age, owning a considerable real estate, the father of seven children, and whose wife was sickly and irritable, was troubled for several years with dissensions among his children about the management of his property, his wife taking part with all his children on one side, except Wm. and J., two of his sons, who took part with him; and the dissensions ran so high, that the mother and the children who took part with her departed, leaving W. and his two sons Wm. and J. in possession of the property, the management of which was confided by their father to them, as it had been for some time before the family was broken up. W. was credulous, and easily led by Wm., and shortly after his wife left him, he was sued in a Justice's Court for her board; and on asking Wm.'s advice, Wm. told him that if he intended giving him any thing, he wished he would do it; that as he and his mother were conducting, he would soon have nothing to give. W.'s fears becoming alarmed by a belief that his wife would dissipate his property, in order to place it beyond the reach of debts which she might contract, he was induced to convey most of his real and personal estate to these two sons in fee, amounting to more than \$9000 and a farm, &c. to Wm. in trust for another son; but which trust was declared by parol only: Though he had before declared an intention to give all his estate to Wm. and J. by way of advancement; and though they executed to him a bond and mortgage to secure his and his wife's maintenance, and \$50 a year, &c. during their lives; yet, *held*, that the conveyance executed under such circumstances was void, as being caused by fraud, undue influence, and unfounded alarm, excited or countenanced by Wm.; and being also for an inadequate consideration; and though J. might have had no part in bringing it about, yet *held*, that it was void as to him. *Whelan v. Whelan*, 3 Cow. 537.

35. To warrant relief, for any cause, in a Court of equity (e. g. undue influence in procuring a conveyance,) it must be stated in the bill; but the charge need not be direct; it is sufficient if, on a hearing upon the pleadings and proofs, the ground of relief can be gathered from an examination of the whole bill. *Ibid.*

36. A conveyance obtained by children from a father will not be sanctioned by a Court of equity, if it appear to have been caused by an abuse of confidence reposed by him in his children, who, for the purpose of procuring it, took advantage of his age, imbecility, and partiality for them, the conveyance being also for an inadequate consideration. *Ibid.*

37. A conveyance by a father seventy-four years of age, his wife being nearly seventy years of age, and in delicate health, to his two sons, of real and personal estate worth more than \$9000, taking from his sons a bond and mort-

gage to secure his and his wife's maintenance, and an annuity of \$50 during their lives; *held*, to be for a consideration grossly inadequate; it not appearing to be intended as an advancement. *Ibid.*

38. If a representation be made by one to another who is going to deal in a matter of interest upon the faith of that representation, the former shall make it good. *Ibid.*

39. He who bargains in a matter of advantage, with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence. *Ibid.*

40. One, falsely supposing his estate in danger, conveys it to his sons, who know that it is not in danger, but neglect to set the grantor right; this concealment is a sufficient ground for avoiding the conveyance. *Ibid.*

41. Where a grant is made by an aged father to his children with whom he lives, who have the management of his property, and in whom he reposes particular confidence, if a Court of equity sees that any acts or stratagems, or any undue means, or the least speck of imposition, or the least acintilla of fraud entered into the bargain, it will avoid the grant. *Ibid.*

42. A deed procured by fraud or undue influence is void, and will be set aside in equity, not only as against the one who practised the fraud or exerted the influence, but as to third persons who have acquired interests under it, though they may be perfectly innocent: thus undoing the whole transaction. *Ibid.*

43. Marriage is a valuable consideration, and a voluntary deed ceases to be so, if a marriage be induced by its provisions; but it should appear in evidence that it was the cause of the marriage. The mere fact that one holding a voluntary conveyance of property marries, will not make the conveyance good. *Ibid.*

44. Whether a marriage induced by a conveyance or settlement obtained by fraud or undue influence will make it good? *Quære. Ibid.*

45. All persons concerned in the demand, or who may be affected by the relief prayed, ought to be parties to a bill in equity, if within the jurisdiction of the Court; but to a bill filed against one to set aside a deed of bargain and sale of land absolute on its face, though the parties agreed by parol that it should be in trust for another, the latter need not be made a party; for the trust, not being declared by writing, is void. *Ibid.*

46. A trust must be manifested and proved by writing, or it is void within the statute of frauds. *Ibid.*

47. A father, having guaranteed the payment of a judgment against S., who had lands by the judgment, which, at a fair value, might well be supposed sufficient to pay the judgment, then disposed of all his real estate, by giving to his son a full covenant deed in fee, and taking from the son a bond to himself (the father) to pay an annuity for his life. The son, also, in consideration of the deed, gave separate bonds to two of his sisters for their portions; after which, the property of I. was exhausted by executions upon the judgment, and proved insufficient to pay the judgment; and the father was sued upon his guarantee, and had judgment against

him, on execution upon which the real estate thus conveyed for the benefit of his children was sold. In ejectment by the purchaser, the jury found against all actual fraud in the parties. *Held*, that the conveyance was not legally fraudulent, as against the creditor on the guarantee. Per *Spencer, Allen, and Stebbins*, Senators. But per *Jones*, Chancellor, *quære*. *Seward v. Jackson*, 8 Cow. 406.

48. A conveyance from a parent to a child, in consideration of love and affection, is not absolutely void as to creditors; but the presumption that it is fraudulent may be repelled by circumstances. Per *Spencer*, Senator, citing *Hinde's Lessee v. Longworth*, 11 Wheat. 213.

49. Even admitting this doctrine to be otherwise, as to present subsisting debts, yet an unbroken guarantee for the payment, a warranty of title to land, and the like, are not subsisting debts, within the meaning of the cases as to which a voluntary conveyance by the guarantor, warrantor, &c., would be fraudulent, *per se*; but in such a case, actual fraud should be proved. Per *Stebbins*, Senator. *Ibid*.

50. A voluntary settlement, or conveyance by way of advancement of children, after marriage, by a person indebted at the time, is fraudulent and void against all his creditors who were such prior to the settlement or advancement; and that without regard to the amount of their debts, or the extent of the property settled, or the circumstances of the person who makes the settlement or advancement. *Jackson v. Seward*, 5 Cow. 67.

51. This rule applies to a debt due from a person as guarantor; though it be contingent, till after the settlement or advancement; and though it be such a debt at the time as could not be proved under an English commission of bankruptcy, or under our insolvent acts. *Ibid*.

52. But with regard to debts contracted subsequent to the settlement or advancement, it seems, that the presumption of fraud arising in law may be repelled by circumstances. *Ibid*.

53. A father, having guaranteed the payment of a certain judgment against S., who had lands bound by the judgment which, at a fair valuation, might well be supposed sufficient to pay the judgment, then disposed of all his real estate, by giving to his son a full covenant deed, and taking a bond to himself for an annuity for his life; and the son also, in consideration of the deed, gave separate bonds to two of his sisters for their portions; after which, the property of S. was exhausted by execution, and proved insufficient to pay the judgment; and the father was sued upon his guarantee, and had judgment against him, on execution upon which the real estate thus conveyed for the benefit of his children was sold. On ejectment by the purchaser, though the jury found against all actual fraud; yet, *held*, that the advancement was fraudulent in law, and void as against the debt due by the guarantee. *Ibid*.

54. *Reade v. Livingston* (3 John. Ch. Rep. 491.) in equity considered; and its doctrine applied to a Court of law. *Ibid*.

55. C., a merchant in failing circumstances, executed to trustees sundry deeds of assignment of his property in trust to pay his credit-

ors, who were thereby ranked into classes, and were to be paid in a certain order of priority. One of the deeds declared a trust, to pay a certain sum annually, for a limited time, to C., the debtor; and all the assignments were subject to this trust. By another of the deeds, any creditor who should attach any of the debtor's property was to be excluded from the benefit of the trusts; which last provision was subsequently annulled. Afterwards, fearing that the assignments might not prove valid, C. confessed a judgment to the same trustees, upon the same trusts for creditors; but without the reservation in his own favour; which judgment was intended to be resorted to only in case the assignment should not be adjudged valid. *Held*, that both the assignments and judgment were void in toto, being a fraud upon creditors. *Muckie v. Cairns*, 5 Cow. 547.

56. An assignment in fraud of creditors being valid as between the parties, the assignee cannot take a judgment and execution, which shall bind the subject of the assignment, until this is annulled, released, or abandoned, so as to revert the property in the assignor. *Ibid*.

57. The intention to use a judgment confessed by a fraudulent assignor to a fraudulent assignee, only in case the assignment should be adjudged invalid, connects the judgment, and infects it with the vices of the assignment. *Ibid*.

58. An insolvent debtor may pay some creditors in preference to others; and may secure his preferred creditors by assignment or judgment in trust for such creditors; but he can make no assignment of any part of his property in trust for himself; and if the security for the benefit of his creditors contain any such provision, or be intended to come in aid of another security containing such provision, it is void not only for the portion reserved, but for the whole; not only in equity, but at law. *Ibid*.

59. A deed or judgment void in part, as being a fraud on creditors, is void in toto. *Ibid*.

60. A contract or judgment illegal and void in part, as being against the provisions of a positive statute, is illegal and void in toto. *Ibid*.

61. The cases of *Murray v. Riggs*, (15 John. 571, 2 John. Ch. Rep. 565, 580, S. C.) *Estwick v. Calland*, (5 T. R. 420, 2 Anstr. 381, S. C.) and *Tarback v. Marbury*, (2 Ven. 510.) considered and explained in reference to the question, whether an insolvent debtor may, in a deed of trust for the benefit of his creditors, reserve a provision for himself. *Ibid*.

62. An assignment by an insolvent of property in trust for his creditors, reserving a provision for himself, is void by the law of Louisiana. *Charles v. Caine*, Court for the E. D. Louisiana, 1825. Note to the opinion of *Colden*, Senator.

63. The property of a debtor who fails belongs, in moral justice, to his creditors. Per *Savage*, Chief Justice. *Ibid*.

64. If a judgment be valid in its concoction, *i. e. bona fide*, and upon sufficient consideration, though execution be taken out and enforced, with a view to delay and hinder creditors, and it have that effect, yet it is not fraudulent within the statute for the prevention of frauds, (*sess.*

10, ch. 44, 1 R. L. 75.) and the plaintiff is not, therefore, liable to the penalty imposed by the fourth section of that statute. (1 R. L. 76, 7.) *Wilder v. Winne*, 6 Cow. 284.

65. It is lawful for a debtor in failing circumstances to prefer one creditor to another, or to prefer one set of creditors, by confessing a judgment, &c., or otherwise. *Ibid.*

66. Fraud is a question of law when there is no dispute about facts. It is the judgment of law on fact and interest. *Jackson v. Mather*, 7 Cow. 301.

67. The law has established certain *indicia*, which, if they appear in relation to a contract, it will be adjudged fraudulent. *Ibid.*

68. In most cases, fraud is a mixed question of law and fact; and the jury are often called upon to draw a conclusion from equivocal facts and suspicious circumstances. *Ibid.*

69. Where such circumstances combine, as where a man, unembarrassed in his circumstances, on the eve of judgment against him, sold out his real estate, which was considerable, to his son-in-law, who was in low circumstances; who gave a mortgage for the purchase money; the grantor still continuing in partial possession, and exercising some control; the son-in-law acting with deference to his directions, making suspicious declarations, and actually taking a fraudulent conveyance of the grantor's personal property, and removing it out of the county to avoid executions against the grantor, &c.; all these circumstances appearing, and not being explained on the trial; though the jury found in favour of the validity of the grant of the real estate against a sale by the creditor; *held*, that a new trial should be granted. *Ibid.*

70. The grantor, before he purchased, took the advice of a counsellor at law upon the question whether he could safely make the purchase, notwithstanding the pendency of the suits against the grantor. *Held*, that though he might himself have sought that opinion, and the jury believed that he did so, and that the opinion was fairly given, it ought not to influence them in favour of the grant; as such an opinion, though honest, could not reach all the circumstances disclosed in evidence. *Ibid.*

71. *Held*, also, that whether the grantee knew that the grantor intended to commit a fraud or not, was not the test of the validity of the conveyance; for without reference to the grantor's intentions, the part taken by the defendant, and his acts, might be fraudulent. *Ibid.*

72. Where the question is upon the fraud in a conveyance of real estate, a fraudulent purchase of personal property by the grantee from the grantor of the real estate, made after the sale of the latter, may be received in evidence in connexion with other circumstances, to impeach the sale of the real estate. *Ibid.*

73. A man in embarrassed circumstances, with a suit for a considerable debt notoriously pending against him, on which execution was shortly expected, conveyed by bill of sale absolute on its face, one-half of a sloop; the vendee agreeing by a memorandum in writing, executed at the same time, that if the vendor paid certain endorsements for himself within twelve months,

to secure which the sale was made, then the sale should be void; but if not, then to be valid; and that the vendee should then pay the endorsements within one year. The endorsers afterwards took the vendee's notes, but did not know of the condition in the sale. A part of these notes were afterwards paid out of moneys furnished by the vendor, judgment being obtained in the pending suit about a month after the sale, and the sloop sold under execution issued upon it; *held*, that the bill of sale was fraudulent as to creditors in judgment of law; and there being no dispute about the facts, *held*, also, that in trover by the vendee against the purchasers under the execution, brought for a conversion of the sloop, that the plaintiff should be nonsuited; there not being sufficient evidence of his right to go to the jury. *Sutton v. Brown*, 7 Cow. 732.

74. A debtor in failing circumstances may prefer one creditor, or set of creditors, to another. *Wintringham v. Lafay*, 7 Cow. 735.

75. This assignment to pay debts, providing for payment or reassignment of the surplus to himself after all his debts paid, is not fraudulent as to his creditors. *Ibid.*

76. A sale of land by one indebted at the time, in consideration of supporting his family, is fraudulent and void as to creditors; and if a jury find the sale valid as to creditors, a new trial will be granted. *Jackson v. Parker*, 9 Cow. 73.

77. To maintain an action for selling one article for another, there must be either fraud or warranty. *Welsh v. Carter*, 1 Wend. 185.

78. The possession of personal property by a vendor or mortgagor, inconsistent with the face of the deed conveying it, is *prima facie* evidence of fraud, but subject to explanation. A mortgage of personal property is no security for subsequent advances made on the strength of a parol engagement. Upon a conceded state of facts, fraud is a question of law. *Diver et al. v. M'Laughlin*, 2 Wend. 596.

79. Actual fraud in the conveyance of property may be shown by a creditor, although his debt accrued subsequent to the conveyance sought to be avoided. So a purchaser for a valuable consideration has a right to avoid a precedent fraudulent conveyance. *Wadsworth v. Havens*, 3 Wend. 411.

80. Where, from the nature of the transaction, the inadequacy of the consideration, the relative character, capacity, and connexion of the parties, fraud and imposition may be presumed, a Court of equity will set aside a contract. *Hall et al. v. Perkins*, 3 Wend. 626.

81. A sale under an execution does not entitle the reversioner to demand a fifth of the consideration money, under a covenant that on every sale or assignment, such proportion of the purchase money shall be paid to him, if it be *bona fide* an adversary proceeding on the part of the creditor, and not collusive with intent to defeat the condition in the lease. *Livingston v. Kipp*, 3 Wend. 230.

82. A voluntary conveyance is a deed without any valuable consideration; if any thing valuable passes between the parties, it is a purchase. *Jackson v. Peck*, 4 Wend. 360.

83. A voluntary conveyance cannot be im-

peached, unless there is actual fraud, which must be passed upon, and decided by a jury. *Ibid.*

84. Whether an action *at law* will lie by a vendee against a vendor, for a fraudulent representation as to the title to land, where the vendee accepts a deed without warranty, and is subsequently evicted by the true owner? *Quære. Leonard v. Pitney*, 5 Wend. 30.

85. The action, at all events, must be brought within six years after the representation; ignorance in the vendee of the defect of the title, and fraudulent concealment on the part of the vendor of such defect until within six years before suit brought, is no answer to a plea of the statute of limitations. *Ibid.*

86. Where goods are obtained by a *fraudulent representation*, and an action is brought for the injury, the jury are authorized to give damages for the punishment of the fraud over and above the value of the goods. *Allen v. Ad-dington*, 7 Wend. 1.

87. An action on the case lies against a party who conspires with another, that such other shall obtain goods on credit from a third person, and deliver the same over to him; the *fraudulent act* of the party obtaining the goods being deemed the act of the other. *Moore v. Tracy*, 7 Wend. 229.

88. The party obtaining the goods is a competent witness against the *particeps fraudis*. *Ibid.*

89. The bare fact of a *grantor* remaining in possession of lands conveyed by him to a third person is not enough, uncorroborated by other circumstances, to subject the transaction to the imputation of fraud. *Every v. Edgerton*, 7 Wend. 259.

90. An action on the case lies against a *public officer* for a *false and fraudulent representation* made by him in relation to property sold by him, and it is no answer that the sale was made in his official character. *Culver v. Avery*, 7 Wend. 381.

91. The action lies for such representation made during a treaty for the sale and purchase of lands, if damage ensues, although the negotiation has been consummated by a deed or written contract. *Ibid.*

92. Whatever is said or done in *good faith*, in a treaty for a sale and purchase, is merged in the purchase itself when consummated, and cannot be overhauled, whether the representations were true or false; but if they were *known to be false* when made, and have produced damage, the subsequent consummation of the agreement will not shield the defendant. *Ibid.*

93. Where a party was induced by a false representation to purchase property at a loan officer's sale, paid the purchase money, and obtained a deed which conveyed no title, the property having been previously sold; *it was held*, that an action on the case might be maintained by the purchaser, without proof that a suit had been brought for the recovery of the premises. *Ibid.*

94. Case lies for a false representation, whether made on the sale of real or personal property, and whether it relates to the title of land, or to some *collateral* thing attached to it. *Ibid.*

95. Whether a deed from a parent to his child, in consideration of natural love and affection, is fraudulent or not as against creditors, is a *question of fact* for a jury. *Jackson v. Timmerman*, 7 Wend. 437.

96. A voluntary conveyance, not actually fraudulent as relates to the grantee, may become valid by matter *ex post facto*, as by a purchase for valuable consideration, or by the marriage of the grantee, if a *feme*. Marriage, if the conveyance forms an inducement thereto, renders the conveyance valid, not only as against a subsequent purchaser, but against the creditors of the grantor. *Wood v. Jackson*, 8 Wend. 1.

97. Case lies against the plaintiff and defendant in a judgment, for fraudulently setting up the judgment as unsatisfied, when in fact it is paid, causing an execution to be issued thereon, and a sale to be had of land on which the judgment when in force was a lien, when such land, subsequent to the judgment, was conveyed by the defendant, and passed into the hands of a third person. *Swan v. Saddlemire*, 8 Wend. 676.

98. It is not necessary to show actual specific damages in such action; trouble, inconvenience, or expense to the plaintiff is enough to sustain the action. *Ibid.*

99. Where the plaintiff in such action derives his title from one of the defendants, the defendants are not allowed to allege that no interest in the land was conveyed to the plaintiff by the deed under which he claims; nor can they avail themselves of a variance between the judgment and execution. *Ibid.*

100. The obtaining of an endorsement to a promissory note by false pretences and with a fraudulent intent, and which the party obtaining it has actually used for his benefit, is within the spirit of the act rendering punishable the obtaining by false pretence money, goods or chattels, or other effects; the words "other effects" in our statute are equivalent to the words "other valuable thing," in the British act. *The People v. Stone*, 9 Wend. 182.

101. By the revised statutes, the obtaining by false pretence the signature of a person to a written instrument, is classed with the obtaining of money by false pretences. *Ibid.*

102. Permitting a vendor of personal property to keep possession thereof three months after the sale, without showing any reason for his so continuing in possession, makes the sale *prima facie* fraudulent against a subsequent judgment creditor of the vendor, who took the property by virtue of an execution. *Collins v. Brush*, 9 Wend. 198.

103. Where creditors unite in a composition deed to their debtor, any security taken by one for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, if unknown at the time to the other creditors, is void and inoperative. *Russell v. Rogers*, 10 Wend. 473.

104. The assignment by an insolvent debtor to his son in trust for the payment of debts, giving preference to certain creditors, of a foundry establishment, with the furnaces, machinery, and tools appertaining thereto, the trustee to carry on the business, to sell the manufactured

articles, to work up and sell the unmanufactured articles, and generally to dispose of the assigned property as soon as the same can conveniently and judiciously be done, applying the proceeds to the payment of debts; and the subsequent use of the property and prosecution of the business by the trustee in the same place, under the same name, and by the same persons, except the assignor, as before the assignment; and the fact that the assignment was unaccompanied with any schedule of the property assigned, or a list of the creditors to be paid, are not such badges of fraud as will justify a Court of equity to pronounce the assignment void, where the case is submitted on bill and answer, in the latter of which the fraudulent intent is denied. *Cunningham v. Freeborn*, 11 Wend. 240.

105. Where the circumstances attending an assignment are of a character to induce suspicion of the *bona fides* of the transaction, and a bill is filed to set it aside, if on the coming in of the answer, the cause is heard, and the relief asked for is not granted, the complainant will not be subjected to costs. *Ibid.*

106. The mere filing of a bill in Chancery by one set of creditors, to avoid conveyance of property by their debtor, gives no preference over other creditors who pursue the same debtor, and, previous to the decree in the equity suit, obtain a judgment at law against him. *Jackson v. Robert's Executors*, 11 Wend. 422.

107. A debtor in failing circumstances may prefer one creditor or set of creditors by assigning his property for their benefit, in exclusion of his other creditors, provided that he devote the whole of the property assigned to the payment of his just debts; that the assignment be absolute and not conditional; that it contain no reservation or condition for his benefit; and does not extort from the fears or apprehensions of his creditors an absolute discharge as a consideration for a partial dividend. *Grover et al. v. Wakeman*, 11 Wend. 187.

108. An assignment containing a preference to certain creditors, "who should, within three months after being required in writing by the trustees so to do, agree in writing under seal to receive from the trustees such proportion of their debts respectively as could be paid by the avails then remaining in the hands of the trustees, in full discharge of their respective claims," is void, and being void in part as against creditors, it is void *in toto*, notwithstanding the denial of the intent to defraud contained in an answer to a bill in Chancery, filed to avoid the assignment. *Ibid.*

109. Whether a provision in such assignment for the benefit of creditors, giving power to the assignees to compound with any or all of the creditors, in such manner and upon such terms as they shall deem proper, avoids the assignment? *Quere. Ibid.*

110. Whether an assignment of the property of a firm by the copartners, for the payment of the individual debt of one of the partners, can be sustained? *Quere. Ibid.*

111. Although the question of fraudulent intent in cases arising upon conveyances, or assignment of property, alleged to have been made to hinder, delay, or defraud creditors, is

declared by statute a question of fact, and not of law, a Court of equity is competent to pronounce upon it, in a case submitted on bill and answer, notwithstanding the denial of such intent in the answer, if the facts of the case be such as to produce the conviction of the fraudulent intent; but in doing so, regard will be had only to such facts as are *per se* conclusive evidence of fraud. What are usually termed badges of fraud, although of an imposing character, and of sufficient weight unexplained to authorize the presumption of fraud, will be overlooked, such badges of fraud being counter-vailed by the denial of the fraudulent intent. *Cunningham v. Freeborn*, 11 Wend. 240.

112. The admission of facts which are *per se* fraudulent in judgment of law, are as much so, and as conclusive upon the defendant, as if he had in express terms admitted a fraudulent intent in his answer; and in such a case, any subsequent disclaimer of such intent will not avail him. *Ibid.*

113. If a party relies upon facts and circumstances not *per se* conclusive evidence of fraud, he must put in a replication, and give his opponent an opportunity to produce proof in explanation of the facts casting suspicion on the transaction. *Ibid.*

114. An actual levy on personal property, which in law is valid as against the defendant in the execution, and will justify a sale under it, will operate to defeat a subsequent purchase, though *bona fide* and for a valuable consideration. *Butler et al. v. Maynard et al.* 11 Wend. 548.

115. The leaving of property in possession of the defendant for a reasonable time, and without any fraudulent motive, after a levy, is not *per se* fraudulent, but the rights of the plaintiff and officer remain in full vigour. *Ibid.*

116. The omission of the officer, at the time of a levy made, to make a public avowal of his doings, will not *per se* affect the validity of the levy, where the fact of the actual levy be incontrovertibly established, although such omission be at the request of the plaintiff in the execution. *Ibid.*

117. The statute against obtaining goods by false pretences extends to every case where a party has obtained money, or goods, by falsely representing himself to be in a situation in which he is not, or by falsely representing any occurrence that has not happened, and to which representations persons of ordinary caution may give credit. *The People v. Haynes*, 11 Wend. 557.

118. In an indictment for obtaining goods by false pretences, all the false pretences relied on to sustain the indictment, and to convict the accused, must be specifically negatived; but, to authorize a conviction, it is not necessary to prove all the pretences laid in the indictment to be false, unless all are material to constitute the offence charged. *Ibid.*

119. Where one or more of the pretences thus proved to be false are sufficient *per se* to constitute the offence, the accused will be convicted, notwithstanding the public prosecutor fails in proving other pretences to be false, alleged in the indictment; such other pretences in will, in such case, be regarded as surplusage. *Ibid.*

120. It is not necessary to a conviction under the statute for obtaining goods by false pretences, that the pretences proved to be false should be the sole or only inducement to the credit or delivery of the property; it is enough if they had so material an effect in procuring the credit, or inducing a delivery of the property, that without their influence upon the mind of the party defrauded, he would not have given the credit, or parted with the property. *Ibid.*

121. Where after goods were bought of a mercantile firm, put up in a box directed to the purchaser at his residence, and by his direction sent on board of the steamboat, the vendors, having become alarmed as to the credit of the purchaser, determined to reclaim the goods, and told the purchaser that they could not deliver them, as they had heard that he had had a note protested; and the purchaser thereupon made representations, as to his pecuniary situation, which induced the vendors to deliver to him the receipt for the goods given by the master of the steamboat, to give him an invoice of the goods, and to take his note for the purchase money; it was held, on an indictment against the purchaser for obtaining the goods by false pretences, that the transmission of the goods to the steamboat, previous to the representations of the purchaser, alleged in the indictment as false pretences, was not such a delivery of them as to disprove the allegation in the indictment, that they were delivered to the purchaser upon the faith of the false pretences. *Ibid.*

122. The whole matter disclosed on the trial of a cause will not be re-examined on a bill of exceptions; the party excepting must lay his finger on the points which may arise, either in admitting or rejecting evidence, or in relation to questions of law, arising from facts not denied, in which either party was overruled by the Court. *Ibid.*

123. Where a sale of property under an execution is brought about by the defendant, in concert with others, with the avowed object of defeating the interest of a third person in such property, such sale will be deemed fraudulent and void, although the execution be issued on a valid and unsatisfied judgment. *Crary v. Sprague et al.* 12 Wend. 41.

124. A mortgage of personal property, as well as an absolute conveyance of such property, is *prima facie* fraudulent and void, as against creditors and *bona fide* purchasers, unless accompanied by an immediate delivery, and followed by an actual and continued change of possession. But a continuance of possession by a vendor or mortgagor may be explained; but his accommodation will not present a sufficient explanation. *Gardner v. Adams*, 12 Wend. 297.

125. Where a voluntary assignment was executed, and a portion of the assigned property was placed, by the assignee, in the hands of an auctioneer to be sold, who sold the same and received the proceeds, the assignment having been subsequently decreed to be void, and a receiver appointed to take charge of the assigned property; it was held, that the auctioneer had no lien upon the proceeds of the goods, and was bound to pay over the same to

the receiver, for the benefit of the creditors of the assignor who had filed creditor's bills, although the auctioneer was a creditor of the assignor, and the money came to his hands previously to the filing of the bills by the creditors, to whose use the money was directed to be paid, the auctioneer having become a party to the assignment by signifying his assent to the same, by a formal acceptance. *Hone v. Henriquez*, 13 Wend. 240.

126. Where a party purchases household furniture, which at the time is in the use and occupation of a third person, and the purchaser permits such possession to continue for a great length of time, *e. g.* twenty-one months, the continuance of such possession is *prima facie* evidence of fraud, and unless satisfactorily explained, conclusive as against a judgment creditor. *Fonda v. Gross*, 15 Wend. 628.

127. It seems, that the continuance of possession by a defendant, after the sale of his property under an execution, is *prima facie* evidence of fraud, as well where the property is bid in by a third person as where it is struck off to the plaintiff in the execution. *Ibid.*

128. The temporary resumption of personal property by a mortgagor, although possession accompanied the execution of the mortgage, will be deemed fraudulent, unless satisfactorily explained. There must be a continued change of possession. *Look v. Comstock*, 15 Wend. 244.

129. Without satisfactory explanation, possession in a vendor is in judgment of law fraudulent; and even where there has been a continued change of possession, the transfer will still be deemed fraudulent in law as against creditors, if not made upon sufficient consideration. *Ibid.*

130. A voluntary conveyance is not void, as against creditors, on the ground that the grantor at the time of the conveyance is indebted, if it be shown that the vendee of the real estate of the grantor was amply sufficient to pay his debts. *Jackson v. Post*, 15 Wend. 588.

131. The property in goods in a store, conveyed to a third person by an instrument of assignment, dated after the docketing of a judgment against the assignor, and left in his hands without any good reason shown therefor, does not pass to the assignee, and the assignment itself is fraudulent and void. The presumption in such cases is, that the assignment was made to defeat the judgment, and it will not be upheld. *Williams v. Lowndes*, 1 Hall, 579.

132. Where an auctioneer has the avails of a fraudulent sale in his hands, he cannot protect himself from answering by a demurrer upon the ground of his being a witness. *Schmidt v. Dietericht*, 1 Edw. 119.

133. An auctioneer, in such cases, is a mere agent or stakeholder; and he cannot protect himself upon the ground of other parties having a defence. Indemnity is all he can ask upon bringing the money into Court, or paying it under an order. *Ibid.*

III. Leases, &c. by parol only; assignments, grants, or surrenders of interests in land, &c.

134. A surrender of a lease for a term of years is not good within the statute of frauds,

unless it be by deed or note in writing, signed by the party; the cancelling and destroying of the lease by the agreement of the parties will not operate to divest the interest of the lessee. *Rowan v. Lytle*, 11 Wend. 616

135. A parol agreement that a party may abut and erect a dam upon the lands of another, not for a temporary but a permanent purpose, as the erection of a water power for the use of mills and other hydraulic works, is void within the statute of frauds. *Mumford v. Whitney*, 15 Wend. 380.

136. *It seems*, all the cases agree that a permanent interest in the land itself can be transferred only by writing. *Ibid.*

137. A license is an authority to enter upon the lands of another, and do a particular act or a series of acts, without possessing any interest in the lands; it is founded in personal confidence; is not assignable, and is valid, though not in writing; but the conferring of a right to enter upon lands, and to erect and maintain a dam as long as there shall be employment for the water power thus created, is more than a license; it is the transfer of an interest in lands, and, to be valid, must be in writing. *Ibid.*

138. A parol agreement between a landlord and a tenant of a term for six years, that the tenant shall surrender his interest in the demised premises, and that the landlord shall execute a new lease for eight years to third persons, does not operate as a surrender by operation of law, unless such new lease be executed, and pass an interest according to the contract and intention of the parties; although the tenant quits the premises, the third persons enter, remain in possession for the space of a year, and pay rent to the landlord; and consequently, the original lease remains in force, and the landlord may maintain an action upon the covenant in it for the payment of rent against the original tenant for rent subsequently accrued. *Schieffelin v. Carpenter*, 15 Wend. 400.

IV. (a) *What writing is sufficient.*

139. A promise in writing unsealed, not for the payment of the money, is void, unless it either express a consideration, or some consideration be shown by averment. *Peoole v. Shall*, 9 Cow. 778.

(b) *Promise to answer for the debt, default, or miscarriage of another person.*

140. A sale of goods to A. on request of B. is a good consideration for B.'s promise to pay for them. But the promise, being collateral, should be in writing; otherwise it is void by the statute of frauds. *Gallagher v. Brunell*, 6 Cow. 346.

141. A promise in writing to pay the debt of another, acknowledging a past consideration, viz. land conveyed to that other, but not at the promisor's request, is *nudum pactum* and void. *Chaffee v. Thomas*, 7 Cow. 358.

142. A promise to pay for a past consideration, though for the benefit of the promisor, is not binding, unless done at the promisor's request. *Ibid.*

143. Where A., in consideration of property transferred and delivered to him by B., pro-

mises to pay and discharge, amongst other creditors of B. named and specified at the time, the demand or claim of C. against B. on certain notes held by him, an action will lie by C. against A., although the promise of A. is not reduced to writing. *Ellwood v. Monk*, 5 Wend. 235.

144. A guarantee, in general terms warranting the collection of a note, does not authorize a suit against the guarantor by any subsequent holder of the note; it is a special contract, which can only be enforced in the name of the person with whom the contract was made. *Lamorieux v. Hewitt*, 5 Wend. 307.

145. A promise to pay the debt of a third person, in consideration of the promisee surrendering property levied upon by execution, is an original undertaking, and need not be in writing to render it valid. *Mercein v. Andrews*, 10 Wend. 461.

146. It is a general principle applicable to all instruments, that whatever may be fairly implied from the terms or language of an instrument, is in judgment of law contained in it. Thus where a party agrees to indemnify another from any damage that may be recovered against him in a certain suit, and for all advances which he may make in that behalf; there is an implied agreement on the part of him who is so indemnified, that he will continue the defence of the suit, and make the necessary advances in the progress of the same; and this implied agreement must be considered as in writing, and constitutes a sufficient consideration to make the instrument of indemnity valid. *Rogers et al. v. Kneeland*, 13 Wend. 114.

147. *It seems*, that the statute of frauds applies to all cases of suretyship, whether the agreement of the surety be collateral to a previous or concurrent promise of the principal debtor. *Ibid.*

148. Whether, since the revised statutes, the requirement of the statute of frauds that the consideration as well as the promise, in cases of engagements for the debts of others, shall be in writing, applies as well to agreements under seal as to agreements not under seal? *Quere. Ibid.*

149. All collateral promises for the debt, default, or miscarriage of others, must be in writing expressing the consideration. *Larson v. Wyman*, 14 Wend. 246.

150. Where an individual urged the completion of a job of work previously undertaken, promising to be responsible for the work done; *it was held*, that the promise was collateral, and, not being in writing, could not be enforced by action. *Ibid.*

151. A promise to answer for the debt of another is void, made since the revised statutes, unless it be in writing, and the writing on its face express the consideration of the promise. Previous to those statutes, *it was held* sufficient if the consideration could be inferred, implied, or spelt out from the terms of the agreement. *Packer v. Wilson*, 15 Wend. 343.

(c) *Agreement not to be performed within a year.*

152. After a sale of V.'s land on *fi. fa.* to O. for \$42, and before the sheriff conveyed, W.

agreed verbally with V. and O. to take the land of O. and give V. \$600, of which he paid \$200, and the sheriff conveyed to Q., who conveyed to W., who afterwards sold part of the land for \$600, and acknowledged the agreement with V.; in *assumpsit* by V. against W. for the \$400 remaining unpaid; *held*, that the agreement was within the statute of frauds, and void, because not in writing; and, also, for want of consideration. *Van Alstine v. Wimple*, 5 Cow. 162.

153. If part of an entire promise be void by the statute of frauds, the whole is void. *Ibid*.

154. A parol contract to pay for certain services, on their being performed, by conveying a certain piece of land, the services being performed pursuant to the contract, is not void by the statute of frauds; but the value of the services can be recovered according to the value of the land promised, which may be resorted to as a measure of damages, though the contract to convey the land cannot be enforced. *Burlingame v. Burlingame*, 7 Cow. 92.

155. Such evidence will not maintain a general count for work, labour, and services; but the count should be upon the special contract. *Ibid*.

156. The plaintiff having a verdict upon a general count, on such evidence, and for other services to which the general count applied, he was, on granting a new trial, allowed to amend by adding a special count. *Ibid*.

157. And this, on paying only the costs of the amendment. *Ibid*.

158. Where a party by a written instrument acknowledges to have received a deed conveying lands to a third person, to be paid for in a specified manner, and at the foot of the instrument promises to see the contract fulfilled, such promise is not within the statute of frauds, and may be enforced by action, the delivery of the deed constituting a good consideration for the undertaking of the guarantor. *Stymetz v. Brooks*, 10 Wend. 206.

159. Where a promise to pay the debt of a third person arises out of some new consideration of benefit to the promisor, or harm to the promisee, moving to the promisor either from the promisee or the original debtor, such promise is not within the statute of frauds, (1 R. L. 78, sec. 11.) though the original debt still subsist, and remain entirely unaffected by the new agreement. *Farley v. Cleveland*, 4 Cow. 432.

160. Thus where M. owed F., and C., in consideration that M. delivered him hay to the value of the debt, promised by parol to pay F.; *held*, that this was not within the statute. *Ibid*.

161. The English and American cases, establishing, illustrating, and explaining this rule, collated and examined. Per *Savage*, Ch. J. *Ibid*.

(d) *Agreements not to be performed within a year.*

162. Where a party contracts by parol to work for another for two years, for which the former was to receive \$100, or \$50 a year, and he quits the service at the end of six months, the contract being within the statute of frauds, no action can be maintained on it for such non-

performance. *Drummond v. Burrell*, 13 Wend. 307.

163. An agreement to waive the statute of frauds need not be in writing, although by the terms of it the party may, at his election, perform the agreement after the year; it is only when it appears by the whole tenor of the agreement, that it is to be performed after the year, that a note in writing is necessary. *Plimpton v. Curtis*, 15 Wend. 336.

V. *Contracts for sale of goods.*

164. Where R. owed J. and W., and all three agreed that R. should sell slaves to the amount of the debts, viz. \$75 to J., and that J. should, on selling them, pay R.'s debt due to W.; and R. said to J., "I deliver you the slaves," (they being ten miles off,) and J. took and sold them; *held*, that the contract was valid, not being within the statute of frauds, either as to the promise or sale; that the delivery was sufficient; and that W. might recover his debt in an action against J. *Jennings v. Webster*, 7 Cow. 256.

165. *Held*, also, that any agreement in different terms, made by R. and J. before the agreement between the three, and when W. was not present, could not affect W.; nor could any declarations on the subject made by R. and J. *Ibid*.

166. A contract by parol to sell the mere improvements made on land is not within the statute of frauds as to the subject-matter; and may, therefore, be enforced by an action. *Lower v. Winters*, 7 Cow. 263.

167. But when the agreement was in January or February, to pay for the improvements one year from the next following March; *held*, that the contract was within the statute of frauds, as a contract not to be performed within a year. *Ibid*.

168. Wheat growing is mere chattel, and the property in it will therefore pass by parol and without writing, the statute of frauds not applying to such a case. *Austin v. Sawyer*, 9 Cow. 39.

169. A signing of a memorandum of a bargain on the sale of goods by the vendor alone is a sufficient compliance with the requirements of the statute of frauds. *Russell v. Nicoll et al.* 3 Wend. 112.

170. The word *sold* at the commencement of such a writing means contracted to sell. *Ibid*.

171. A memorandum kept by a clerk of a vendor, who sells goods at auction, of the articles sold and the prices bid for them, is a sufficient note in writing to bind the vendee. *Frost v. Hill*, 3 Wend. 386.

172. An assignment or relinquishment of a copyright of a book, or of an interest therein, is void if not in writing; the agreement to assign or relinquish may be by parol, and is a good consideration for a promise on the other side. *Gould v. Banks*, 8 Wend. 562.

VI. *What will take a case out of the statute.*

173. The rule that a memorandum of a sale of goods, made by an agent having merely parol authority, satisfies the statute of frauds, means that he should be an auctioneer or broker, or

other agent of both parties; not the mere agent of the vendee, or the agent of either party singly, e. g. a commission merchant authorized to buy goods in behalf of a foreign correspondent. *Sewall v. Fitch*, 8 Cow. 215.

174. And see *Dixon v. Broomfield*, cited from 2 Chit. Rep. 205, note (a) to this case, as to a memorandum of guarantee made by an agent. *Ibid*.

175. The statute requiring a memorandum, &c. of goods sold above the value of \$25, means goods in *solido*. It extends both to contracts executed and executory for the sale of such. But where the goods are yet to be manufactured, or any labour performed about them, the contract is more properly for work and labour, and materials to be found; and, though by parol, is not within the statute. *Ibid*.

176. Where a promise to pay the debt of a third person arises out of some new consideration of benefit to the promisor, or harm to the promisee moving to the promisor either from the promisee or the original debtor, such promise is not within the statute of frauds, (1 R. L. 78, s. 11.) though the original debt still subsist, and remain entirely unaffected by the new agreement. *Cleveland v. Farley*, 9 Cow. 639.

177. Thus where M. owed F., and C., in consideration that M. delivered him (C.) hay to the value of the debt, promised by parol to pay F.; *held*, that this promise was not within the statute. *Ibid*.

178. A contract for the sale of a boat load of wheat, to be delivered at a subsequent day, is within the statute of frauds, where no part of the wheat is delivered at the time, no earnest paid, and no note or memorandum in writing of the bargain made. The mere fact that the article sold is not to be delivered immediately does not take the case out of the statute. *Jackson v. Covert*, 5 Wend. 139.

179. Where A., who had contracted to build a house for B. to be paid for when finished, refused to go on and perform the contract, because B., after the materials were collected and the buildings framed, had absconded, but was subsequently induced to proceed and finish the building upon the promise of C. (who had purchased B.'s interest) that he would pay A.; *it was held*, that the promise of C. was an original undertaking, and not within the statute of frauds. *King et al. v. Despard*, 5 Wend. 277.

180. A promise by one to indemnify another for becoming a guarantor for a third person, is not within the statute of frauds; such promise need not be in writing, and the assumption of the responsibility is a sufficient consideration. *Chapin v. Merrill*, 4 Wend. 657.

181. A parol promise to pay the owner of land a specific sum, on his consenting to have a public road or highway laid through his lands, is not within the statute of frauds, and may be enforced by action, if such road be laid out and occupied as such. *Noyes v. Chapin*, 6 Wend. 461.

182. The public acquire an interest in such road, although there be no writing to pass the title of the owner, the statute regulating highways providing for the laying out of a road by the consent of the owner. *Ibid*.

183. A delivery of goods by the vendor, and an acceptance by the agent of the vendee, are sufficient to take a contract out of the operation of the statute of frauds, where there is no earnest paid, and no note or memorandum in writing. *Outwater v. Dodge*, 6 Wend. 397.

184. To take a case out of the statute of frauds, not only the promise, but the consideration for the promise must be in writing. *Smith v. Ives*, 15 Wend. 182.

185. In a promise to guaranty the payment of a note over due when the promise is made, expressing no consideration, forbearance to sue will not be implied as the consideration moving to the promise. *Ibid*.

186. Forbearance to sue is not a new consideration, taking the case out of the statute. *Ibid*.

GAMING.

1. An action of *debt* for money had and received, in the form authorized by the second section of the "act to prevent excessive and deceitful gaming," (1 R. L. 153.) will lie against the *stakeholder*, to recover money deposited in his hands, upon the event of a trotting match; but the limitation of three months prescribed by that act affords a bar to the action; and if pleaded, will protect the *stakeholder*, as well as the winner. *M'Keon v. Caherty*, 2 Hall, 299.

GRANT.

1. An exception of a mill site, in a grant or lease, operates as an exception of the soil of the mill site, and so much land as is necessary for the mill pond, and for erecting and carrying on the business of a mill. *Jackson v. Vermilyea*, 6 Cow. 677.

2. It is not the reservation of a mere easement, but of the soil itself; and the grantor or lessor, or his assigns, may enter upon and locate, under the exception, even after the grantee or lessee has conveyed, or assigned, or mortgaged his interest to another. *Ibid*.

3. In the description of parcels in a conveyance of land by boundaries, or number of the lot, or other certain designation, the quantity being mentioned in the addition, without an express covenant that the land contains that quantity, the whole is considered as mere description; and quantity, being the least certain part, must yield to certain boundaries, or the number of the lot, or other more certain description. *Jackson v. Moore*, 6 Cow. 706.

4. Effect should be given to every part of the description, if practicable. But if the thing to be granted appear clearly from any part of the description, and other circumstances are mentioned not applicable, the grant will not be defeated; but the false or mistaken part will be rejected. *Ibid*.

5. What is most material and most certain shall prevail over that which is less material and less certain. Thus course and distance shall yield

to natural and ascertained objects, as a river, a stream, a spring, or a marked tree. *Ibid.*

6. Thus, where a conveyance was of "two tracts or parcels of land, &c., being township No. 3, &c.; also township No. 4, &c., to be six miles square; and containing 23,040 acres each, and no more, &c." though these tracts were in fact six by eight miles in size; *held*, that the whole six by eight miles passed. *Ibid.*

7. Such a description is not ambiguous in a legal sense, so as to be a subject of elucidation from extrinsic evidence. *Ibid.*

8. The acts of a portion of the grantees, tenants in common in locating land under a deed, will not affect the co-tenants, unless it appear that they sanctioned these acts in some way. *Ibid.*

9. And the Court will not, in such a case, presume a grant for the purpose of quieting ancient possessions. *Ibid.*

10. A grant of land will never be presumed from lapse of time, unless it be so great as to create the belief that it was actually made, or unless the facts and circumstances in the case show that the party to whom it is presumed to have been made was legally or equitably entitled to it. *Ibid.*

11. Of the descriptions of parcels in a grant; with the English rules of construction. Note (a), 720 to 722. *Ibid.*

12. In the construction of grants, it is a general rule, that both course must be varied and distances lengthened or shortened, so as to conform to the natural, or ascertained natural or artificial objects, or bounds called for by the grant. *Wendell v. The People*, 8 Wend. 183.

13. Grants by the Legislature of islands in rivers and streams where the tide does not ebb and flow, although made during a long series of years, will not justify the conclusion that the principle of the common law has not been adopted here, that grants of land bounded upon rivers or streams where the tide does not ebb or flow carry the exclusive rights of the grantees to the middle, or that the principle, having been adopted, has been legally abrogated or exploded. *The People v. Damon*, 13 Wend. 351.

GUARDIAN.

1. The father, as guardian by nature, has no right to receive the rents and profits of his child's land. *Jackson v. Combs*, 7 Cow. 36.

2. A father cannot, by law, be guardian in socage to his child. *Ibid.*

3. None can be guardian in socage except one to whom the inheritance cannot possibly descend; but by our statute it may descend to the father. *Ibid.*

4. Guardianship in socage is strictly only till the infant arrives at the age of fourteen; but it continues after that age if no other guardian be appointed. *Ibid.*

5. A guardian, though appointed by the surrogate, may be removed from his office, compelled to account, and another guardian be substituted by the Court of Chancery on petition. A

bill is not necessary. *Disbrow v. Henshaw*, 8 Cow. 349.

6. Though the chancellor may, in his discretion, order a bill to be filed. *Per Sutherland, J. Ibid.*

7. There can be no guardianship in socage of lands granted by the state since the fourth of July, 1776. By the act concerning tenures, all such lands are declared to be allodial, and not feudal. *Combs v. Jackson*, 2 Wend. 153.

8. At the common law, where there was no guardian in socage, the father was guardian by nature to his heir apparent until the age of twenty-one. This was a guardianship of his person only, and gave the father no right or control over his property, real or personal. *Ibid.*

9. In this state, under the statute of descent, all the children are heirs apparent of the father, and he is entitled, as guardian by nature, to the care of their persons until they attain the age of twenty-one, or marry, except where lands granted before the revolution descend to the children from their maternal relations, in which case, as the lands cannot go to the father, he may be guardian in socage, and take the rents and profits thereof for the use of his children until they attain the age of fourteen, and until another guardian is appointed. *Ibid.*

10. Where a lease is made by the guardian of a minor, reserving rent, the action for the nonpayment of the rent is properly brought in the name of the guardian as plaintiff, although the suit be brought after the ward has attained his age. *Pond v. Curtiss*, 7 Wend. 45.

11. The presumption in such case is, unless the contrary be shown, that the suit is prosecuted for the benefit of the ward. *Ibid.*

12. A guardianship by nature is entitled to the charge of the person, but not of the personal estate of the ward. *Hyde v. Stone*, 7 Wend. 354.

13. Where a widow, in the assignment of a lease, professes to act as the administratrix of the estate of her husband, she will not be considered as having performed the act as guardian in socage to her children. *Ritchie v. Putnam*, 13 Wend. 524.

14. Guardian *ad litem* to the infant cannot be assigned as error in fact, on a writ of error brought in the same Court to revoke the judgment, where upon the *capias ad respondendum* the infant is returned not found, and the other defendant taken, and the judgment is entered against both defendants, pursuant to the statute authorizing proceedings against joint debtors. *Mason v. Dickson*, 15 Wend. 64.

15. If upon such judgment the joint property of the defendants be taken in execution, and the infant or defendant not brought into Court was not liable to the payment of the debt, his remedy, *it seems*, is by *audita querela*, or by bill in equity. *Ibid.*

16. Previous to the last revision of our statutes, a father could not be guardian in socage to his child; now he may be: as guardian by nature, a father has no control over the property, real or personal of his child. *Fonds v. Van Horne*, 15 Wend. 631.

HABEAS CORPUS.

1. Proceedings by *habeas corpus* under the statute. (Sess. 36, ch. 57, (R. L. 354.) *In the matter of Sweatman*, 1 Cow. 144.

2. Affidavit upon which to procure allowance of writ. *Ibid.*

3. Writ of *habeas corpus ad subjiciendum* returnable before a circuit judge, pursuant to the fifth section of the fifth article of the constitution. *Ibid.*

4. Endorsement, and allowance thereon, and return of the sheriff by his deputy. *Ibid.*

5. When preferable to a writ of error. *Ibid.* 149, note (c).

6. On removing a cause by *habeas corpus*, the plaintiff must declare within two terms after the return of the writ. But filing a declaration, and a *bona fide* attempt to serve it, as by mailing a copy to the defendant's attorney, is a declaring within the rule. The third week is term time for all purposes except the test and return of writs. But whether it be so where the Court adjourn before that time? *Quære. Bank of Orange v. Van Ankin*, 1 Cow. 58.

7. Suit is removed from Common Pleas by *habeas corpus*, and the plaintiff neglects to declare within two terms, and the defendant afterwards refuses to receive a declaration; then the plaintiff brings a second action here for the same cause. The Court will not stay proceedings in the last suit till the costs of the first are paid. *Laurence v. Dickenson*, 2 Cow. 580.

8. Where the defendant removes a case by *habeas corpus*, and the plaintiff does not follow him by declaring in this Court, he is not bound to pay costs. *Ibid.*

9. The two terms within which a plaintiff is allowed to declare on a *habeas corpus* must be reckoned inclusive of the term at which bail is put in. *Bogart v. Brinckerhoff*, 3 Cow. 587.

10. Motion to set aside declaration served after that time; but because the plaintiff showed a good excuse for the delay, the motion was denied. *Ibid.*

11. And so the plaintiff does not absolutely lose his right to declare though two terms pass. *Ibid.*

12. A cause being removed by *habeas corpus* from the Common Pleas to this Court, the former have no jurisdiction till a *procedendo* filed, and till this be done, any proceeding in the cause in the Court below is irregular. *In the matter of Smith*, 3 Cow. 27.

13. A motion to supersede a *habeas corpus, cum causa*, will be heard though the writ be not returned. *Snowden v. Roberts*, 4 Cow. 69.

14. Though a *habeas corpus, cum causa*, be not properly directed, it lies with the Court below to object to this; not with the party, who cannot move to supersede it on this ground, after the Court below have acted upon it. *Ibid.*

15. Though the sum in question do not exceed \$500, in a cause in the Common Pleas of New York, (*vid. sess. 46, ch. 207.*) yet if it appear by affidavit that the title to land will come in question, the cause is removed by *habeas corpus*. *Ibid.*

16. One of several defendants returned, taken in the Court below, may sue out a *habeas corpus*;

but to avoid a *procedendo*, he must put in bail for all the defendants, according to the tenth general rule of October term, 1796. *Ibid.*

17. On *habeas corpus*, a prisoner who had been committed by a state magistrate for further examination touching a robbery of the United States mail, was remanded without any cause being shown by the attorney-general; the prisoner having been in custody but a short time. *Ex parte Smith*, 5 Cow. 273.

18. The first judge of a county, of the degree of counsellor at law in the Supreme Court, may allow a *habeas corpus ad testificandum*, to bring up a prisoner in execution upon a *ca. sa. Writles v. Marsh*, 5 Cow. 176.

19. This writ may be allowed to bring up a person under a *ca. sa.* to testify in relation to his own application to a first judge, for a discharge paramount to an act of insolvency. *Ibid.*

20. And if valid on its face, though irregularly or erroneously allowed, the sheriff will be protected in his obedience to it. *Ibid.*

21. Form of the writ. *Ibid.*

22. Though it do not say to testify, yet if it have words equivalent, this is sufficient. *Ibid.*

23. So, though it did not specify a place of return within the county, as at the office of the first judge; for this is to be intended. *Ibid.*

24. The alteration of the writ after it is executed, without the knowledge or privity of the sheriff, will not deprive him of the right to give it in evidence for his justification, though such alteration be made by the deputy who executed it. *Ibid.*

25. If a *habeas corpus ad testificandum* be issued by an officer of competent authority, and be not void on its face, the sheriff is bound to obey it. *Ibid.*

26. Upon the return of a *habeas corpus ad subjiciendum*, with the body of a prisoner against whom a coroner's inquest have found an inquisition of murder or manslaughter, the Court are not concluded by the finding; but will look into the depositions to see whether a crime has been committed, its nature, and the strength of the proof by which the accusation was supported. *Ex parte Thylee*, 5 Cow. 39.

27. A rule to appear upon a *habeas corpus* cannot be taken before the return day, though the writ be actually returned when the rule is entered. *Jones v. Spicer*, 5 Cow. 391.

28. Where joint debtors are sued in the Common Pleas, and the plaintiff proceeds on the arrest of one under the statute, (1 R. L. 521, s. 13.) this one may remove the cause by *habeas corpus*, and put in bail for himself only. *Corkins v. Wyckoff*, 7 Cow. 145.

29. How the plaintiff should declare in such a case. *Ibid.*

30. Whether the plaintiff may bring in the other debtors on process *simul cum* in the Supreme Court? *Quære. Ibid.*

31. In a case where the plaintiff would have removed the costs in the Common Pleas, he shall have them on the defendant's removing his cause to the Supreme Court by *habeas corpus*. *Salisbury v. Parker*, 7 Cow. 150.

32. On *habeas corpus cum causa* to the Common Pleas, the plaintiff proceeded on the sup-

position that it was returned, obtained a *procedendo*, tried the cause in the Court below, and went on to execution there. The defendant, knowing that the writ was not returned, filed special bail with a clerk of the Supreme Court pursuant to a written notice of such intention, but a few days after the rule for a *procedendo* was entered; and having notice of all the plaintiff's proceedings, did not apprise him of the writ not being returned. *Sacket v. Billingshurst*, 7 Cow. 520.

33. Held, on motion by the defendant to set aside the plaintiff's proceedings for irregularity, that the latter might file the *habeas corpus* with the return *nunc pro tunc*, on the payment of costs and thus sustain his proceedings. *Ibid.*

34. A *habeas corpus* under the authority of this state runs to West Point. *In the matter of Carlton*, 7 Cow. 471.

35. To take away the jurisdiction of the state Courts on *habeas corpus*, within state territory ceded to the United States, such jurisdiction must be expressly surrendered by the state. *Ibid.*

36. The enlistment of a minor, without consent of his parent or guardian, into the army of the United States, is void, and he may be discharged by the state authority. *Ibid.*

37. Any person illegally detained has a right to be discharged on *habeas corpus*. *Ibid.*

38. Where there are two causes of imprisonment, one good, and the other invalid, the Court may, on *habeas corpus*, discharge as to the invalid cause; remanding the prisoner as to the other. *Ex parte Badgley*, 7 Cow. 472.

39. Mileage on *habeas corpus ad testificandum* to be computed both for going and returning. *Ulrica Bank v. Kibbe*, 7 Cow. 424.

40. Neither the original *habeas corpus* act, (1 R. L. 354, s. 2.) imposing a penalty for not delivering a copy of a warrant of commitment or detainer, nor the amendatory act, (sess. 41, ch. 277.) so far as it respects that penalty, extend to a commitment or detainer under the warrant of a military officer for a military offence. *Cole v. Thayer*, 8 Cow. 249.

41. *Semble*, in this respect the two statutes are confined to warrants, or process of commitment or detainer by the civil magistrate, issued, or purporting to be issued, for a criminal or supposed criminal offence. *Ibid.*

42. Where property is burglariously stolen in one county, and the offender is apprehended and committed for such offence to the jail of another county, if he is indicted in the county where the property was stolen, this Court will, on the application of the district attorney of that county, award a *habeas corpus* to bring up the prisoner, so that he may be delivered to the sheriff of the county within which the property was stolen, and there tried. *The People v. Mason*, 9 Wend. 505.

43. In such a case, the sheriff of the county where the prisoner is confined is authorized, on the production of a bench warrant issued by a judge of the county Courts where the prisoner was indicted, duly endorsed by a justice of his own county, to deliver the prisoner to the sheriff of the county where the property was stolen. *Ibid.*

44. The Supreme Court, at a special term, has power to grant a *habeas corpus* to inquire into the cause of detention of a party, and when such party is brought up, to discharge him from custody; the *habeas corpus*, when thus granted, is granted by the Court, and not by one of the justices thereof, acting as commissioner. *Ex parte Beat'y*, 12 Wend. 239.

45. Every person having an interest in continuing the imprisonment of the party named in the *habeas corpus*, is entitled to notice of the time and place of the return of the writ; but it is not necessary to serve with such notice a copy of the petition or other paper upon which the writ was granted. *Ibid.*

46. On *habeas corpus*, a Court or judge before whom is brought a prisoner, arrested as a fugitive from justice, by a warrant from the executive of one state on the requisition of the executive of another state, under the constitution and laws of the United States, will not inquire as to the probable guilt of the accused; the only inquiry is, whether the warrant on which he is arrested states that the fugitive has been demanded by the executive of the state from which he is alleged to have fled, and that a copy of the indictment, or an affidavit charging him with having committed *treason, felony, or other crime*, certified by the executive demanding him as authentic, has been presented. *In the matter of Clark*, 9 Wend. 212.

47. An offence made indictable by statute is a crime, within the meaning of the constitution and law of Congress on this subject. *Ibid.*

48. In a case of this kind, where a prisoner is remanded, the Court will not grant a stay of proceedings on the prosecution of a writ of error. *Ibid.*

49. Notice of the suing out of a *habeas corpus* to relieve a party from imprisonment must be given to the party interested in continuing the imprisonment, although the latter do not reside in the county where the former is imprisoned, or where the proceeding is had for a *habeas corpus*; it must be given without reference to residence. *The People v. Pelham*, 14 Wend. 48.

HALF-MOON PATENT.

1. The east line of the half-moon patent, running from the Mohawk to the Hudson river, should touch the source of Anthony's kill. *Jackson v. Frost*, 5 Cow. 346.

HEIR.

1. Form of declaring against heirs, on the simple contract of the ancestor under the act "for the relief of creditors against heirs and devisees." (1 R. L. 316.) *Whitaker v. Young*, 2 Cow. 569.

2. The statute prescribing the mode of proceeding against joint debtors, where a part only are brought into Court, (1 R. L. 521.) does not apply to an action against heirs, &c. *Ibid.*

3. These are liable to the extent of their inheritance only. *Ibid.*

4. If some are not named, those who are must plead it in the first instance, or they lose the benefit of contribution. But where it appears on the face of the declaration, that only a part of the heirs, &c. are arrested in the suit, those who are so arrested may demur. *Ibid.*

5. In an action against heirs, if they will show nothing by descent, or insufficient assets by descent, they must plead or give notice of this specially, and cannot show it upon the general issue. *Vandusen v. Brower*, 6 Cow. 50.

6. The rules of pleading are the same, in this respect, in the case of heirs as of personal representatives. *Ibid.*

7. If they do not so plead, the plaintiff may take judgment, either generally or of assets descended, at his election. *Ibid.*

8. Execution against infant heirs cannot issue till a year after judgment. *Ibid.*

9. But where some of the heirs are adults, it may issue against them short of the year. *Ibid.*

10. If issued against both short of the year, it may be so amended as to affect only the adults. *Ibid.*

11. Where the plaintiff appears for infants by a nominal guardian, the Court will, at any time before the judgment is finally executed, let them in to plead, the judgment standing as security. *Ibid.*

12. In covenant against the heirs of the covenantor, they pleaded that they had not at the commencement of the suit, or before, or since, any lands, tenements, or hereditaments by descent. Replication, that the defendants have, and at and after the commencement of the suit, had sufficient lands, tenements, and hereditaments by descent, &c., wherewith they could, and might, and ought to have satisfied the moneys claimed. *Roosevelt v. The Heirs of Fulton*, 7 Cow. 71.

13. Held, that this plea and replication, though broader than those authorized by the statute, (1 R. L. 316.) were yet substantially within the statute; and that the jury should have inquired of the value of the land descended, &c. *Ibid.*

14. Held, also, that lands owned, but mortgaged by the ancestors, and which descended, were legal assets within the issue, not merely equitable assets; especially as the ancestor died before the mortgage money fell due. *Ibid.*

15. The mortgagor before entry or foreclosure is deemed legally seized of the mortgaged premises as to all persons except the mortgagee. *Ibid.*

16. Plain words, or necessary implication, are necessary in a will, to disinherit the heirs at law. *Ibid.*

17. The testator gave by his will certain annuities to his wife, some for her use, and some for the use of her children; those for the use of the wife to be out of the profits of his steamboat, and those not proving sufficient, then out of any other property or profits arising from his estate, real or personal; those for the use of his children to be out of the profits of his steamboats, or any other property, real or personal; and there were other provisions in the will countenancing the

idea that these annuities were intended by the testator to be made dependent upon the profits of his estate, and not to break in upon the capital. There being no express devise of his real estate; held, that it descended, and became assets in the hands of his heirs for the payment of debts; and remained totally unaffected by the words of the devise; and that the children of the testator should, therefore, be sued on his covenant, as heirs, not as devisees. *Ibid.*

18. In an action against the heir on the debt of his ancestor, to a plea of *riens per descent*, at the time of the commencement of the action, the plaintiff may reply that the defendant had lands before the time, &c.; and if this issue be found for the plaintiff, the jury shall inquire of the value. *Ibid.*

19. In every other case, there is no inquiry as to value. *Ibid.*

20. If the plaintiff reply according to the statute, (1 R. L. 317, s. 4.) he is bound to have the value of the land inquired of by the jury. *Ibid.*

21. If the plaintiff to a plea of *riens per descent* reply assets as at common law, and the issue is found for him; or there be judgment by confession, demurrer, or *nil dicit*, the judgment is general for the plaintiff, without any writ to inquire of the lands described. *Ibid.*

22. The only difference between a replication at common law to such a plea and a replication under the statute, is in the time when the assets are alleged to be had by the heir. At common law, the replication is, that on the day of issuing the writ, the defendant had sufficient, &c., by descent, with a conclusion to the country. Under the statute, it is sufficient assets before the issuing of the writ. *Ibid.*

23. The plaintiff proves the latter issue, by showing either assets when the writ issued, or assets before that time, which have been *bona fide* aliened; otherwise, on a replication at common law. Then, if the land be aliened, it ceases to be assets. *Ibid.*

24. A direction in a will to executors to sell lands to pay legacies, and distribute the residue, does not break the descent to the heir at law, though he be expressly cut off by a disinheriting legacy, and a declaration in the will that he shall take nothing as heir; otherwise, if the land be devised to the executors to sell. *Jackson v. Schaubert*, 7 Cow. 187.

25. To cut off the heir at law, the estate must be devised expressly or by implication to some other person. *Ibid.*

26. A devise that executors shall sell confers merely a naked power without interest. *Ibid.*

27. The Court will not, nor is a jury authorized to presume a conveyance by the executors, and a continued outstanding title, as between the heir and a mere intruder, without pretence of title, even after the lapse of more than forty years' possession. *Ibid.*

28. A mortgage of more than twenty years' standing, on which no interest has been paid, and under or upon which there has been no entry or foreclosure, is not such an outstanding title as will bar an ejectment by the mortgagor or his heirs. *Ibid.*

29. Courts will not countenance presumptions of outstanding title in favour of a mere intruder without pretence of title. *Ibid.*

30. An heir is not liable to costs *de bonis propriis*, where he pleads the general issue, and *riens per descent*, where the last is admitted by the plaintiff, though the first is found against him. *Van Patten v. Badger*, 1 Wend. 69.

31. Where an heir, previous to the death of his ancestor, conveys by deed all his interest in the estate of his ancestor, and there is a judgment against the heir previous to the conveyance on which, after the descent of the property, a sale is had, the purchaser at such sale, and not the grantee under the conveyance, takes the land. *Jackson v. Bradford*, 4 Wend. 619.

32. Although a covenant of warranty would bar, by way of estoppel, the heir and his issue from setting up title to the estate, such estoppel does not affect the purchaser under a judgment entered previous to the conveyance creating the estoppel. *Ibid.*

33. No title passes by the deed of an heir apparent or presumptive, to lands that may afterwards descend to him on the death of his ancestor, the expectancy of an heir at law in the life of the ancestor being less than a possibility; yet the heir may be barred by his deed from recovering such lands. *Ibid.*

34. The next of kin cannot maintain an action, or prosecute a claim for a distributive share of the personal property of the deceased, in their character of next of kin; letters of administration must be taken out, and suit brought in the name of the administrator. *Woodin v. Bagley*, 13 Wend. 453.

HIGHWAYS.

I. Highways generally.

II. Proceedings under the statute to regulate highways: (a) Laying out highways and assessments, &c.; (b) Obstructing and encroaching on a highway; (c) Removing the proceedings into the Supreme Court.

III. Public rivers.

I. Highways generally.

1. The power of a turnpike commissioner in ordering a gate open, under the act concerning turnpike roads, cannot be questioned, because it does not appear that these commissioners were appointed and sworn for the county. *Trowbridge v. Baker*, 1 Cow. 251.

2. Debt against an overseer of highways for the penalty of \$12.50, under the act, (sess. 44, ch. 123, s. 1.) for refusal to accept the office, does not lie, except where the town proceed to a new election. *Winnegar v. Roe*, 1 Cow. 258.

3. Merely neglecting to file notice of his acceptance with the town clerk is not enough. *Ibid.*

4. The object of the statute was to enforce the performance of his duties, and, if the town

proceed to a new election, then to exact the penalty. *Ibid.*

5. A road or highway of which a survey has been filed and recorded by the commissioners of highways, between 1805 and 1826, is a public highway, notwithstanding that the same may not have been regularly laid out in pursuance of the requirements of the statute. *Parker v. Van Houten*, 7 Wend. 145.

6. On a question arising under the acts of the Legislature, requiring all persons meeting each other on any public highway to drive their carriages to the right of the centre of the road; it was adjudged, that the true construction of the acts is, that persons thus meeting shall keep to the right of the centre of the worked part of the road, and not only of the smooth or travelled part. *Earing v. Lansingh*, 7 Wend. 185.

7. It is no defence that the party had no design to offend, or that he tried to prevent collision, or that it was easier for the other to turn out; unless the obstacles to turning out on his own side are insuperable. *Ibid.*

8. Where, by an act of incorporation of a turnpike road and bridge company, it was made the duty of the president and directors to keep the road in repair, and the neglect to do so was declared a misdemeanour in the president and individual directors for the time being; it was held, that an individual director might be indicted for such neglect, either separately or jointly with his co-directors, and on conviction might be punished separately, although the board of directors consisted of seven members, and the concurrence of a majority was necessary to the doing of a corporate act. *Kane v. The People*, 8 Wend. 203.

9. When the road is out of repair, *prima facie*, all the directors are liable; those, however, who have done their duty, and were prevented from complying with the act by the omission of others to do their duty, may show the facts of the case in exoneration of themselves. *Ibid.*

10. Under such an act, the offence is set forth with sufficient certainty, by reciting the substance of the statute imposing the duty, averring the company to be in existence as a body corporate, and that they have erected gates and exacted toll, without formally alleging the road to have been made and completed, that the defendant was a director, that he had notice of the road being out of repair, and had been guilty of a neglect of duty in the premises. *Ibid.*

11. Although two statutes are set forth in the indictment, it is not necessary to allege that the offence was committed *contra formam statutorum*, where it is wholly created by one of the statutes, and the second merely makes some alterations in the first, without affecting the offence. *Ibid.*

12. The fact that a corporation, incorporated as a road and bridge company, was, by a subsequent act of the Legislature, permitted to form itself into two distinct companies, one designated as a turnpike road company and the other as a bridge company, was held not to exonerate

the officers of the road company from the penalty imposed by the original act, it being manifest that the Legislature did not intend to relieve them from their liabilities. Nor does an act of the Legislature, permitting a turnpike company to *abandon* a part of their road, discharge the directors from a penalty incurred, in reference to such part of the road, previous to the act authorizing the abandonment. *Ibid.*

13. Lands adjoining a public highway, remaining unenclosed, are considered as dedicated to the public use, and the owner of such land cannot maintain an action against any person travelling over it. *Cleveland v. Cleveland*, 12 Wend. 172.

14. To defeat an action for penalties, by a turnpike road company, it is not necessary to show an absolute forfeiture of the charter; it is enough if the company have so conducted as to induce the belief that they have abandoned the road. *Hooker v. Utica and Minden Turnpike Company*, 12 Wend. 371.

15. *It seems*, that the title to the land over which a turnpike road passes is vested in the company solely for the purposes of a road, and that when the road is abandoned, the land reverts to the original owners. *Ibid.*

II. Proceedings under the statute to regulate highways: (a) Laying out highways, and assessments, &c.

16. The survey on laying out a public highway need not specify the width. *People v. Commissioners of Salem*, 1 Cow. 23.

17. Proceedings on laying out a road through improved lands, and discontinuing an old road. Form of certificate to the commissioners. Their refusal. Petition of appeal. Reversal of their decision. Order to lay out and discontinue, &c. *Certiorari* to remove appeal, &c., return thereto. Continuances and judgment of affirmance. Record of the judgment. Alternative. *Mandamus* to compel the commissioners to lay out and discontinue, &c. *Ibid.*

18. The judges, on reversing the decision of the commissioners, ordered them to proceed and lay out and discontinue, &c., and a *mandamus* was *halden* to lie, to compel their obedience. *Ibid.*

19. An order on appeal that the road be laid out as applied for, is a sufficient direction to the commissioners to lay it out. *Ibid.*

20. The owner of the soil over which a highway is laid retains all his rights not incompatible with the public right of way. *Babcock v. Lamb*, 1 Cow. 238.

21. He may maintain trespass for cutting timber, &c. *Ibid.*

22. In laying out a public highway on the sworn certificate of twelve freeholders, the commissioners of highways must all be present, but a majority must decide. *Ibid.*

23. The power of the judges of the Common Pleas, under the act to regulate highways, (sess. 36, ch. 33, s. 36.) is strictly appellate; and they cannot lay out a road differing from the one submitted to the commissioners. *Ex parte Commissioners of Danube*, 1 Cow. 142.

24. Where commissioners had laid out a road on the application of twelve freeholders,

but neglected to file their proceedings, and a *mandamus* directed to their successors, commanding them to open it, by mistake misdescribed the road; on application for a rule requiring the defendants to furnish the original application, and that the *mandamus* be amended thereby, it appeared that the paper sought for had remained in the hands of H., a former commissioner, and was beyond the control of the defendants. Motion, therefore, denied as to the defendants. *People v. Vail et al.* 1 Cow. 589.

25. But a rule was made upon H. that he file the paper with the clerk of the town, &c., or show cause why he should not do so. *Ibid.*

26. Though a road be laid out, the overseer of highways has no right to open it, by removing fences, without an order from the commissioners or a majority of them. *Kelly v. Horton*, 3 Cow. 424.

27. Nor have they a right to open a road which they have laid out, or direct it to be opened, by removing fences, until after sixty days' notice to the owner to remove his fences. *Ibid.*

28. And if fences are removed, to open a road newly laid out, without such notice, all persons concerned therein are trespassers. *Ibid.*

29. If a highway, or any part of it, be not opened, and worked within six years after the 19th March, 1813, it ceases to be a road; though it had been opened and worked before that time, and within six years after it had been laid out. *Lym v. Munson*, 2 Cow. 426.

30. Accordingly, where a road had been laid out in 1798, and opened and worked within six years thereafter; but a part of it had been fenced up, and the travel turned another way for six years after, and including the 19th March, 1813; *held*, that the part thus fenced ceased to be a road. *Ibid.*

31. And consequently, that an action for the penalty of \$5, within the 25th section of the act to regulate highways, would not lie for continuing the fence. *Ibid.*

32. The sworn application of twelve freeholders for a public highway, pursuant to the 16th section of the act to regulate highways, (2 R. L. 275.) is a public document, open for inspection by all the inhabitants of the town in which the road is laid out, and belongs to the town clerk's office. *People v. Vail*, 2 Cow. 623.

33. And if it come into the hands of a stranger, not a commissioner of highways, this Court will compel him, by attachment, to file it with the town clerk for the inspection of a person who is a party to a suit in which the road is in question. *Ibid.*

34. So, for the inspection of one who is prosecuting a *mandamus* to compel the opening of the road. *Ibid.*

35. By the act to regulate highways, (2 R. L. 270, s. 1, 16.) the commissioners of highways are authorized to lay out public highways through land lying in a state of nature, or through improved or cultivated land, commonly so called; but this provision does not authorize them to lay out a highway through buildings, mills, or manufactories, or fixtures, yards, &c. appurtenant to them, without con-

sent of the owner. *Clark v. Phelps*, 4 Cow. 190.

36. Accordingly, where commissioners laid out, and opened a road through a corn crib, mill yard, and the tender bars of a felling mill; *held*, that they were liable to the owners in trespass. *Ibid*.

37. The right of the owner of improved or cultivated land, through which the commissioners have laid a highway, to appeal to three judges of the Court of Common Pleas, under the 36th section of the act, (2 R. L. 282.) is personal to such owner, whose private rights cannot be affected by an appeal in behalf of any other person, through whose land the same road may also have been laid. If there be several owners, each may appeal for himself. *Ibid*.

38. It is the duty of the judges to whom such appeal is made to convene and decide it as soon as may be, on a day, &c. which they shall agree upon, of which they should give notice to the parties, who then, and not till then, are bound to attend, or be concluded. *Ibid*.

39. An appeal suspends the powers of the commissioners; and till their acts are affirmed by a decision, they cannot open the road. If they do so, they are trespassers. *Ibid*.

40. Where one C., through whose land a road was laid, appealed to three judges; then M., through whose land the same road passed, appealed to three judges, two of whom were the same judges appealed to by C.; and C. appeared before the last board, and objected to their proceeding, on the ground that his appeal was first; but his objection was overruled; and he then stated his reason against the proceedings of the commissioners, in passing over the ground through which the road ran; and the judges affirmed the acts of the commissioners; *held*, notwithstanding, that their decision was void, and of no effect as to C., and that he was entitled to select the three judges who were to pass upon his right. *Ibid*.

41. After C.'s appeal, one of the judges to whom he appealed went abroad, and did not return till after M.'s appeal was decided; and no further proceedings were had by C.; and the commissioners laid out and opened the road; yet, *held*, that C.'s appeal continued in force, and was not to be deemed discontinued or abandoned by the neglect of the judges to convene and hear it; and that the commissioners were trespassers. *Ibid*.

42. If the commissioners deem the judges dilatory, they should apply to them to fix a day for the hearing. *Ibid*.

43. After the appeal the judges become actors, and if they do not proceed, it cannot be imputed as a *lack* to the party. *Ibid*.

44. The assessment of damages by commissioners appointed under the sixteenth section of the act to regulate highways, (2 R. L. 275.) is conclusive upon the board of supervisors, who are bound to proceed and levy such damages; and cannot inquire whether they be too high or not. *People v. Supervisors of St. Lawrence*, 5 Cow. 292.

45. Commissioners of highways are not bound to build bridges, when not in funds to defray

the expense. *The People v. Commissioners of Highways of Hudson, &c.* 7 Wend. 474.

46. Where the probable expense of building a bridge would exceed \$250, the sum which the commissioners may cause annually to be raised for the improvement of roads and bridges, they will not be required by *mandamus* to proceed in the erection of the bridge; and, on a motion for such *mandamus*, the Court do not look at the affidavits on which the alternative writ was founded; their decision is made solely upon the return to the alternative writ. *Ibid*.

47. The President and Directors of the Mohawk Turnpike Company are personally liable to punishment as for a misdemeanour for every neglect to keep the road in good repair. The offence is joint and several; and on an indictment, some may be acquitted and others convicted. *Kane v. The People*, 3 Wend. 363.

48. Where the record of a private road laid out by commissioners designates the course, distance, and quantity of land taken, in legal indentment, the road will be considered as laid out (the course specified in the record taken as the centre) of such a width as the quantity of land will permit; and parol evidence is admissible to show the width from the data given. *Herrick v. Slover*, 5 Wend. 580.

49. Sixty days' notice to the owner of land must be given before proceeding to open a road, as well where it has been established by an *alteration* made by judges after the same had been laid out by them on *appeal*, as where a road is originally laid out by commissioners of highways. *Case v. Thompson*, 6 Wend. 634.

50. Actual notice must be shown in such case, and will not be presumed. *Ibid*.

51. The payment or assessment of damages of the owners of lands through which a road is laid, is not a condition precedent to the right to open the road. *Ibid*.

52. It is no objection, in proceedings under the act as to laying out roads, that the certificate as to the necessity and propriety of a road is made by more than twelve freeholders. *Commissioners of Carmel v. Judges of Putnam*, 7 Wend. 264.

53. Where the certificate is made by twenty freeholders, the fact that five of them are of kin to the owners of the land through which the road is proposed to be laid does not vitiate it, as there still remain twelve not interested. *Ibid*.

54. The fact that one of the judges to whom an appeal is made from the decision of commissioners refusing to lay out a road, was one of the freeholders who originally certified to the propriety of the road, is not such an error as will produce a reversal of the doings of the judges, if the objection was omitted to be urged on the hearing of the appeal. *Ibid*.

55. A *general appeal* from the determination of commissioners refusing to lay out a road, is a sufficient compliance with the requirements of the statute. *Ibid*.

56. The supervisors of a county, when called on to credit the damages of owners of lands taken for roads, are not concluded by the assessment of a jury or liquidation of commissioners,

but may reduce the amount certified, and direct only the balance to be levied and collected. *The People v. Supervisors of King's County*, 7 Wend. 530.

57. The supervisors have no authority to inquire into the proceedings of the commissioners; they can be reviewed only by *certiorari*. *Ibid.*

58. The making and filing of the map of the route of a turnpike road required to be made and filed, is not a condition precedent to the right to enter upon lands for the purpose of making the road. *Estes v. Kelsey*, 8 Wend. 555.

59. The map is but evidence of the route of the road, and should be received as testimony, whenever made. *Ibid.*

60. Nor is it material that the commissioners appointed to lay out the road should be together at the time of their certifying the map, provided they acted together in the designation of the route of the road. *Ibid.*

61. An omission to file the petition at the time of making an order laying out a road does affect the regularity of the proceedings, the statute requiring it to be filed being merely directory. *Commissioners of Highways of Bushwick v. Meserole*, 10 Wend. 123.

62. On an appeal from the acts of commissioners in laying out a road, an inquiry into the damages of the owners of lands is proper to enable the judges to determine whether the benefit will equal the expense, and whether the public good will be promoted by the road. *Ibid.*

63. Freeholders whose freeholds are situated in the village of Williamsburgh are not competent petitioners for a road in the town of Berwick, without the bounds of the village. *Ibid.*

64. Parol testimony is admissible on an appeal to show the location of the freeholds of the petitioners. *Ibid.*

65. It seems, that a justice of the peace has no authority to administer the oath required to be taken by petitioners for a road. *Ibid.*

66. An appeal stating the proceedings of commissioners in laying out a road to be illegal, is a sufficient compliance with the statute requiring the grounds of appeal to be briefly stated in a case where the petitioners for the road are not freeholders of the town, within the meaning of the act; although, it seems, it would have been well to have specified the objection. *Ibid.*

67. On an appeal, a commissioner of roads is not a competent witness to prove the regularity of the proceedings in the laying out of a road. *Ibid.*

68. An assessment of damages on the laying out of a private road, is not subject to the revision or correction of a board of supervisors. *Craig v. Supervisors of Orange*, 10 Wend. 585.

69. Where, in the laying out of a road, the commissioners of highways ran a single line, but specified the length of the road over the land of each proprietor over whose grounds the road would pass, and the quantity of that land which the road would take from each proprietor; it was held, that the line so laid out should be taken as the centre of the road, and that its width should be ascertained by the quantity of land which it would take from each proprietor.

The People v. Commissioners of Highways of Red Hook, 13 Wend. 314.

70. On an appeal from the decision of commissioners of highways in refusing to lay out a road, the judges have no authority to entertain an objection to the regularity of the proceedings anterior to the decision of the commissioners; their decision can be only on the merits, as to the necessity and propriety of laying out the road. *Commissioners, &c. of Warwick v. Judges of Orange County*, 13 Wend. 432.

(b) *Obstructing and encroaching on a highway.*

71. Though the statute (2 R. L. 277.) requires public roads to be laid out four rods wide, and where they are laid out under the statute, they are to be deemed of that width; yet where they are claimed, not as being laid out under the statute, but by reason of a user for twenty years or more, they may be less than four rods wide. *Kenlow v. Humiston*, 6 Cow. 189.

72. And in trespass for laying wood in a highway of the latter sort, by which the plaintiff's horse, being frightened, ran upon it and was killed, the road being in fact but two and two and a half rods wide, and it being questionable on the evidence whether the wood was laid within the road as established by use, though it lay within the road fence on the land of the defendants; held, that it should have been left to the jury to find whether the wood was in the highway. *Ibid.*

73. All the land within a highway fence is not necessarily subject to the right of way; and if not, it may be occupied by the owner; and if he place an obstruction there, and another be injured by it, he is not, therefore, liable. *Ibid.*

74. And though such obstruction be within the highway, he is not liable, unless the person injured exercise ordinary diligence to avoid it. *Ibid.*

75. If a man's servant in the ordinary course of his business obstruct the highway, from which a traveller receives a special injury, the master is liable. *Ibid.*

76. The question seems to be, whether the act be such that he can justify himself to his master; if he may, it shall be deemed in the course of his business as a servant, and the master is liable. *Ibid.*

77. The owner of land adjoining a private road cannot build a Virginia fence, placing the centre of it on the exterior lines of the road, with the angles projecting into the road. *Herick v. Stover*, 5 Wend. 580.

78. A plea of title is no bar to an action by commissioners of highways for an obstruction of a highway. *Parker v. Van Houten*, 7 Wend. 145.

79. An overseer of highways is bound to remove obstructions from highways within his district although not specially directed to do so by the commissioners. *M'Fadden v. Kingsbury et al.* 11 Wend. 667.

(c) *Removal of proceedings into the Supreme Court.*

80. A public highway having been laid out by three judges of the Common Pleas, on a

petition to discontinue it, they discontinued only a part, and *certiorari* was brought from their decision; *held*, that the *certiorari* did not suspend proceedings as to that part of the road which they had not directed to be discontinued, but that the commissioners were bound to go forward and open this part. *Ex parte Sanders*, 4 Cow. 544.

81. And a *mandamus* to compel them to do this was granted, notwithstanding the *certiorari*. *Ibid*.

82. The true construction of the act to regulate highways, declaring the adjudication on an appeal to be conclusive in the premises, is, that the decision of the judges is conclusive in the case in which the appeal was made, but it does not interdict or affect a new application, or deny the right of instituting proceedings *de novo*. *Bruyn v. Graham*, 1 Wend. 370.

83. The prohibition as to the taking up or altering a road fixed by the decision of the judges applies only to cases where the proceedings of commissioners have been affirmed, and not where they have been reversed. *Ibid*.

84. A turnpike company have a right to remove fences or other encroachments upon their road, and are not compelled to resort to a remedy by action. *Estes v. Kelsey*, 8 Wend. 555.

III. Public rivers.

85. A patent or grant of land by the state, bounded on the margin of a river above tide water, carries the land to the grantee *usque flum aquæ*. *Ex parte Jennings*, 6 Cow. 518.

86. Otherwise, where it is bounded on a navigable river. *Ibid*.

87. A navigable river, in the common law sense of the term, is only where the tide ebbs and flows. *Ibid*.

88. A patent or grant of land was bounded on the margin of the Chittenango creek; *held*, that it carried the land to the grantee *usque flum aquæ*. *Ibid*.

89. The water of the Chittenango creek was diverted from a mill and other hydraulic works on that creek; the right to erect the works being claimed under a patent or grant from the state, bounded on the margin of the creek; *held*, that the appraisers appointed pursuant to the act, (sess. 48, ch. 275, s. 1.) were bound to appraise the damages to the owners of the works, they having a right to erect them, and a right to the use of the waters; that this was a case within the statute. (Sess. 40, ch. 262, s. 3.) *Ibid*.

90. The appraisers having refused to act, on the ground that the property of the creek was in the state, and that, therefore, they had no jurisdiction; *held*, that a *mandamus* should issue, commanding them to appraise. *Ibid*.

91. The Court granted a peremptory *mandamus* on the first motion, the case being argued on both sides, and the Court understanding that the appraisers were willing to abide by the decision on the facts as they then stood; but afterwards, on suggestion that the appraisers wished to bring error, they changed the rule into one for an alternative *mandamus*; so that the facts might be put on record by a return. *Ibid*.

92. Form of the rule for a peremptory *mandamus*. *Ibid*.

93. Some account of Hale's treatise *De jure Maris et brachiorum ejusdem*, with his doctrine in relation to private waters, extracts from his treatise, and a view of the modern authorities relating to public and private right in soil adjoining to and under waters. Note (a), 536 to 554. *Ibid*.

94. The owners of land adjoining a stream of water where the tide does not ebb and flow, own also the bed of the stream *usque flum aquæ*. *People v. Seymour*, 6 Cow. 579.

95. It is competent to a state government to authorize the erection of a bridge across a navigable river, at a point below where the coasting trade is carried on by licensed vessels, provided that the bridge be built with a draw for the passing and repassing of vessels free of expense. *The People v. Rensselaer and Saratoga Railroad Company*, 15 Wend. 113.

96. The Rensselaer and Saratoga Railroad Company are authorized, by their act of incorporation, to build a bridge across the Hudson river from the city of Troy to Green island on the opposite side of the river. *Ibid*.

97. In an information in the nature of a *quo warranto* against a corporation, calling upon them to show by what warrant they use certain franchises alleged to have been usurped, it is a sufficient answer to say that such franchises were granted by an act of the Legislature. It is not competent to the attorney-general in behalf of the people to allege that the act of the Legislature is repugnant to the constitution of the United States and the laws of Congress, and therefore void. *Ibid*.

HORSERACING.

1. Keeping a horse for trotting, and using him for that purpose on a wager, is not within the second section of the statute against horseracing. (Sess. 25, ch. 44, 1 R. L. 222.) *Van Valkenburg v. Torrey*, 7 Cow. 252.

2. The first section of a statute declared all racing, running, pacing, and trotting of horses for a bet, public nuisances, punishable by fine and imprisonment. The second section declared the owner of every horse used for racing with his privity or permission on bet, should forfeit the value of the horse; *held*, that keeping a horse for, and allowing him to be used in trotting on a bet, was not within the latter section of the statute. *Ibid*.

3. Penal statutes are generally to be construed strictly. *Ibid*.

4. Where a statute declares that the penalty for a certain offence shall be sued for by a common informer; and a subsequent statute, that it shall be sued for by the overseers of the poor exclusively; during the existence of which last statute the offence is committed; and then a third statute comes and repeals the second, so far as it excludes persons other than overseers from prosecuting; *held*, that this does not restore the right of the common informer to pro-

secute for the offence committed intermediate the second and third statutes. *Ibid.*

5. Overseers of the poor may still prosecute as such, for the penalties given by the act to prevent horseracing. (Sess. 25, ch. 44, 1 R. L. 221.) *Ibid.*

6. Under the statute against horseracing, (1 R. L. 222, s. 5.) and the statute against gaming, (*Ibid.* 152.) the loser may recover his wager of the stakeholder, on demanding the money of him before it is paid over to the winner. *Allen v. Ehlk*, 7 Cow. 496.

HUSBAND AND WIFE.

- I. *Marriage and its incidents.*
- II. *Husband's interest in the wife's estate, and conveyances, &c. by and to husband and wife, and by the wife alone.*
- III. *Husband's liability for the wife, and how far bound by her acts.*
- IV. *Actions by and against husband and wife.*
- V. *Separation and separate maintenance.*
- VI. *Divorce.*

I. *Marriage and its incidents.*

1. A husband is not bound to support his wife's child by a former marriage. *Gay v. Ballou*, 4 Wend. 403.

2. A marriage is complete, if there be a full, free, and mutual consent between parties capable of contracting, though not followed up by cohabitation. *Jackson v. Winne*, 7 Wend. 47.

3. The circumstance of a party being under arrest as the putative father of a bastard child, is not enough to avoid the contract on the ground of duress. *Ibid.*

4. In deciding upon the question of the sufficiency of the assent, the Court will look principally to the facts which transpired at the espousals. *Ibid.*

II. *Husband's interest in the wife's estate, and conveyances, &c., by and to husband and wife, and by the wife alone.*

5. A conveyance to husband and wife makes them neither joint tenants nor tenants in common; but both are seised of the entirety; and neither can alien without the consent of the other; and on the death of one, the whole will go to the survivor. *Sulkiff v. Forgey*, 1 Cow. 89.

6. A wife cannot purchase, except through the medium of her husband. *Ibid.*

7. The wife's equity, as it is called, cannot be disposed of by the husband, without first making a suitable provision for her support. *Udall v. Kenney*, 3 Cow. 590.

8. Though the wife should join the husband in the assignment of it, this will not render the disposition valid, she being an infant. *Ibid.*

9. The only way in which she can herself dispose of it is by consent in Court, or out of Court, on an adequate provision being made for her. *Ibid.*

10. Otherwise, as to a wife's choses in possession or in action. Of the former, the hus-

band is absolute owner by the marriage; and so of the latter, when reduced into his possession. *Ibid.*

11. *It seems*, that when the property of the wife is the subject of an action at law, equity will not interfere, by injunction or otherwise, so as to prevent the husband getting possession till he make proper provision for his wife. *Ibid.*

12. But if the aid of a Court of equity be necessary to enable the husband to get possession of his wife's property, the Court will see, when he comes there for that purpose, that he first make a suitable provision for her; or it will interfere, at her suit, to prevent his getting possession in any way till such provision is made. *Ibid.*

13. So of the general assignment of the husband, by his own act, with or without valuable consideration, or by operation of law. *Ibid.*

14. So of a specific assignment for valuable consideration, with or without notice of the wife's equitable claim. *Ibid.*

15. Cases on the three last heads considered in chronological order by *Savage*, C. J. *Ibid.*

16. In all these cases, the extent of the provision for the wife is properly the subject of reference to a master, and must depend on circumstances; and the husband, or his assignee, is entitled to what remains after provision made. *Ibid.*

17. The general rule is, that the interest or income of the wife's equitable property may be received by the husband while he lives with and maintains her. *Ibid.*

18. But if he neglects to do this, or if he ran away with and married her while she was a ward of the Court, or has shown incapacity to manage his concerns, or a disposition to squander his wife's property, the Court will direct the interest to be paid to her, or to a trustee for her benefit. *Ibid.*

19. While, however, he has a right to receive the interest or income of his wife's property, he may transfer that right to another for a valuable consideration, who shall not be holden to account to the wife, especially if such right of the husband or assignee be sanctioned by an order of Court. *Ibid.*

20. *It seems*, that inadequacy of price alone is not a sufficient ground for setting a contract aside. *Ibid.*

21. Bank stock was settled by a father, by deed declaring a trust in favour of his infant daughter, and by an order of the Court of Chancery, was placed in the hands of the assistant register of that Court, as trustee to execute the trust in her favour. She married, and an order of the Court was made to pay the dividends of the stock to the husband, within a year after the marriage; and while she was an infant, she and her husband transferred the stock for a valuable consideration, the assignee knowing at the same time of the deed of settlement and the infancy of the wife; whereupon an order was made that the dividends should thereafter be paid to the assignee till the wife came of age, or the further order of the Court. On a bill filed by the wife against the husband and assignee, the Court of Chancery declared the assignment null and void, so far as it respected the wife's equity.

and decreed that the assignee should account for the dividends received by him under the order. And, the husband having misbehaved himself, the dividends were directed to be paid to the wife, until she came of age, with liberty for her then to apply for such suitable provision out of the property as might be determined on the usual reference to a master. On appeal to the Court of Errors, the decree was affirmed, except so much as directed the assignee to account for dividends received anterior to the decree; and the wife in the mean time having come of age, the record was remitted with directions to the Court below to make the proper reference, and determine what would be a suitable provision; the overplus, if any, to be paid to the assignee. And the chief justice intimated, in delivering the opinion of the Court, that if the wife had no fortune beside the stock, which was \$8000, the whole would not exceed a reasonable provision. *Ibid.*

22. Husband and wife holding lands by a conveyance to them jointly are not joint tenants, or tenants in common. They are seised *per tout*, but not *per my*; each owner of the whole; and the conveyance by one is inoperative as to any part; for both are necessary to make one grantor. *Doc v. Howland*, 8 Cow. 277.

23. The deed of a *feme covert* is void at common law, not merely voidable; and though she acknowledge the execution after her husband's death, this shall not relate to the time of original execution. It can be made operative only in virtue of an acknowledgment under the statute. (1 R. L. 369, s. 12.) *Ibid.*

24. But her acknowledgment of the deed after the husband's death shall pass her right in the land; for it gives effect to the old deed, as an original conveyance, from the time of the acknowledgment. *Ibid.*

25. Husband and wife were seised of land by a conveyance to them jointly. They executed a deed in fee in the common law form, which was not acknowledged pursuant to the statute. (1 R. L. 369, s. 1, 2.) After the husband's death, the wife went before a master in Chancery, and with full knowledge of her rights, and with intention to give effect to the deed, acknowledged that she executed it freely, &c. *Held*, that this was an original execution of the deed by her; and that it passed her estate, taking effect from the time of the acknowledgment. *Ibid.*

26. The wife may convey land to her husband by first aliening with her husband to a stranger, who may alien to the husband. Per *Jones*, Chancellor, *arguendo* in support of his decree. Recognised per *Stebbins*, Senator, who says an indirect mode of conveyance is no fraud upon the law, when resorted to in order to remedy a want of capacity to convey directly. *M^cCartee v. Orphan's Asylum*, 9 Cow. 437.

27. Goods conveyed to a trustee for the use of the wife, places them beyond the control of the husband. Per *Jones*, Chancellor, *arguendo* in support of his decree. *Ibid.*

28. Where *marriage articles* were entered with a female, an *infant*, not conveying an estate of freehold to secure the settlement, but making provision for the payment of an annuity, after the decease of the husband, to the wife *during*

widowhood; which articles, after the decease of the husband, were considered as *invalid*, by reason of the *infancy* of the wife at the time of entering into the same, as well by the *widow* as by the *executor*, to whom the estate of the husband was devised in trust, and the latter, upon the assumption of the invalidity of the marriage articles for several years, paid the *one-third* of the rents, issues, and profits of the estate to the *widow as and for her dower*, and by other acts acknowledged her right of dower; *it was held*, upon his subsequently refusing, after the remarriage of the widow, to pay over one-third of the rents, &c., that he was concluded by his acts, and an *account* of the moneys received by him was directed to be taken and stated by a master. *M^cCartee v. Teller*, 8 Wend. 267.

29. Personal property of the husband bought in at a sheriff's sale by a trustee of the wife with trust funds belonging to her, and left with the wife, who resides with the husband, is not subject to the debts of the husband, where there is no pretence of fraud in the purchase, no allegation that the act of leaving the property with the wife was fraudulent, or done with the intention to defraud the creditors of the husband, and no evidence that the husband ever exercised acts of ownership over the property, or in any manner intermeddled with it; *so held*, where such purchase was made in 1817, and the property was levied upon as long subsequent as 1829, under an execution against the husband. *Quick v. Garrison*, 10 Wend. 335.

30. *It seems*, that without some proof of *actual fraud*, the question whether such a transaction be fraudulent or not, will not be submitted to a jury. *Ibid.*

31. A wife, mortgaging her separate property for the debt of her husband, is entitled to all the rights and remedies of a personal surety, and consequently may avail herself of a contract entered into by the creditor without her assent with the husband, the principal debtor, by which the creditor is disenabled for a given time from enforcing payment of the moneys, or a part thereof actually due; but to enable her to do so, the fact of suretiship must be known to the creditor. *Gale v. Neimecoviez*, 11 Wend. 312.

32. It is not enough in such a case that it be known to the mortgagee that the property mortgaged is the inheritance of the wife, and that the security was given for money loaned to the husband; for as the money may have been obtained for the benefit of the wife's estate, or with the view of a gift to the husband, the fact of suretiship must be shown affirmatively. *Ibid.*

33. A bond executed by a husband to a third person, to secure the amount of a legacy left to the obligor's wife by her father, and received by the obligor after marriage, is a valid bond, and may be enforced in an action by the trustee of the wife against the personal representative of the obligor. *Northrup v. Barnum's Executors*, 15 Wend. 167.

34. A deed to a husband and wife, and to six of their children, naming them, and to such other children of the marriage as might be subsequently born, creates a tenancy in common between the husband and wife and the children; the husband and wife, being considered in law

but as one person, take, while there are six children, one-seventh of the estate granted, and when two more children are born, take only one-ninth of the estate. *Barber v. Harris*, 15 Wend. 615.

35. As between themselves, the husband and wife hold neither as joint tenants, or as tenants in common; each is seised of the entirety *per tout et non per my*, and for that reason the husband alone cannot alien the estate; but having the absolute control of the estate during his life, he may convey or mortgage it during that period. *Ibid*.

III. Husband's liability for the wife, and how far bound by her acts.

36. Where a *feme covert* has a separate estate vested in a trustee, and services are rendered on account of the estate, and the credit for such services is given to her, the husband is not liable for them. *Stammers v. Maccomb*, 2 Wend. 454.

37. A wife may act as the agent of her husband, and a subsequent acknowledgment, or ratification of her acts by the husband, is evidence of and equivalent to an original authority. *Hopkins v. Moliniex*, 4 Wend. 465.

38. Where a husband professes to provide for his wife, who lives apart from him, it is incumbent upon a party who has been expressly forbidden to give credit to her, in order to render the husband liable for subsequent supplies, to show affirmatively and clearly that the husband did not supply her with necessaries suitable to her condition. *Mott v. Comstock*, 8 Wend. 544.

39. Where the wife, when furnished with provisions in large quantities, sells them, the husband is excused in adopting the mode of providing for her by sending her meals to her, if the supply be abundant and of good quality. *Ibid*.

40. A wife, in the absence of her husband, may hire out property of her husband, and trover will not lie for the possession thus obtained, unless it be shown that the husband had constituted some other person his agent to take charge of his property in his absence. *Church v. Landers*, 10 Wend. 79.

41. The wife, in the absence of the husband, is considered as having a general authority to exercise a usual and ordinary control over his property, unless it be expressly shown he has constituted some other one his agent for that purpose. *Ibid*.

42. A husband, being separated from his family, is bound to provide them with necessaries suitable to their condition in life, and his omission to do so furnishes them with a general credit to that extent. *Kimball v. Keyes*, 11 Wend. 33.

43. But the husband and parent has a right to supply his family in such reasonable measure as he may think proper, as by designating persons to furnish what may be wanted; and if an individual not thus designated furnish necessaries, and it be shown that a notice was published forbidding credit, and that the newspaper in which such a notice appeared was taken by such individual, an action cannot be maintained by him. *Ibid*.

44. The wife of the plaintiff, being intrusted by

him with certain sums of money, and directed to deposit them in some bank for safe keeping, opened an account with the defendants in her own name, and deposited the money in their bank. The defendants were not aware at the time of the deposits, nor until the money had been entirely withdrawn from the bank, that the depositor was a married woman, and they therefore gave her a bank book in the ordinary form, and prescribed the mode in which her checks should be made, as she was illiterate, and could not write. *Dary v. The Chemical Bank*, 2 Hall, 550.

45. Under this arrangement the wife drew out of the bank, at various times, the entire sums deposited; and her husband, then discovering that his money was gone, brought an action of *assumpsit* against the bank, to recover the amount of the deposits. *Held*, that he was not entitled to recover; that the wife, being the agent of the husband to make the deposits, might fairly be presumed to have had authority to withdraw them; but if this were otherwise, as the bank had no notice of the agent's coverture, and as the husband had enabled his wife, by intrusting her with the money, to do the wrong, that the loss accruing from her breach of trust should fall upon him, rather than upon the bank. *Ibid*.

IV. Actions by and against husband and wife.

46. A *feme covert* may be imprisoned on a *ca. vi.* with or without her husband; though otherwise as to *meeme* process. *M'Kinstry v. Davis et ux.* 3 Cow. 339.

47. In an action against husband and wife, for the debts of the wife contracted by her while *sole*, a plea that the husband is an infant is no bar to a recovery. *Roach v. Quick*, 9 Wend. 238.

48. A wife must be joined with her husband in an action to recover a demand which accrued to the wife before marriage. *Moore v. Earle*, 13 Wend. 271.

49. *It seems*, where a husband performs the stipulations of a contract entered into by his wife before marriage, which, if performed by her whilst *sole*, would have given her a right of action, that the action for the recovery of a demand thus arising must be brought in the joint names of the husband and wife. *Ibid*.

50. An action against husband and wife, for the debt of the wife *dem sola*, abates by the death of the wife after commencement of suit and before declaration. *Williams v. Kent*, 15 Wend. 360.

51. The statute declaring the husband liable for the debts of his wife, contemplates a new suit against the husband after the death of the wife, in which he is answerable only for assets, unless he neglects to take out letters of administration. *Ibid*.

52. The statutory provision that an action shall not abate by the death of one of several defendants, applies only to cases where the cause of action survives. *Ibid*.

53. Where a lease is made by husband and wife of premises belonging to the wife, and an action be brought for the recovery of the rent, the lessee is entitled to set off a demand

against the husband alone, although the suit be in the names of both husband and wife. *Ferguson v. Lothrop*, 15 Wend. 625.

54. Where the husband may bring an action in his own name, he cannot defeat the right of set off by joining his wife as a co-plaintiff. *Ibid.*

V. Separation and separate maintenance.

55. Where a bond is given by a husband, to secure a separate maintenance to his wife, on an agreement between them to live separate and apart, and they separate, and the wife, subsequently returning for the purpose of resuming her duties and privileges as a married woman, is received by her husband as his wife, their previous agreement to live separate from each other is at an end, and the bond which had been given for her separate maintenance must fall with the contract or agreement out of which it arose, and upon which it was founded. Her subsequently abandoning her husband would not revive the bond, or the legal liability of her husband to afford her a separate maintenance. *Shellhar v. Gregory*, 2 Wend. 422.

VI. Divorce.

56. Where, in an action of *ejectment for dower*, in answer to proof on the part of the defendant that the plaintiff, previously to the marriage by virtue of which she claimed dower, was a married woman, and that her first husband was still alive, the plaintiff produced a record of the Superior Court of Connecticut, containing a sentence of divorce, on her petition, from her first husband, and such record did not state that the husband was served with process, or had notice of the proceedings, or appeared; but on the contrary alleged that the adjudication was made on hearing the plea and evidence produced by the plaintiff; and the defendant in the ejectment suit further proved that the first husband of the plaintiff, at the time of the presentation and of the granting of the divorce, was an inhabitant of the state of New York; *it was held*, that the divorce was void and inoperative here, and that the plaintiff was not entitled to recover dower in any lands of which her second husband died seised, although such divorce was granted thirty-eight years previously to the trial of the action for dower, and twenty years had elapsed since the second marriage. *Bradshaw v. Heath*, 13 Wend. 407.

57. A voluntary cohabitation of a wife with her husband, with full knowledge of an act of adultery committed by him, is legal evidence of condonation or forgiveness of the offence, and bars a suit by her for a divorce. *Johnson v. Johnson*, 14 Wend. 637.

58. Whether in this state, where a divorce *a mensa et thoro* only is granted for *cruel and inhuman treatment*, a divorce *a vinculo matrimonii* will be granted, when an adultery has been committed by the husband, a condonation of the offence, and subsequent *cruel and inhuman conduct* on the part of the husband? *Quære*. In other words, does the rule of the English law, that a condonation of the offence of adultery implies a condition not only that the same offence shall not be repeated, but that

the wife shall be treated with conjugal kindness, and that on breach of the latter part of the condition, the right to sue for a divorce *dissolving the marriage contract* is revived, prevail here? *Ibid.*

59. It is *prima facie* evidence of adultery that a husband, long after marriage, is infected with the venereal disease. *Ibid.*

INDIANS.

1. The conveyance by an Indian, resident in this state, of his land by deed to a white person, is void, whether he reside at the time with his tribe or not. *Lee v. Glover*, 8 Cow. 189.

2. Being void, no act of disaffirmance is necessary to render it unavailable to the grantee. *Ibid.*

3. The case is not altered by the Indian deriving his title by patent from the people. *Ibid.*

INDICTMENT.

- I. *Indictment, and its incidents:* (a) *What is indictable, and form of the indictment;*
(b) *Plea;* (c) *Trial.*
- II. *Verdict and judgment.*

- I. *Indictment, and its incidents:* (a) *What is indictable, and form of the indictment.*

1. It is a general rule, that in an indictment for forgery, the instrument forged should be described particularly. *People v. Kingsley*, 2 Cow. 522.

2. But if in the hands of the defendant, or lost or destroyed by him, the indictment may show this excuse, and set forth the instrument in general terms, if it contain enough to show the offence. *Ibid.*

3. Dates, sums, and times of payment may be omitted. *Ibid.*

4. And parol evidence given of the contents. *Ibid.*

5. An indictment lies for maliciously, wickedly, and wilfully killing a cow, the property of another. *People v. Smith*, 5 Cow. 258.

6. Acts injurious to private persons, which tend to excite violent resentment, and thus produce a disturbance of the peace, are indictable. *Ibid.*

7. An indictment against an attorney, &c., upon the statute, (sess. 41, ch. 259, s. 1.) for buying a note, need not allege that he bought the note with intent to prosecute, &c., nor that the note has been prosecuted, nor need it show when it became due, its amount, or other circumstance from which an intent to prosecute is to be inferred. *People v. Walbridge*, 6 Cow. 512.

8. The act of buying is the offence, unless it come within the *proviso* of the statute; which it lies with the defendant to show. *Ibid.*

9. The statute is constitutional. *Ibid.*

10. The indictment upon it may conclude, contrary to the form of the *statute*, in the singular. It need not be contrary to the form of the *statutes*. *Ibid.*

11. The omission, in reciting the title, of the word *the* after the *practice of*, will not vitiate the indictment. *Ibid.*

12. An indictment lies for a conspiracy to defraud an individual of his property. *Lambert v. The People*, 7 Cow. 166.

13. Form of the indictment. *Ibid.*

14. It may be in very general terms, as to a description of the offence, its object, and the persons concerned. *Ibid.*

15. A judgment record in the Oyer and Terminer, on an indictment transmitted there from the Sessions, adjudged good upon various exceptions of form. *Ibid.*

16. *Semble*, that no rule or order need be entered in the Sessions to send up the indictment. *Ibid.*

17. The Courts take judicial notice of the civil divisions of the state into towns, &c., by statute. *The People v. Breeze*, 7 Cow. 429.

18. Therefore, where an indictment described the defendants as late of W., in the county of Oneida; and then laid the offence at F., in said county; F. being, in truth, in the county of H.; *held*, that this was equivalent to laying the offence in the latter county; F. being a town created by public statute. *Ibid.*

19. An indictment for a conspiracy to defraud individuals of private property must set forth the means agreed upon by the conspirators. *Vide* this case, in connexion with *Lambert v. The People*, 7 Cow. 166. *People v. Eckford*, 7 Cow. 535.

20. It is in the discretion of the Court to quash an indictment for insufficiency, or put the party to a motion in arrest; and where the question is doubtful, they will put him to the latter. Otherwise, where it is clear. *Ibid.*

21. As where the question is settled by the Court of Errors in another cause. *Ibid.*

22. Manner in which the Court will inform themselves as to the ground of decision in the Court of Errors. *Ibid.*

23. Quashing an indictment as to one of several defendants quashes it as to all. *Ibid.*

24. Every indictment must contain a certain description of the crime, and a statement of the facts by which it is constituted. An indictment for common barratry is an exception; and a bill of particulars is required. Why indictments of common scolds, houses of ill fame, common nuisances, &c., are exceptions. Per *Spencer, Senator*. *Lambert v. People*, 9 Cow. 578.

25. *Semble*, the time of committing an offence laid in an indictment is, in general, wholly immaterial, and any other time may be proved. *People v. Van Santvoord*, 9 Cow. 656.

26. Where there are two counts in an indictment for a misdemeanour, one good and the other bad, and the defendant is convicted, the indictment will not be quashed on demurrer, nor the judgment arrested or reversed for that cause. *Kane v. The People*, 3 Wend. 363.

27. In an indictment for perjury by an insolvent debtor, in the oath taken by him on pre-

sending his petition and the inventory of his estate required by the statute, it is not necessary to set forth the facts which give jurisdiction to the officer, as is done in pleading a discharge in a civil suit; it is enough to aver that the officer had lawful and competent authority to administer the oath. *The People v. Phelps*, 5 Wend. 9.

28. Where the perjury consisted in omitting to set forth in the inventory property belonging to the insolvent, it is sufficient to aver that with the papers presented to the officer, was one purporting to be a full and just inventory of all the estate, both real and personal, in law and equity, of the insolvent. *Ibid.*

29. Where some of the words in the prescribed form are omitted in the affidavit, they may be supplied by an innuendo. *Ibid.*

30. In an indictment for perjury committed in the taking of an oath by an insolvent on presenting his petition for a discharge, it is not, nor was it necessary, previous to the revised statutes, to set forth more than the substance of the oath. *The People v. Warner*, 5 Wend. 271.

31. Where the oath is set forth in the indictment to be in substance, and to the effect following, to wit, &c., an exact recital is not necessary; and accordingly where the indefinite article *an* was substituted for the definite article *the*, the variance was *held* to be immaterial. *Ibid.*

32. A count in an indictment charging a party with neglect of duty, as a director of a road and bridge company, after the company had been formed into two distinct companies, viz. a road and bridge company, is bad; but if there be also a count charging him as a director of the road company, and there be a general verdict of guilty, judgment may rendered upon the last count; the law in criminal cases varying from civil cases in this particular. *Kane v. People*, 8 Wend. 203.

33. It cannot be objected in error, that two or more offences of the same nature, upon which the same or a similar judgment may be given, are contained in different counts of the same indictment, nor can such objection be urged either on demurrer or in arrest. *Ibid.*

34. In cases of felony, where two or more distinct and separate offences are contained in the same indictment, it may be quashed, or the prosecutor compelled to elect upon which charge he will proceed; but such election will not be required to be made when several counts are inserted in an indictment solely for the purpose of meeting the evidence as it may transpire on the trial, the charges being substantially for the same offence. In cases of misdemeanour, however, punishable by fine and imprisonment, the prosecutor may join several distinct offences in the same indictment, and try them at the same time. *Ibid.*

35. In an indictment for perjury against a person voting at an election, an averment that he was sworn by and before the board of inspectors is a sufficient averment that the oath was administered by the board. *Campbell v. The People*, 8 Wend. 636.

36. It is not necessary in such case to set forth the whole oath taken by the elector; it is

enough to set out of it in which the perjury is alleged to have been committed; as where the prisoner is accused of having falsely sworn to his citizenship, only that part of the oath which relates to his being a citizen need be set forth. *Ibid.*

37. It must appear on the face of the indictment, that the matter alleged to be false was material; but such materiality need not be expressly averred, when it evidently appears on the record. *Ibid.*

38. Where, by an act of the Legislature, certain oaths are prescribed, and false swearing in taking them is declared perjury, and by a subsequent act the original act is amended and the form of the oaths altered, false swearing under the amendment is perjury, although it be not so expressly declared in the amended act. *Ibid.*

39. A fraud, to be indictable at common law, must be such as affects the public, or is calculated to defraud numbers, and which ordinary care and caution cannot guard against; as the use of false weights and measures, defrauding another under false tokens, or by a conspiracy to cheat. *People v. Stone*, 9 Wend. 182.

40. In an indictment under the statute for obtaining by false pretences the signature of a person to a written instrument, it is not necessary to charge loss or prejudice to have been sustained by the prosecutor; the offence is complete when the signature is obtained by false pretences, with intent to cheat or defraud. *People v. Genung*, 11 Wend. 18.

41. An indictment lies against a corporation *quasi a corporation*, for neglecting to do what the common good requires, as where the corporation of a city have power to direct the excavating, deepening, or cleansing of a basin connected with a river, and neglect to take the necessary measures in that respect, after such basin becomes foul by the aggregation of mud and other substances, so that the water is corrupted, and the air infected by noisome and unwholesome stenches, and thus a nuisance is created. *The People v. The Corporation of Albany*, 11 Wend. 539.

42. The corporation of the city of Albany has no right under its corporate powers, granted by charter, or by special acts of the Legislature, to remove the bulk-head at the foot of the basin, connecting the Erie canal with the Hudson river; if the public health can be preserved in no other way than by the removal of the bulk-head, the duty of removing it is no more incumbent upon the corporation than it is upon individual citizens; and where a Court of General Sessions instructed a jury that the corporation were bound to abate a nuisance, arising from the basin being foul, *even if in doing so it should be necessary to cut down and remove the bulk-head*, and a verdict was found accordingly, the judgment entered upon such verdict was reversed by the Supreme Court upon a writ of error. *Ibid.*

43. Circus performers are liable to the penalty given by the statute concerning jugglers and the exhibition of shows, if they exhibit without license. *Downing et al. v. Blanchard*, 12 Wend. 383.

44. The total prohibition of shows, &c. extends only to those enumerated in the first

section of the act; all others may be exhibited if a license be obtained. *Ibid.*

45. In an indictment for receiving stolen goods, it is not necessary to allege that they were received upon any consideration passing between the thief and the receiver. *Hopkins v. The People*, 12 Wend. 76.

46. Where a party is charged with forging or counterfeiting a check on a bank, it is sufficient to allege in the indictment that he falsely made, forged, and counterfeited a certain check, with intention to defraud, &c., setting forth the check in *hæc verba*, with the name of the drawer as appearing upon it; and it is not necessary to aver that by such forgery any person is affected or injured in his person or property. *The People v. Rynders*, 12 Wend. 425.

47. An indictment under the revised statutes is not vitiated by pursuing the forms under the old statute, in charging that the prisoner made, forged, and counterfeited, and caused or procured to be falsely made, forged, and counterfeited, and willingly aided and assisted in the false making, &c., the latter charges being mere surplusage. *Ibid.*

48. An indictment for forging a check on a bank in the name of A. B., is not superseded by an indictment subsequently found, charging the same party with personating A. B., and in such assumed character receiving a sum of money, although the money be alleged to have been received from the same individual who is stated in the first indictment to have been defrauded by means of the check, and the amount thereof corresponds with the sum received by means of the check. *Ibid.*

49. Offences, though differing from each other, and varying in the punishments authorized to be inflicted for their perpetration, may be included in the same indictment, and the accused tried upon the several charges at the same time, provided that the offences be of the same character, and differ only in degree; as for instance, the forging of an instrument, and the altering and publishing it knowing it to be false. *Ibid.*

50. Under the provisions of the revised statutes relative to homicide, the indictment for murder may be in the common law form, charging the offence to have been committed *feloniously, wilfully*, and *of malice aforethought*, instead of charging it to have been perpetrated from a *pre-meditated design* to effect the death of the person killed; but the accused cannot be convicted, on such an indictment, of a *felonious homicide with malice aforethought*, unless the evidence be such as to bring the case within the statutory definition of murder. *The People v. Enoch*, 13 Wend. 159.

51. Where an offence is created by statute, or a statute declares a common law offence, committed under peculiar circumstances, not necessarily included in the original offence, punishable in a different manner from what it would be punished without such circumstances, or where the nature of the common law offence is changed by statute from a lower to a higher grade, the indictment must be drawn with reference to the provisions of the statute, and conclude *contra formam statuti*; but where the

statute is only declaratory of what was previously an offence at common law, without adding to, or altering the punishment, the indictment need not conclude *contra formam statuti*. *Ibid.*

52. An indictment for obtaining goods or the signature of a party to a written instrument by false pretences, &c., must contain all the facts and circumstances which the public prosecutor will be bound to prove to produce a conviction. It must be shown upon the face of the indictment that the offence charged has been committed, or in the language of Lord Mansfield, it must be an intelligible story, so explicit as to support itself. *The People v. Gates*, 13 Wend. 311.

53. A writing in the form of a bond, neither having the signature nor purporting to have the signature of any person attached to it, is not a false writing within the meaning of the statute. *Ibid.*

54. A conspiracy of journeymen workmen of any trade or handicraft to raise their wages, by entering into combinations to coerce journeymen and master workmen employed in the same trade or business to conform to rules established by such combination for the purpose of regulating the price of labour, and carrying such rules into effect by evet acts, is indictable as a misdemeanour; and it was accordingly held, where journeymen shoemakers conspired together and fixed the price of making coarse boots, and entered into a combination that if a journeyman shoemaker should make such boots for a compensation below the rates established, he should pay a penalty of ten dollars; and if any master shoemaker employed a journeyman who had violated their rules, that they would refuse to work for him, and would quit his employment, and carried such combination into effect by leaving the employment of a master workman in whose service was a journeyman who had violated their rules, and thus compelled the master shoemaker to discharge such journeyman from his employ, that the parties thus conspiring were guilty of a misdemeanour, and punishable accordingly. *The People v. Fisher*, 14 Wend. 9.

55. Where a purchase of merchandise is made, the goods selected, put in a box, and the name of the purchaser and his place of residence marked thereon, and the box containing the goods sent by the vendor, and put on board a steamboat designated by the purchaser to be forwarded to his residence, the sale is complete, and the goods become the property of the purchaser. *The People v. Haynes*, 14 Wend. 546.

56. And where, after such delivery, the vendor, on receiving information inducing him to suspect the solvency of the purchaser, expressed an intention to reclaim the goods, and the purchaser thereupon made representations in respect to his ability to pay, by means of which the vendor abandoned his intention; and the purchaser was then indicted, charged with the offence of having obtained the goods by false pretences, the representations made by him being alleged as false pretences; it was held, that the sale being complete before the representations were made, the defendant could

not be considered guilty of the crime charged against him. *Ibid.*

57. In an indictment for arson, the house or building set fire to or burned must be described as the house or building of the person in possession; and it was accordingly held in this case, where the building burned was alleged in the indictment as the building of the owner, and the proof was, that at the time of the commission of the offence it was in the possession of a tenant, that the accused could not be convicted. *The People v. Gates*, 15 Wend. 159.

58. A turnpike road company is liable to an indictment at common law for suffering their road to be out of repair, notwithstanding that by the terms of the charter a specific penalty is provided, if the charter contains no negative words, nor any thing from which it can be inferred that the Legislature intended to take away the common law remedy. *President, &c. of the Susquehannah and Bath Turnpike Road Company v. The People*, 15 Wend. 267.

59. So when the indictment is at common law, the Court before whom the conviction is had may impose a fine of \$250, notwithstanding that the general act relative to turnpike companies limits the fine to \$200 in case of a conviction on an indictment had under that act. *Ibid.*

60. A justice of the peace is indictable for misbehaviour in his office, when he acts partially, or oppressively, from malicious or corrupt motives. *The People v. Coon*, 15 Wend. 277.

61. Discharging an offender without requiring sufficient sureties, when it is done with intent to pervert the course of law and justice, is clearly an indictable offence. *Ibid.*

62. The indictment, however, in such case must charge the magistrate to have acted from a corrupt motive, and with the intent to pervert the course of law and justice; it is not enough to charge the act to have been done fraudulently, corruptly, and in violation of duty; the indictment must allege how, and in what particular the offence was committed. *Ibid.*

63. So also, it must be directly and positively charged that the offender was discharged without taking sufficient sureties, or sureties in a sufficient sum for his appearance; it is not enough that it is alleged that the magistrate discharged the offender, upon his finding sureties in a small and trifling sum, to wit \$50. The offence cannot be charged argumentatively or inferentially. *Ibid.*

64. It is not necessary, in such an indictment, to state the offence with which the party suffered to escape was charged, with the same formality and precision which would be necessary in an indictment against such offender; it is enough, if it be shown that he was charged with a criminal offence, and that the proceeding against him was not utterly void. Thus, where it was alleged that the party suffered to escape had been charged with falsely and fraudulently obtaining the signature of a certain person to a promissory note, by means of certain false pretences, without particularly describing the note, or averring the signature to have been obtained with the intent to cheat or

defraud, &c.; it was held, that this being matter of inducement, the indictment was not objectionable in this respect. *Ibid.*

(b) *Plea.*

65. It is not necessary to negative all the pretences set forth in an indictment for obtaining goods by false pretences, but those relied on by the pleader, and which he expects to prove false, must be specifically and directly negatived; it is, however, sufficient to prove one of several assignments. *The People v. Stone*, 9 Wend. 182.

66. It is not a good plea to an indictment that one of the grand jurors who found the same is not a freeholder, &c. *The People v. Jewell*, 6 Wend. 386.

67. A party indicted for compounding a larceny, and agreeing to withhold evidence, cannot plead the acquittal of the person charged with the larceny, in bar of his own conviction. *The People v. Buckland*, 13 Wend. 592.

68. A previous indictment for the same offence is no bar to a second indictment, although upon the first the defendant has been arraigned and pleaded. *The People v. Fisher*, 14 Wend. 9.

69. An indictment, trial, and acquittal for the forgery of a certificate of deposit of money in a bank, is no bar to a subsequent indictment for an attempt to obtain money from another bank, by colour of a forged letter enclosing the certificate of deposit, and desiring the amount to be transmitted to the writer of the letter. *The People v. Ward*, 15 Wend. 231.

(c) *Trial.*

70. A rule merely directing a criminal cause, removed into this Court by *certiorari*, to be tried in a county other than that in which the offence is alleged to have been committed, will not authorize the trial in such county, without a suggestion on the roll that a fair and impartial trial cannot be had in the county where the indictment was found; and such suggestion cannot be made without special leave obtained from the Court. *The People v. Mather*, 3 Wend. 431.

71. A rule to change the place of trial may be waived, by the parties going to trial in the county where the indictment was found. *Ibid.*

72. A rule entered in the minutes of the Court during one of its terms, without the express direction of the Court, and not asked for by either party, will be regarded as a nullity. *Ibid.*

II. *Verdict, judgment, and conviction.*

73. Though an indictment lay the time so long before the indictment is found, that the crime appears to be barred by the statute of limitations, this is no ground for arresting judgment. *The People v. Van Santvoord*, 9 Cow. 665.

74. A judgment that a defendant pay a fine, and an award of process for the recovery thereof, according to the course and practice of the Court, is good, although it be not added that the defendant stand committed until the fine be paid; it is enough if there be an award of process to carry into effect the sentence of the Court. *Kane v. The People*, 9 Wend. 203.

75. Where a party convicted of an offence is subject to two distinct and independent punishments, it cannot be alleged for error, by the defendant, that only one of the punishments to which he is liable is adjudged against him; the prosecutor may complain of such omission, but not the party convicted. *Ibid.*

76. In every case where a party, charged with a criminal offence, is brought before a justice on a warrant, the accused must be examined, but not on oath, in relation to the offence charged, and is entitled to have witnesses sworn and examined on his part, and the assistance of counsel; a conviction, however, will not be quashed, or a judgment set aside, after a trial had, for the omission of duty by the justice in these particulars. *Son v. The People*, 12 Wend. 344.

77. A conviction in a Court of Special Sessions, founded upon the verdict of a jury, will not be quashed, on the ground that the verdict was against evidence. *Ibid.*

78. It is not necessary that a defendant in a criminal proceeding should be present in Court when judgment is pronounced, except when corporeal punishment is to be inflicted. *Ibid.*

INFANT.

I. *How far the acts of an infant are binding.*

II. *Privilege of infancy and liability of an infant.*

III. *Actions by and against infants.*

I. *How far the acts of an infant are binding.*

1. A sale and delivery of goods by an infant with his own hands is not voidable till he come of age. *Roof v. Stafford*, 7 Cow. 179.

2. So of his conveyances of real estate. *Ibid.*

3. If he marry under the age of discretion, he cannot disagree till he arrives at that age. *Ibid.*

4. The executory contracts of an infant by deed are generally voidable, not void. So, in some senses, his simple contracts. *Ibid.*

5. His executory contracts are voidable at any time, without his restoring, or being liable to restore the consideration. *Ibid.*

6. But it is otherwise as to contracts executed on his coming of age; and on avoiding these, he must restore the consideration. *Ibid.*

7. The holding of a note taken by a plaintiff, in payment for work done by him during his minority, eight months after he arrived of age, before he offered to return it to the defendant, is, in judgment of law, a ratification of the contract, especially where in the mean time the maker of the note has become insolvent, the debt lost, and the offer to return made on the heel of that event. *Delano v. Blake*, 11 Wend. 85.

8. After a plaintiff comes of age, every inference in relation to a contract entered into by him during his minority should be drawn against him the same as against any other adult. *Ibid.*

9. If a father, during the infancy of his child, sells chattel property belonging to the

child, with the assent of the child, and for the purpose of having it replaced by other property, and the father purchases other property and gives it to the child, but it remains in the possession of the father, who at the time is insolvent, such substituted property does not become the property of the child, but is the property of the father, and subject to a levy under an execution against him. *Fonda v. Van Horne*, 18 Wend. 631.

10. No title passes to the purchaser of personal property belonging to an infant, unless manual delivery is made by the infant; it is not enough that the property be sold by an agent appointed by the infant. *Ibid.*

11. Acts of an infant, when void and when only voidable, considered. *Ibid.*

12. If an infant give or sell his goods, and deliver them with his own hand, the act is voidable only; but if he give or sell goods, and the donee or vendee take them by force of the gift or sale, the act is void, and the infant may bring trespass. *Ibid.*

13. A warrant of attorney by an infant, to confess judgment, is void; and a judgment entered in virtue of it will be set aside on motion. *Bennett v. Davis*, 6 Cow. 393.

II. Privilege of infancy and liability of an infant.

14. Though the executory contracts of an infant are voidable, yet where he does work in payment of his contract, or pays money upon his contract, he cannot, by avoiding it, get back the money, or recover a compensation for his work. The avoidance goes merely to relieve him from his contract as far as it is so executed. *M'Coy v. Huffman*, 8 Cow. 84.

15. Where one assumes to be guardian, or the agent of a guardian, and, as such, enters on the infant's land, and receives the rents, the infant may elect to consider him a wrong doer, and bring trespass, or charge him as guardian; and if the infant waive the tort, his only remedy is by action of account or bill in equity. *Sherman v. Ballou*, 8 Cow. 304.

16. Infants are liable, in the same manner as adults, for trespass and assault. *Bullock v. Babcock*, 3 Wend. 391.

17. An express promise after a party came of age need not be proved to render him liable for necessities furnished to him during his minority. *Gay v. Ballou*, 4 Wend. 403.

III. Actions by and against infants.

18. It is irregular for an infant to declare by attorney; and that the defendant does not know the infancy to be material, is an excuse for delay in moving to set the declaration aside. *Ex parte Scott*, 1 Cow. 33.

19. Plaintiff's infancy not a ground of non-suit, but may be pleaded in abatement. *Ibid.* note (b).

20. An infant under the age of twenty-one years is not liable to an action for a breach of promise of marriage. *Hunt v. Peake*, 5 Cow. 475.

21. *Semble*, that such a contract is not void, but voidable at the election of the infant, who may maintain the action, though he is not liable to it. *Ibid.*

22. In a nonbailable action against infants, the plaintiff may take a rule that they appear in twenty days after personal service of the rule; or that the plaintiff's attorney have leave to appoint John Doe a nominal person for their guardian, and enter their appearance. *Vandusen v. Brower*, 6 Cow. 50.

23. On filing an affidavit of the service, the plaintiff may enter a rule of course for the appointment of John Doe as guardian. *Ibid.*

24. An infant, having a general guardian, sold a horse belonging to him, the infant; but there was no proof that he delivered the horse with his own hand. The vendee afterwards offered to sell the horse; *held*, that trover lay by the infant even before coming of age, without any demand of the horse from the vendee. *Stafford v. Roof*, 9 Cow. 626.

25. And per *Jones*, Chancellor, the sale is void, no manual delivery being shown. The sale and actual delivery of a personal chattel by an infant is voidable before he attains the age of twenty-one years. Otherwise of land. *Ibid.*

26. If an infant, who has a horse on hire, wilfully and intentionally injures the animal, it amounts to an election, on his part, to disaffirm the contract of hiring, and an action of trespass lies against him for the tort. *Campbell v. Slater*, 3 Wend. 137.

27. A plea of infancy, with an averment that the injury happened through the unskillfulness, want of knowledge, discretion, and judgment of the defendant, would be a complete answer to an action of trespass brought for killing a horse (let to hire) by violent driving and cruel treatment. *Ibid.*

27*. A *prochein ami* must be a responsible person. *Dabrymple v. Lamb*, 3 Wend. 424.

28. The note of an infant (though a negotiable one) is voidable and not void, and may be affirmed after the infant comes of age. *Goodell v. Myers*, 3 Wend. 479.

29. But its affirmation should be a promise to a *party* in interest or his agent, or at least an explicit admission of an existing liability, from which a promise may be implied. *Ibid.*

30. Infancy is admitted by a replication of a new promise to a plea of infancy. *Ibid.*

31. The rule that an infant shall appear by *prochein ami*, and not by attorney, relates to the appearance upon the record, but is not intended to deprive the infant of the professional aid of an attorney. *The People v. New York Common Pleas*, 11 Wend. 164.

32. An attorney retained in a suit commenced for an infant by his *prochein ami*, may conduct the proceedings in his own name, and is not obliged to sign the name of the *prochein ami* to his notices, and use the name of the *prochein ami* in entering rules as if he were an attorney. *Ibid.*

33. A Court of Chancery will, on its own motion, or upon petition, direct a reference to ascertain whether a suit prosecuted for an infant by a *prochein ami* is for the interest of the infant, and whether the infant is properly placed in the cause. *Idley v. Bowen*, 11 Wend. 227.

34. In a suit by an infant, a *prochein ami* must be appointed before the suing out of process. *Wildes v. Ember*, 12 Wend. 191.

35. If an infant who is arrested does not appear to the action, nor take any notice of his

arrest, upon motion of the plaintiff, and on notice to the infant, the Court will appoint a guardian *ad litem* for him, in order to prevent the proceedings from being afterwards set aside. *Fearing v. Dawson*, 1 Hall, 55.

36. If upon the return to a *certiorari*, the plaintiff in error rely upon infancy, disclosed by the record, as a defence, it must be specially assigned as *error in fact*, that the defendant in error may take issue upon it. *Hankins v. Kingland*, 2 Hall, 425.

INSOLVENT.

- I. *Of the discharge under the insolvent laws.*
- II. *Effect of an insolvent's discharge.*
- III. *How the insolvent may avail himself of his discharge.*
- IV. *What will avoid the discharge.*
- V. *Imprisonment for debt.*
- VI. *Of the assignment under the insolvent act; its effect, &c.*

I. *Of the discharge under the insolvent laws.*

1. An insolvent discharge under the act to abolish imprisonment for debt in certain cases, (sess. 42, ch. 101.) may be granted by a judge of the Common Pleas, though not of the degree of counsel in the Supreme Court. *Union-Cotton Manufactory v. Curtis*, 7 Cow. 105.

2. An insolvent law of one of the United States which discharges the person and future acquisitions of a debtor, is constitutional and valid as to contracts made between citizens of such state subsequent to the passing of the law. *Sebring v. Mercereau*, 9 Cow. 344.

3. An insolvent's notices for creditors to show cause must be published for six weeks successively, that is, during forty-two days. *Anonymous*, 1 Wend. 90.

4. No person can become a petitioning creditor for an insolvent's discharge who has purchased a judgment against the insolvent, except for so much as was actually given for the judgment. *Slidell v. M'Crea*, 1 Wend. 156.

5. If an insolvent procure a person to become a petitioning creditor for any sum not *bona fide* due from him to such creditor, or for any larger sum than is so due, to make such sum in value as is necessary to procure the insolvent's discharge, this *per se* avoids the discharge. *Ibid.*

6. A foreigner who has resided and transacted business in this state for seven years, and then returns home, taking with him his effects, being uncertain whether he will come back here, loses his character as an *inhabitant*. *Ex parte Wrigley*, 4 Wend. 603.

7. A foreigner who, after residing in this state seven years, and transacting business as a commission merchant, returns home, taking with him his effects, *uncertain whether he will return or not*, loses his character of an *inhabitant*; so that although he returns to this state after sojourning only three weeks in his native land, he is not entitled to be discharged as an *insolvent debtor* if, after his return, he engages in no business, and his residence is merely of a temporary character. *In the matter of Wrigley*, 8 Wend. 134.

8. In all *summary proceedings* under a statute, although enough is shown in the institution of them to give jurisdiction to the officer intrusted with the execution of the powers conferred, if on the progress of the case it is discovered that, in fact, the officer has not jurisdiction, it is his duty to stop and dismiss the proceedings. *Ibid.*

II. *Effect of an insolvent's discharge.*

9. Where a defendant has no opportunity of pleading his discharge under the insolvent act *puis darein* continuance, he will be relieved on motion. *Palmer v. Hutchins*, 1 Cow. 42.

10. The mere fact that the defendant's person is discharged under the act to abolish imprisonment for debt in certain cases, (sess. 4, ch. 101.) is not, of itself, notice to the creditor. *Warner v. North*, 1 Cow. 179.

11. And if he hold the defendant to bail without an order, being ignorant of the discharge, a suit upon the bail bond will be set aside only on the terms of paying the costs of the suit and the application, provided the plaintiff has no actual notice of the discharge till the papers for the motion are served. *Ibid.*

12. When and how the Court will relieve where the discharge is after verdict, or *cognovit*, and before judgment, so that the defendant has no chance to plead his discharge. *Palmer v. Hutchins*, 1 Cow. 42. *Mabbott v. Van Buren*, 1 Cow. 44, in note (b). *Baker v. Taylor*, 1 Cow. 165.

13. Difference between practice of English Courts and ours as to discharging insolvents on common bail. 1 Cow. 51, note (a).

14. Insolvent act (sess. 36, ch. 81, sec. 1, 1 R. L. 348.) extends to fines not exceeding twenty-five dollars, imposed by a special session. *In the matter of Sweetman*, 1 Cow. 144; and see 150, note (d), and 151, 2, note (c).

15. The law of the state, &c., where a contract is made, controls it, unless it appear on its face that it was to be performed, or was made in reference to the law of some other place. Accordingly, an action on a contract made in this state, in 1806, between citizens of Massachusetts, is barred by a discharge under the insolvent act of 1801; and even if the contract had been made in that state, yet to the plea of such a discharge, the plaintiff must reply, and show the law of that state to be against the operation of the discharge; otherwise the law there will be presumed the same as our own. The form of a plea of discharge under the insolvent act of 1801, 1 R. L. by K. and R. 428. *Sherill v. Hopkins*, 1 Cow. 103.

16. The defendant's discharge under the insolvent act of the 3d April, 1811, will not prevent the statute of limitations running against an action of *assumpsit*, upon a contract made before the act, though the money did not fall due upon the contract until after the discharge. *Sacta v. De Graaf*, 1 Cow. 356.

17. The exceptions in the statute of limitations will not be extended by construction to cases within the reason, but not within the letter of the exceptions. *Ibid.*

18. Where the plaintiff in the case mentioned proved nothing more than an insolvent discharge, in answer to a plea of the statute of limitations; held that the Court should have nonsuited him;

and they refusing to do so, error lies upon a bill of exceptions taken to their decision. *Ibid.*

19. In an action on a judgment rendered in this Court, the plaintiff is not estopped to show that the judgment here was rendered on another judgment in a neighbouring state, which latter judgment was rendered on a contract made, and to be performed there before the passage of our insolvent law, and thus to avoid the operation of a discharge under that law, which is pleaded here to an action on the last judgment. *Wyman v. Mitchell*, 1 Cow. 316.

20. A replication setting out these facts is not a departure, though the judgment, as declared on, purports to have been upon promises. *Ibid.*

21. Nor is the plaintiff for that reason estopped to deny that it is in fact upon a judgment. *Ibid.*

22. A contract made before the act of April 12, 1813, is not affected by a discharge under that act. *Ibid.*

23. Nor is a contract made and to be performed in another state, though made subsequent to the act. *Ibid.*

24. An insolvent discharge of a neighbouring state, which exempts the person from imprisonment, but leaves the future acquisitions of the debtor liable to execution, relates to the remedy merely, not the contract, and is not of any force in this state. *Whittemore v. Adams*, 2 Cow. 626.

25. Imprisonment is no part of the contract. *Ibid.*

26. The *lex loci* governs the remedy. *Ibid.*

27. An insolvent law does not operate as a part of the *lex loci contractus*, unless it discharges the contract. *Ibid.*

28. A discharge under the act for giving relief in cases of insolvency, (1 R. L. 464, § 5, s. 9.) passed April 12th, 1813, is a bar to an action on a contract made in this state subsequent to that day. *Raymond v. Merchant*, 3 Cow. 147.

29. A promissory negotiable note given for an antecedent debt is not absolutely an extinguishment of that debt; but an action may still be maintained for the original consideration, provided the note be lost, or produced and cancelled at the trial. *Ibid.*

30. Where such antecedent debt was contracted in this state subsequent to the act for giving relief in cases of insolvency; and a negotiable note was afterwards given for that debt in the state of Vermont; *held*, that a discharge under that act was a bar to an action on the note, the original consideration of which might be inquired into in reference to the discharge. *Ibid.*

31. An action on a note given February 6th, 1812, just before the repeal of the insolvent act of 1811, which was repealed February 14th, 1812, is barred by a discharge under the insolvent act of April, 12th, 1813. *Bryar v. Wilcocks*, 3 Cow. 159.

32. A discharge under the act to abolish imprisonment for debt in certain cases (secs. 42, ch. 101.) extends to judgment in actions for wrongs. *Ex parte Thayer*, 4 Cow. 66.

33. A discharge under the act to abolish imprisonment for debt, &c., (secs. 42, ch. 101.) does not extend to a debt due the people of this state. *The People v. Rossiter*, 4 Cow. 143.

34. Nor, *semble*, does any insolvent or bankrupt law, unless the people are named in it. *Ibid.*

35. The people have succeeded to the rights of the king, the former sovereign of this state. They are not, therefore, bound by general words in a statute restrictive of prerogative, without being expressly named. *E. g.* the insolvent laws. *The People v. Herkimer*, 4 Cow. 345.

36. The plaintiff, resident in Ireland, drew a bill of exchange in favour of the defendant, resident in New York, for money to be employed in building a vessel and prosecuting a particular adventure, pursuant to a previous agreement. The defendant received the bill May 27th, 1818, and the money was paid to him upon it, July 27th, 1818. The defendant built the vessel, but employed her in a different adventure from the one agreed on. On the 22d June, 1818, he petitioned for his discharge under the act for giving relief in cases of insolvency, (1 R. L. 460.) which was granted, his property being assigned, &c. on the 12th August, 1818; *held*, that the money was recoverable, as money had and received to the plaintiff's use; and that the debt (not accruing till after the defendant petitioned) was not affected by the discharge. *M'Neilly v. Richardson*, 4 Cow. 607.

37. A discharge under the act for giving relief in cases of insolvency does not affect debts which are contracted after the time of presenting the petition. *Ibid.*

38. Nor will the discharge affect creditors residing out of the United States, unless the eighth section of the act be pursued. *Ibid.*

39. A discharge under the act to abolish imprisonment for debt, &c., (secs. 42, ch. 101.) extends to one committed to gaol for not fulfilling an order of filiation and maintenance, within 1 R. L. 306, s. 1. *Ex parte G. Smith*, 5 Cow. 276.

40. A subsequent promise to pay a debt, as to which the debtor has been discharged from imprisonment under the act of 1819, (secs. 42, ch. 101.) will not take away the effect of such discharge. *Hubert v. Williams*, 6 Cow. 537.

41. An insolvent debtor, who has released all claim to a surplus, is a competent witness for his assignees. *Jaques v. Marquand*, 3 Cow. 497.

42. An insolvent discharge, under the act of 1813, is constitutional as to debts contracted after the act. *Ibid.*

43. An insolvent discharge after a verdict, but before judgment, in an action of trespass, does not protect a defendant from imprisonment. *Hodges v. Chace*, 2 Wend. 248.

44. An insolvent discharge obtained in this state cannot be pleaded in bar of a suit brought in a Court of this state, on a contract made in another state subsequent to the passage of the act under which the discharge is obtained, but between parties not inhabitants of this state at the time of the making of the contract, although previously to the presentation of his petition by the insolvent for his discharge, they became such inhabitants. *Will v. Follett*, 2 Wend. 457.

45. An action cannot be maintained against the maker of a promissory note payable to bearer by a person to whom the same has been transferred, where the maker has obtained a discharge

from all his debts, as an insolvent debtor, previous to the transfer; although after the discharge, but before the transfer, the maker makes a new promise to the payee to pay the debt, and such new promise is set up by way of replication to the plea of discharge. *Deputy v. Stuart*, 3 Wend. 135.

46. An insolvent discharge under the act operating a debtor from the payment of his debts discharges the debt for which a note is given; the note becomes *functus officio*, loses its negotiable qualities, and a person to whom it is transferred after such discharge acquires no right to maintain an action upon it. *Ibid.*

47. A promise to pay a debt discharged under such insolvent law is a new contract. A suit on such contract can be brought only in the name of the person with whom the contract is made; and a note, the evidence of the original debt, has no connexion with such suit, other than as furnishing a consideration for the new promise. *Ibid.*

48. The moral obligation resting upon a debtor who has obtained an insolvent's discharge, is a good consideration for a subsequent promise to pay a debt. *McNair v. Gilbert*, 3 Wend. 344.

49. Such a promise to a petitioning creditor is as valid as to any other creditor. *Ibid.*

50. An action cannot be maintained by the assignee of a note payable to bearer directly on the note, where the negotiability of such note has been destroyed by an insolvent discharge granted to the maker. *Moore v. Fick*, 4 Wend. 490.

51. Where, at the time of the transfer of such note, it was agreed between the payee and the assignee that the payee should be a witness to prove a new promise, and the transfer was made expressly upon such understanding; it was held, that the jury ought to be instructed that it went far to impeach the credibility of the payee as a witness. *Ibid.*

52. A discharge obtained by an insolvent debtor from all his debts is no bar to an action by an accommodation endorser for money paid by him, subsequent to the discharge, in satisfaction of a note made by the insolvent. *Ford v. Andrews*, 9 Wend. 312.

53. The provision in the revised statutes that such discharge may be pleaded in bar of any action incurred by the insolvent in consequence of the payment by any party to such note of the money thereby secured, whether such payment be made prior or subsequent to the execution of the assignment by the insolvent, applies to future contracts, and not to contracts made previous to the statute going into operation. *Ibid.*

54. A defendant who has obtained a discharge as an insolvent debtor since judgment against him, and who is arrested on a *ca. sa.*, is entitled to a discharge from arrest on production of his insolvent discharge. *Russell v. Packard*, 9 Wend. 431.

III. How the insolvent may avail himself of his discharge.

55. The plea of an insolvent discharge under the act of April 12th, 1813, (secs. 36, ch. 38, 1 R. L. 460.) must expressly aver that the de-

fendant, at the time he applied for the discharge, was an inhabitant of the county in which his application was made. *Wyman v. Mitchell*, 1 Cow. 316.

56. This is essential in order to give the judge jurisdiction. *Ibid.*

57. The want of proper averments to give jurisdiction cannot be supplied by the recital in the discharge. *Ibid.*

58. For the presumption that the judge did his duty, and required those things to be done which should be done, does not arise till after jurisdiction is sufficiently alleged. *Ibid.*

59. To avail himself of a discharge of the person from imprisonment, the defendant should plead such discharge; or he may give it in evidence on the trial, and if found valid, this finding should make a part of the *postea*, on which a modified judgment may be entered. But where this course was overruled by the circuit judge, and the plaintiff did not express a desire to contest the discharge at the circuit, nor impeached it by affidavit, on motion in the Supreme Court to have the judgment qualified, the motion was granted. *Robertson v. Crowell*, 3 Cow. 13.

60. In a plea of a discharge of an insolvent debtor, under the ninth section of the act for giving relief in cases of insolvency, the fact that the insolvent was indebted to the creditor on whose application the proceedings were had in a sum not less than \$25, must be expressly averred, or the plea is bad on general demurrer. The recital of the fact in the discharge set forth in the plea will not supply the defect. *Wheeler v. Townsend*, 3 Wend. 247.

61. An averment in a plea of an insolvent discharge, that the defendant was "of the county" to a judge of which he presented his petition for a discharge, is sufficient to give the judge jurisdiction. *Porter v. Miller*, 3 Wend. 329. See also *Barber v. Winslow*, 12 Wend. 102.

62. Sureties to a bond for the payment of money, who have been fully indemnified for their responsibility, cannot avail themselves of an insolvent discharge granted to their principal, although such discharge was obtained by the concurrence of the creditor, and without such concurrence would not have been granted. *Moore et al. v. Paine*, 12 Wend. 123.

63. A plea of an insolvent's discharge cannot be joined with a plea of *nul tiel record*; but the misjoinder can only be taken advantage of by special demurrer, or by motion. *Delavan v. Stanton and Wilbur*, 2 Hall, 190.

64. If a party plead a judgment, he must show the certainty of it, setting forth the parties and the Court in which it was obtained. And the plea of an insolvent's discharge ought to set forth the action in which the debtor was imprisoned, the Court out of which the execution was issued, and the name of the creditor upon whose application the proceeding was instituted. *Ibid.*

65. A defect in the averments of a plea, as to these particulars, is matter of substance, and may be taken advantage of by a general demurrer. *Ibid.*

66. A plea of a discharge under the ninth section of the general insolvent act, (1 R. L.

464.) must aver every fact necessary to give jurisdiction to the officer granting it; and the want of such averments cannot be supplied by the recitals contained in the discharge itself, though the discharge be set forth at large in the plea. By this act it is essential, in order to give the magistrate jurisdiction over the case, that the debtor should have been imprisoned for sixty days upon execution in a civil suit. A plea, therefore, which merely set forth, that the debtor was imprisoned for sixty days and upwards on a civil suit, was held to be insufficient. *Hildreth v. Shillaber*, 2 Hall, 231.

67. To an action of debt on judgment, the defendant pleaded his discharge under the insolvent act, and the plaintiff replied, that after the discharge was obtained, the defendant "assented to, ratified, renewed, and confirmed the said judgment and demand of the plaintiff." Held, that the replication was no departure from the count, and that the new promise was sufficiently laid in the replication. *Ibid*.

68. The plaintiff declared on a promissory note, bearing date the 20th of June, 1816, and also for goods sold, money paid, &c. The defendant pleaded a discharge under the ninth section of the act "giving relief in cases of insolvency," passed April 12th, 1813. The plaintiff replied, admitting the discharge, but averring that the consideration of the note arose out of the state of New York, before the passing of the act, and that the plaintiff then resided out of the state, to wit, at Philadelphia. The same matters were also set forth relative to the goods, money, &c., specified in the second count of the declaration. The defendant rejoined, stating that, "at the time when," &c., he was an infant, residing in the state of New York, and so continued until after the passing of the act; and that he resided in said state until after he arrived at the age of twenty-one years. *Roberts v. Kelly*, 2 Hall, 307.

69. Upon demurrer to the rejoinder, it was held to be a departure from the plea, and consequently bad. That the replication was bad, also, for duplicity; but as that defect could not be noticed, except upon a special demurrer, the plaintiff had judgment on the issue. *Ibid*.

70. To an action of debt on a bond, the defendant pleaded his discharge under the insolvent act. The plaintiff replied, that the defendant afterwards ratified and confirmed the bond, and waived the benefit of the discharge. *Tucker v. Doane*, 2 Hall, 532.

71. To support the issue taken on this replication, the plaintiff produced a paper, signed by the defendant more than two years after his discharge, wherein he agreed that the obligee "might make any settlement he thought proper with one Sexten, (for whose benefit the bond was made,) without giving up any lien he might have on the defendant for the amount of the bond." Held, that the proof did not support the replication, and that the agreement was no waiver of the discharge. *Ibid*.

72. Sexten, it appeared, after the date of the discharge, made two payments on the bond; but as it was not shown that they were made with the knowledge or assent of the defendant;

it was held, that no inference unfavourable to him could be drawn from the acts of Sexten. *Ibid*.

IV. What will avoid the discharge.

73. The validity of a discharge under the two-third act cannot be questioned, on an application to discharge the defendant on common bail, either on the ground of fraud or irregularity. *Reed v. Gordon*, 1 Cow. 50.

74. The defendant, having been arrested and given bail to the sheriff for a debt from which his person had been discharged under the statute, &c., moved to be discharged on common bail, which was refused, because a *prima facie* case of fraud was made out against him by affidavit. *Reynolds v. Manning*, 1 Cow. 228.

75. If a debtor fail to specify the true cause and consideration upon which the debts were contracted; his discharge is fraudulent and void. *Skidell v. Crea*, 1 Wend. 156.

76. A specification that a debt is due on a promissory note, without setting forth the consideration thereof, is insufficient. *Ibid*.

77. The omission by an insolvent to state the cause or consideration of his indebtedness to his creditors vitiates his discharge. *M'Main v. Gilbert*, 3 Wend. 344.

78. A discharge of an insolvent debtor, void as to its effect in relieving a party from the payment of his debts, is equally inoperative to protect him from the imprisonment of his person. *Witt v. Follett*, 4 Wend. 501.

79. A discharge of an insolvent debtor will not be set aside on certiorari, because the officer before whom the proceeding was had refused to hear the objections of a creditor, who appeared to show cause thirty minutes after the hour appointed; the order of assignment having been made, the assignment executed, and the discharge signed, but not delivered, when the creditor appeared. *In the matter of Pulver*, 6 Wend. 632.

80. An insolvent's discharge will be set aside as fraudulent in law, where the insolvent, in contemplation of obtaining a discharge, confesses a judgment, on which his property is sold, although it be confessed to a trustee for the benefit of all his creditors without preference; the judgment and sale under it being considered an assignment in fraud of the statute. *In the matter of Hurl*, 7 Wend. 239.

V. Imprisonment for debt.

81. On an application for a discharge under the act to abolish imprisonment for debt in certain cases, (sess. 42, ch. 101.) an order for ten weeks' advertisement to creditors, and a publication of only six weeks, and then an order by mistake for assignment, which is made, the second order is a nullity, being made without jurisdiction, and the commissioner may refuse to sign the discharge. *In the matter of Underwood*, 3 Cow. 59.

82. The act for the relief of debtors, with respect to the imprisonment of their persons, (1 R. L. 348, s. 4.) extends to debtors in execution on judgments founded on wrongs as well

as on contracts; e. g. on an assault and battery. *The People v. Marine Court*, 3 Cow. 366.

83. Under the act to abolish imprisonment for debt in certain cases, (sess. 41, ch. 101.) a new promise to pay the debt, made after the discharge, will not restore the right to imprison the defendant. *Couch v. Ash*, 5 Cow. 265.

84. On a motion to be discharged under the provisions of the statute to abolish imprisonment for debt for an arrest by *copias*, the facts authorizing an arrest by warrant under that act will not be heard in opposition to the motion. *Stoddard v. Coffin*, 10 Wend. 602.

85. A party against whom a judgment for costs is rendered on the reversal of a justice's judgment, is entitled to the protection of the act abolishing imprisonment, &c., and is not subject to arrest, if the action in which the judgment in his favour was rendered was founded on contract. *Phelps v. Barton*, 13 Wend. 68.

86. If such party be arrested on a *ca. sa.* for the costs, and escapes, the sheriff, in an action against him for such escape, may plead, in bar of a recovery, the defendant's exemption from arrest. *Ibid.*

87. In a proceeding by attachment under the act to abolish imprisonment, &c., a justice cannot render judgment for a demand exceeding \$50. *Comfort v. Gillespie*, 13 Wend. 404.

88. The affidavit on which the application is made for an attachment must state that the acts charged upon the defendant were done with the intent to defraud creditors, and the facts and circumstances relied on must be *set forth in the affidavit*. *Ibid.*

89. In a proceeding by attachment under the act to abolish imprisonment and to punish fraudulent debtors, the plaintiff must state in his affidavit the origin of his demand, that is, whether founded upon contract or upon judgment; and must also state the facts and circumstances upon which the application is made, as that the defendant had declared his intention to remove his property, &c., or had assigned it without consideration, or secreted it, or other circumstance indicating fraud; the mere belief of the plaintiff is not sufficient. *Smith v. Luce*, 14 Wend. 237.

VI. Of the assignment under the insolvent act, its effect, &c.

90. An assignment under the insolvent act will not pass any interest in a chose in action which was before voluntarily assigned by the insolvent. *Hopkins v. Banks*, 7 Cow. 650.

91. But the insolvent cannot bring a suit for such chose in action without the assent of his previous assignee. *Ibid.*

92. Having sued with his assent, the assignee is not a competent witness for the plaintiff, for he is liable to the defendant for costs on the plaintiff's failure. *Ibid.*

93. Where an assignee, under an assignment for the benefit of creditors, which he had not executed or assented to, took possession of all the real and personal property in pursuance of the assignment, and thereby accepted of the trusts committed, he will be bound to execute them in every particular as effectually as if he

had entered into an express covenant to do so. *Cunningham v. Freeborn*, 11 Wend. 240.

94. In an assignment by a debtor to a stranger, actually delivered and accepted, of all the real estate of the debtor in trust, for his creditors without any consideration, the title of the real estate will pass to such assignee since the revised statutes, either as a grant or as a statute trust, by delivery and acceptance of the deed of assignment, and will be held subject to the trusts therein specified; and it is not necessary for a creditor to be a party to or assent to such conveyance, in order to give it validity. *Ibid.*

95. If a conveyance of property be directly to the creditors, their assent must be shown; but where it is made to a trustee for the benefit of creditors, the legal estate or title to the property may pass to him without their assent; but to give effect to such conveyance, it must be made with the knowledge and privity of the trustee, or of the creditors. *Ibid.*

96. The nominal consideration of one dollar, or the fact that the assignee was a creditor, as appearing on the face of the deed of assignment, will be sufficient to transfer the legal title to the property, and vest it in him. *Ibid.*

97. Persons liable on existing or even future responsibilities for a failing debtor, are as much entitled to indemnity against the same, and to be preferred, as creditors in the more strict sense of that term. *Ibid.*

INSPECTION LAWS.

1. Under a defence of tender to an action on a contract to deliver sole leather, the inspection and stamp of an official inspector, who had inspected the leather, pursuant to the provision of the statute, (3 R. L. 340.) is not conclusive evidence as to the quality of the leather; but it may be shown by witnesses to be of a quality different from that denoted by the stamp. *Clinfman v. Northrop*, 8 Cow. 45.

2. It is not the object of our system of inspection laws, to render the decision of the different inspectors of flour, beef, pork, staves, leather, &c., final and conclusive; but to protect the community from frauds and impositions in domestic sales, and to preserve the character of the state abroad as to exported articles. *Ibid.*

3. *Semble*, the law never gives a conclusive effect to the *ex parte* certificate of any officer, as to matter depending on the exercise of integrity, judgment, and discretion. *Ibid.*

INSURANCE.

- I. *Subject-matter. Profits. Freight.*
- II. *Insurable interest:* (a) *What is an insurable interest;* (b) *Wager policy.*
- III. *Ship. Seaworthiness and competency of the ship to perform the voyage.*
- IV. *Policy:* (a) *General construction of the policy, and when valued or open;* (b) *Parol evidence to explain a policy.*



V. *Warranty*: (a) *Compliance with warranties*; *Warranty of neutrality*; (b) *Warranty against illicit and contraband trade*; (c) *Other warranties*.

VI. *Loss by seizure*.

VII. *Abandonment*.

VIII. *Preliminary proofs*.

IX. *Adjustment of losses*.

X. *Return of premium*.

XI. *Action on the policy*.

XII. *Insurance against fire on buildings, goods, &c.*

I. *Subject-matter. Profits. Freight.*

1. It is well settled that the charterer of a vessel cannot insure the amount of his charter money under the general name of freight. The policy itself is the evidence of the contract of insurance, and parol proof cannot be admitted to show that the plaintiff, under the name of freight, intended to insure the profits on his charter party. *Mellen and Nesmith v. The National Insurance Company*, 1 Hall, 452.

2. In a policy on freight supposed to be valued, the sum insured cannot be assumed as a valuation of the freight, nor adopted as conclusive evidence of the amount of the charterer's interest. *It seems*, that the true rule by which that interest is to be ascertained is the actual freight which the vessel did or could carry. *Ibid.*

II. *Insurable interest*: (a) *What is an insurable interest.*

3. The owner of the cargo, without request from the owner of the vessel, repaired her on the voyage, and effected an insurance in his own name on his expenditure for repairs; *held*, that he had not an insurable interest; that the repairs, being voluntarily bestowed, belonged to the vessel, and the property of them vested in the owner. *Buchanan v. The Ocean Insurance Company*, 6 Cow. 318.

4. A part owner may insure his individual interest in a vessel without specifying that interest; it is sufficient if he has an insurable interest to the amount in question. *Turner v. Burrows*, 5 Wend. 541.

5. If it clearly appears that the owner who effected the insurance did it on joint account, and the language of the policy is for account of whom it may concern, or for account of the owners, any one having an interest in the vessel insured may claim the benefit of the policy; but where the policy contains no words importing interest in any other than the person effecting it, none but himself can claim the benefit of the policy. *Ibid.*

6. The charterer of a ship has no interest in the freight as such, and he cannot, therefore, insure it *eo nomine*. *Robbins v. New York Insurance Company*, 1 Hall, 325.

7. *It seems*, however, that an advance of freight money may be insured under the general name of freight; but to enable the charterer to recover the amount of the underwriter, he must prove the fact of advance. *Ibid.*

(b) *Wager policy.*

8. The insurance was by a wagering policy, and against total loss only. The owner of the

vessel had previously insured her; and after she had arrived at her port of destination, she was abandoned as for a technical total loss, by the owner, to his underwriters; and sold with their consent, and for their account. The owner of the cargo, who had made the repairs, then abandoned to his underwriters; *held*, that this was not such a total loss as came within the policy; that a constructive total loss of the subject was not enough, but the loss must be absolutely and finally total. *Buchanan v. Ocean Insurance Company*, 6 Cow. 318.

III. *Ship. Seaworthiness and competency of the ship to perform the voyage.*

9. In an action on a policy of insurance upon a cargo, the underwriters may show, in their defence, that the vessel had not a competent crew, or a captain or pilot of competent skill. But this is a question of fact to be submitted to a jury, upon the nature of the voyage, &c. *Treadwell v. The Union Insurance Company*, 6 Cow. 270.

10. If the vessel become disabled, in such case, the underwriters have a right to claim that the master should procure another vessel to forward the cargo, if in his power. *Ibid.*

11. The rule on this subject is, that if there be a vessel in the port of distress, or in a contiguous port, the master should procure it. *Ibid.*

12. But where it appeared that resort most have been had to distant places, and independent of procuring a vessel, there were further serious impediments in the way of putting the cargo on board; *held*, that the rule was not obligatory. *Ibid.*

13. A cargo was insured at and from North Carolina to New York; *held*, that if the vessel was seaworthy when she passed the boundary line of North Carolina, this was sufficient, and her unseaworthiness previous to that point of time would be no defence in an action against the underwriters for a loss. *Ibid.*

14. Seaworthiness is an implied warranty in a policy of insurance; it relates, however, only to the commencement of the risk; if it be then broken, the insurer is discharged from liability; but a breach of this warranty after the commencement of the risk does not discharge the insurer from loss subsequently happening, unless such loss be the consequence of unseaworthiness. *American Insurance Company v. Ogden*, 15 Wend. 532.

15. To an action, for a total loss of freight, upon a policy of insurance containing the usual special agreement, "that if the vessel, upon a regular survey, should be thereby declared unseaworthy, or incapable of prosecuting her voyage, by reason of her being unsound or rotten, the insurers should not be bound to pay their subscription," the defendants pleaded, that the vessel upon her outward voyage sought a port of necessity; "that a regular survey was held upon her there;" that upon such survey, it was thereby found and declared that certain parts of the vessel (in the survey any plea particularly specified) were rotten; that other parts (also specified) were so defective "that they would necessarily require to be shifted;"

that the probable cost of the repairs would amount to three thousand dollars, and that, in the opinion of the surveyors, the vessel was unworthy of repairs, and would not sell for the amount of her bills;" whereupon they recommended that she should be sold at public auction, for the benefit of all concerned. *Rogers v. The Niagara Insurance Company*, 2 Hall, 86.

16. Upon demurrer to this plea, principally upon the ground that the survey did not expressly declare the vessel to be unseaworthy or incapable of proceeding on her voyage, and that the plea sought to draw matters of fact from the jury, and put the finding as to the seaworthiness or unseaworthiness of the vessel upon the Court, by inference to be drawn from particulars stated in the survey; the plea was held to be sufficient. *Ibid.*

17. The conclusion of the surveyors, that the vessel was unworthy of repairs; that she would not sell for the amount of her bills; and their recommendation that she should be sold for the benefit of all concerned, were held to be tantamount to a declaration in the survey, that the vessel was unseaworthy, and incapable of prosecuting her voyage by reason of unsoundness. And such a declaration upon a regular survey is, by the terms of the agreement, made conclusive upon the question of seaworthiness, and may be pleaded as a bar to an action upon the policy. *Ibid.*

IV. Policy: (a) General construction of the policy, and when valued or open.

18. The contract in a valued policy is to pay the assured the whole valuation, if the subject of the policy be lost; and the valuation in the policy is conclusive as to the amount of recovery, if the subject be lost by the perils insured against, unless there be fraud or imposition in fixing the value. *Whitney v. American Insurance Company*, 3 Cow. 210.

19. Where the insurance was of goods, valued at \$14,000 on board a ship, and the returns of these goods on a voyage out and home; and the goods, in the course of the voyage round, were delivered to L. upon his advance of \$7000, and his receipt promising to answer drafts of the assured to \$3000 more; the goods to be sold by L. for his reimbursement, and the proceeds remitted to the assured; and the \$7000 were vested in a return cargo, together with \$1621, for which he drew on L., making in the whole an investment of \$8469 85; and L. paid the draft as he had agreed; and the return cargo was lost by the perils insured against; and the outward cargo, on actual sale, did not bring enough to reimburse L. by \$4680 26, for which he drew on the assured; held, that the assured was entitled to recover, as for a total loss, the \$14,000 and interest. *Ibid.*

20. But it would be otherwise, if part only of the value of the goods had been invested in the return cargo. *Ibid.*

21. Of the extent of liability on a valued policy of insurance. *American Insurance Company of New York v. Whitney*, 5 Cow. 712.

22. An insurance by a valued policy on a cargo out and return home embraces goods

procured by an hypothecation of the outward cargo to its full value. *Ibid.*

23. The provision in a policy of insurance that the risk is against total loss only, means an absolute, not a mere technical total loss, whether the policy be a wagering policy or not. *Buchanan v. Ocean Insurance Company*, 6 Cow. 318.

24. Where goods are warranted by the memorandum in a policy of insurance, free from average unless general, the loss by a sea damage must be total in fact, to warrant a recovery by the assured. *Astor v. Union Insurance Company*, 7 Cow. 302.

25. The policy of insurance was on fur; the title of the invoice was furs; under which it detailed bear and racoon skins, opossum, deer, fine fisher, cross fox, martin, wild cat, wolf, wolvine, panther, and cub skins. The memorandum warranted skins and hides, and all other articles perishable in their nature, free from average unless general. The articles in the invoice were deteriorated by sea damage to more than half their value, and the insured abandoned. In an action upon the policy, held that it was competent for the plaintiff to show in evidence, that the term fur covered the skins in the invoice, and that the term hides and skins in the memorandum, in mercantile usage, did not include them; also that they were not articles perishable in their nature, within the meaning of these words in the memorandum; and the jury having, on conflicting evidence upon these questions, found for the plaintiff, though contrary to the charge of the circuit judge, the Supreme Court refused to set aside the verdict. *Ibid.*

26. Where a question of fact proper for the jury is submitted to and passed upon by them, the verdict will not be set aside as against the weight of evidence, unless it be clearly so; even though it be directly contrary to the charge of the judge. *Ibid.*

27. When the meaning of a word, used to designate an article of trade, is to be fixed by proof of mercantile usage, it may be by the usage of trade among merchants dealing particularly in that article. *Ibid.*

28. Underwriters insuring by certain words are bound to know the mercantile meaning of the words; and are liable according to that meaning. *Ibid.*

29. *Seem*, that the meaning of the clause, all other articles perishable in their own nature, in the memorandum of a policy of insurance, extends to those articles not particularly enumerated, which are liable to perish of themselves in the course of the voyage, without any external injury. *Ibid.*

30. Upon the trial of the question, whether certain articles are within the memorandum in a policy of insurance, providing against particular average, evidence that the agents of the assured urged the taking of the risk, on the ground that the articles would be free from particular average, is inadmissible. *Ibid.*

31. So is evidence showing insurance at a higher premium on non-memorandum articles, for the same voyage, by persons other than the underwriter, to the policy in question; and that

insurance offices commonly charge a higher premium on such articles. *Ibid.*

32. A policy on time simply, where no ports are mentioned, necessarily implies a trading voyage, with liberty to touch and trade at such ports and places on the globe as the insured shall choose, subject to the accustomed and usual mode of transacting business at the several places visited by such vessel; and however often the goods may be changed, the policy will attach. *Oggeshall v. American Insurance Company*, 3 Wend. 983.

33. The insurer under such a policy is liable for goods which are lost whilst in the transportation from the shore to the ship during a trading voyage, if the means employed for such transportation are according to the known and established course of trade, and the established usage of the place where the goods are thus attempted to be laden on board the vessel. *Ibid.*

34. Underwriters may contract so as to incur risks antecedent to the date of the policy. *Ibid.*

35. The assurer of goods to a specified amount, shipped on a trading voyage under a policy on time, where the value of the whole cargo exceeds the sum subscribed, is liable to the full amount of his subscription, if, after the landing of a portion of the cargo in safety at the first port where the vessel stops to trade, the residue of the cargo is totally lost by one of the perils insured against; provided, that at the time of the loss, there are goods on board to an amount in value equal to the sum subscribed; that being the only question in such case as between the assurer and assured. *American Insurance Company v. Griswold*, 14 Wend. 399.

36. Nor can such assurer, in case of such loss, claim contribution from subsequent assurers upon the same cargo, although there was aliment for all the policies at the time of subscription, where the policy contains what is denominated the American clause; i. e. a proviso that in case of any subsequent insurance, the insurer shall nevertheless be answerable for the extent of the sum subscribed by him, without right to claim contribution from subsequent assurers. *Ibid.*

37. Insurance upon goods outward, and upon their proceeds home, will not cover the same goods on their return voyage. *Dow v. The Hope Insurance Company*, 1 Hall, 166.

38. Insurance was effected upon goods from New York to Batavia, and upon the proceeds thereof home; the goods valued at the sum insured out; "to be open on the proceeds home." The identical goods shipped to Batavia were returned to New York in the same vessel, and damaged upon their return voyage; *held*, that they were not protected by the policy during the voyage homeward. *Ibid.*

39. A policy of insurance, being a contract of indemnity, must receive such a construction of the words employed in it as will make the protection it affords co-extensive, if possible, with the risk of the assured. But a just regard must also be paid to the language used by the parties, and no strained or unnatural sense must be ascribed to it, (unless from necessity) to the prejudice of either party. *Ibid.*

40. Where the insurance is on the proceeds or returns of an outward cargo, the words must receive a liberal construction; and it is not necessary that the return cargo should be procured by an actual sale of the outward cargo, and an appropriation of the money arising from it. It is sufficient that the homeward cargo should be a substitute for the outward, and should spring, though indirectly, from the disposal of the latter, either by sale or deposit. *Ibid.*

41. A contract for the benefit of a third person, made without his knowledge or authority, is a binding contract on the promisor; and if subsequently adopted by him for whose benefit it was made, it may be enforced by him. *Bridge v. The Niagara Insurance Company*, 1 Hall, 246.

42. The plaintiff was a general agent for a merchant residing at Carthage, who was in the practice of making shipments to New York: on the 19th of February, 1827, the plaintiff, without any orders from his principal, caused an open policy of insurance for \$5000 in goods laden, or to be laden, on board any vessel from Carthage to New York on account of his principal, to be executed by the defendants, who received the premium. On the 17th of February the agent wrote to his principal, informing him of his intention to effect said policy; and on the 23d of March following, the principal replied to his letter, and conditionally affirmed his act. On the 21st of February (two days after the policy was effected) a loss occurred by the perils insured against, on goods shipped by the principal, on board the brig Mary, from Carthage to New York; *held*, that these goods were covered and protected by the policy; that the defendants, having contracted with the agent for the express benefit of the principal, and having received the premium, could not be permitted to show any want of authority in the agent; and that the principal, having adopted the acts of the agent, could enforce the contract in the name of the agent. *Ibid.*

43. Under a policy of insurance upon goods against loss by thieves, the underwriter is liable for a loss by thieves, who are in no way connected with the ship, whether the robbery is perpetrated by a simple larceny, or by open violence, although the master or ship owners may be also liable as common carriers for the loss. *Atlantic Insurance Company v. Storow*, 5 Paige, 285.

44. Whether the insurer is liable for a loss from a simple larceny committed by persons belonging to the ship? *Quære. Ibid.*

45. Where the underwriter insures against loss by thieves, and the master or ship owners are also liable to the assured for the loss from a theft, such master or ship owners have no equitable claim upon the underwriter for a contribution to make good the loss; and if the assured receives satisfaction from them, the policy cannot legally be assigned for their benefit, so as to enable them to recover against the underwriter. *Ibid.*

46. Where the master or ship owners are liable to the assured for a loss by theft for which the underwriters are also liable, if there is an abandonment for a total loss, and the insurer

pays the amount of such loss, he is entitled in equity to be subrogated to the rights of the assured as against the master or ship owners; and if the assured cancels the bill of lading, or discharges the claim against the master or ship owners for the loss after he has obtained judgment against the underwriter, the Court of Chancery will relieve the latter against the judgment *pro tanto*. *Ibid*.

(b) *Parol evidence to explain a policy.*

47. Evidence that a policy executed in blank is deemed by insurance companies and merchants equivalent to a policy, for account of whom it may concern, is inadmissible. *Turner v. Burrows*, 8 Wend. 144.

48. Where goods are shipped for a voyage, and an insurance is effected upon the goods out, and upon the proceeds thereof home, the identical goods brought back again in the return voyage will not be considered as included in the words *proceeds home*, nor covered by the policy. *Dow v. Whetten*, 8 Wend. 160.

49. It is competent, however, for the insured to show by parol proof that by the usage of trade, or by the practice between insurers and the insured, the word *proceeds*, thus inserted in a policy, is understood to include the identical goods brought back on the return voyage. *Ibid*.

50. Where such proof was offered and rejected, and a judgment reversed, and a *venire de novo* awarded to enable the party to give his proof, the costs of reversal were ordered to abide the event of the cause, the Court doubting whether such usage could be proved. *Ibid*.

51. The *slip* or application for insurance is inadmissible in evidence to show the intention of the parties. In a Court of law, it is proper evidence only to show a misrepresentation; in equity, it may be used to correct the policy. *Ibid*.

V. *Warranty*; (a) *Compliance with warranties; warranty of neutrality.*

52. Insurance, by the defendants, on a cargo, at and from New York to Havana, and at and from thence to Lagaira and Porto Cavello, or either of them, at a premium of seven per cent., to return five and a quarter per cent. if the risk ended at H. without loss, or two per cent. if only one of the two other ports was used, and the risk ended without loss; warranted American property. The cargo, consisting of flour and pork, was purchased of the plaintiff, a native American citizen residing in New York, by L., a Danish citizen of St. Thomas, then in New York, under a contract entered into here, by which the plaintiff agreed to deliver the cargo to L., at Havana, or at Lagaira, or Porto Cavello, at five per cent. advance on the invoice, or cost, paid by the plaintiff, and the freight and premium of insurance paid by the plaintiff. The cargo was consigned by the plaintiff to Spanish merchants at Havana, (designated by L.) with instructions to dispose of the cargo for the plaintiff's account, &c., or to send it to another market; that is, to a windward port. The bill of lading expressed that the cargo was shipped for the account and risk of the plaintiff, to be delivered at Havana to H. and C., or their assigns,

paying no freight, it being the property of the owner of the vessel. On the arrival of the vessel at the Havana, the consignees interlined the bill of lading with the words, "or a market," and directed the master to proceed to Lagaira; and while proceeding to Lagaira, the vessel was captured near that place, by a Venezuelan privateer, and carried into a port in the island of Margarita, and the vessel and cargo libelled in the Admiralty Court there, and the cargo condemned as prize, &c. *New York Firemen Insurance Company v. De Wolf*, 2 Cow. 56.

53. In an action on the policy to recover for a total loss; held, that the cargo was and remained the property of the plaintiff until its delivery at one of the ports mentioned; that there was no delivery or acceptance of it at Havana; and that the consignees there, in directing the master to proceed to L., acted as agents of the plaintiff, who continued to be and was the owner of the cargo at the time of its capture; and that, therefore, the warranty was complied with. *Ibid*.

54. That such a contract of sale is legal and valid, both by the municipal law of this country and by the law of nations, and does not destroy the neutral character of the property. *Ibid*.

55. That the plaintiff was not bound to disclose to the defendants the facts and circumstances of the contract; for even if they were material, yet the insured is not obliged to communicate any fact as to which there is a warranty, express or implied. *Ibid*.

56. Where, on a sale of goods, no time is stipulated for the payment, the price is to be paid on their delivery to the purchaser. *Ibid*.

57. Provisions shipped by a neutral, with a view to supply the army or navy of a belligerent, are not contraband of war. *Ibid*.

58. On the contrary, such a destination is perfectly lawful. *Ibid*.

59. The right of neutral and peaceful states to carry on commerce with countries at war, except in contraband articles, and with places in a state of blockade, is perfect and unquestionable. *Ibid*.

60. Though the question may frequently arise, whether the contract is a fraudulent disguise, to give to the property the character of neutrality during its transit; and whether the property, in truth, belongs to the neutral or the enemy. *Ibid*.

61. The principle of the law of nations, laying out of view the case of contraband articles, and of places actually invested, is that the property of a neutral, in its passage to a country at war, is free; and that the property of the adverse belligerent is subject to capture and forfeiture. *Ibid*.

62. It is settled, that the sentence of condemnation by a foreign Court of Admiralty is not conclusive, but only *prima facie* evidence of the facts upon which it purports to have been founded; and the Court will not hear an argument in favour of its being conclusive. *Ibid*.

63. The warranty of American property is established by proof that the vessel is owned by citizens of the United States; that she cleared from an American port, and had a re-

gistry. *Callett v. Pacific Insurance Company*, 1 Wend. 561.

64. Proof that a vessel has a register is *prima facie* evidence that it was on board during the voyage. *Ibid.*

65. A copy of the register of a vessel from the treasury department of the United States, where it was deposited after condemnation, certified by the register of the department, and the fact of his being register, attested by the secretary of the treasury, under the seal of the department, is admissible in evidence. *Ibid.*

(b) *Warranty against illicit and contraband trade.*

66. Where a vessel warranted not to be employed in an illicit trade is condemned by an Admiralty Court, acting as a Municipal Court, to carry into effect navigation laws, for a violation of such laws; to support the allegation of a breach of the warranty, it is incumbent on the insurers to prove the existence of the laws alleged to be violated, as Courts cannot judicially notice the municipal laws of foreign countries, but they are required to be proved like other facts. *Ocean Insurance Company v. Francis*, 2 Wend. 64.

67. If underwriters make no objection to the sufficiency of proof of interest, but put their refusal to pay on the ground that they are not liable for the loss, it is a waiver of preliminary proof of interest. *Ibid.*

68. Testimony that a voyage was fair and lawful, and that the vessel was not engaged in any illicit trade, is evidence of a fact, and not an opinion upon the law. *Ibid.*

69. An insurer is liable for damages sustained in consequence of the seizure and detention of a vessel and cargo, by reason of prohibited goods being found on board belonging to the master, shipped by him for the purpose of being smuggled, but without the knowledge of the assured, notwithstanding the clause in the policy that the insurer shall be free from charge in consequence of seizure or detention for, or on account of any illicit or prohibited trade. *The American Insurance Company v. Dunham*, 12 Wend. 463. S. C. 2 Hall, 422.

70. The warranty extends only to the acts of the assured, and of those acting with his knowledge and consent. *Ibid.*

71. Where, by a policy of insurance, the warranty of the master and mariners is insured against by the underwriter, and the vessel is lost through the barratrous act of the master in attempting an illicit trade by smuggling a few articles in his possession, the underwriter is liable, notwithstanding the policy contains a warranty on the part of the assured against illicit or prohibited trade. *American Insurance Company v. Dunham and Wadsworth*, 15 Wend. 9.

72. Such warranty is not broken, unless the illicit trade is carried on by the assured himself, or with his knowledge or assent; he is not affected by the acts of the master or mariners. *Ibid.*

(c) *Other warranties.*

73. Where a vessel is warranted British, general evidence of her national character is sufficient, until doubts are raised by proof on

the other side. *Ocean Insurance Company v. Francis*, 2 Wend. 64.

VI. *Loss by seizure.*

74. The assured in a policy upon a ship, who sustains a total loss by seizure, &c., is entitled to recover all expenses fairly incurred in obtaining a restoration of the proceeds of the ship on condemnation and sale. *Francis v. Ocean Insurance Company*, 6 Cow. 404.

VII. *Abandonment.*

75. After a vessel is repaired, and successfully pursuing her voyage, the assured cannot abandon as for a technical total loss. *Depau v. Ocean Insurance Company*, 5 Cow. 63.

76. If the injury to a ship by the perils insured against exceed one-half her value, the insured may abandon to the underwriters as for a total loss, which cannot afterwards be turned into a partial one. *Dickey v. The New York Insurance Company*, 4 Cow. 222.

77. Accordingly the abandonment may be enforced, though the ship afterwards be repaired by the master, and proceed on her journey. *Ibid.*

78. But the abandonment must be before the vessel is fully repaired and able to proceed on her voyage. *Ibid.*

79. If she be in fact repaired, the abandonment is void, though this be not known to the assured. *Ibid.*

80. It is the actual state of things, therefore, at the time of the abandonment, and not the state of the party's information, that decides the validity of an abandonment. *Ibid.*

81. Where a ship bound to Antwerp was insured, and repaired on account of sea damage at Port Louis in the Isle of France; and the expense of a part of the repairs was defrayed by a sale of the cargo, and the residue charged upon the remainder of the cargo by a *respondentia* bond; *held*, that no lien was thereby created upon the ship, which could be taken into the account in estimating the insured's right to abandon as for a total loss. *Ibid.*

82. In making an abandonment, the assured is bound to assign the true cause: *e. g.* if he abandon on account of sea damage only, he cannot avail himself of the fact that the ship was afterwards encumbered by the expense of repairs; as to the latter he should make a new abandonment. *Ibid.*

83. Where a ship has sustained damage by the perils insured against to more than one-half her value, her restoration, in order to divest the right of abandonment, must be complete and perfect; and if, though in fact restored, she still remain subject to a lien for the expense of her repairs to more than half her value, this is not such a full and beneficial restoration as to take away the right to abandon. *Ibid.*

84. If a vessel or goods insured on a sea voyage be damaged to more than half of the value by any peril insured against, the assured may abandon, and recover for a total loss. *Center v. The American Insurance Company of New York*, 7 Cow. 564.

85. As to the vessel, the meaning of the words in the rule, "one-half the value," is the

half of the general market value of the vessel at the time of the disaster, not her value for any particular voyage or purpose. *Ibid.*

86. In estimating the expense of the repairs, such sum is to be taken as will place her in *statu quo* in general with the same kind of materials of which she was composed at the time of the disaster. *Ibid.*

87. Thus, if she be copper sheathed, and her sheathing injured or destroyed by the disaster, the expense of repairing or resheathing with the same material must be taken into account; and this, though a sheathing of wood might render her seaworthy for the voyage. *Ibid.*

88. The expense of thus repairing at the port of necessity is the true test for determining the amount of the injury. *Ibid.*

89. The term repair means to amend, or restore, or fully reinstate the vessel. *Ibid.*

90. Where a ship is injured by a peril insured against to more than one-half her value, and a sale is recommended on proper surveys, *semble*, that the master may sell. But if he sell improperly, and without authority, this does not take away the right in the assured afterwards to abandon. *Ibid.*

91. In general, the master cannot impair the right to abandon by any act he may do. Repairing and putting the vessel on her voyage is one exception. *Ibid.*

92. The abandonment of a vessel does not affect the remedy on the policy upon the freight. *Ibid.*

93. But, in general, where another vessel can be obtained to carry on the cargo from the port of abandonment, it is the duty of the master to tranship the cargo, and earn freight; and if he neglect to do this, the insured on freight cannot recover. *Ibid.*

94. Yet where a vessel was driven back to the port of departure, and there abandoned as for a total loss, no progress therefore being made in the voyage, and no freight *pro rata itineris* earned, though the goods were accepted by the shippers; *held*, that the loss on freight was absolutely total; that there was nothing to abandon to the underwriters on the freight; and that, under such circumstances, the master was not bound to procure another vessel, and proceed with the goods, to warrant a recovery upon the freight policy. *Ibid.*

95. Where a vessel proceeds, but is totally lost at so early a stage of the voyage that more than half the freight must be lost to the assured, and the shipper receives his goods, it is a technical total loss of the freight, and the assured may abandon. *Ibid.*

96. Three objects of insurance, vessel, cargo, and freight, stand on the same group as to technical total loss, by a deterioration to more than one-half of the value. *Ibid.*

97. The neglect of a supercargo to put in a claim to a vessel captured for an alleged violation of navigation laws, will not affect the right of the assured to abandon. *Ocean Insurance Company v. Francis*, 1 Wend. 15.

98. A report by the surveyors of a port into which a vessel has put in distress, that her repairs would cost \$20,000, (and the value of the vessel itself was only \$10,000,) is sufficient

evidence of a technical total loss, where, upon such report and the request of the master, the vessel was sold, by order of a Court of Vice Admiralty. *Caillet v. Pacific Insurance Company*, 1 Wend. 561.

99. Where a vessel, insured against the perils of the sea on a voyage from the East Indies to Holland, was greatly damaged, and put into the Isle of France, from whence advice was sent to New York to the assured, who forthwith abandoned the vessel to the underwriters there as for a total loss, but before such abandonment the master had caused the vessel to be repaired, (though at an expense greater than three-fourths of her value,) and she had sailed from the Isle of France, being tight, staunch, and strong, bound to a port in Holland, where she subsequently arrived in safety; *it was held*, that although a technical total loss had originally occurred, that the plaintiff could only recover as for a partial loss. *Dickey v. American Insurance Company*, 3 Wend. 658.

100. In case of a technical total loss of a vessel insured, if no freight *pro rata itineris* has been earned, or if the expense of sending on the cargo by another vessel will exceed a moiety of the freight agreed upon by the charter party, it is a technical total loss of the freight, which will authorize the assured to abandon. *American Insurance Company v. Center*, 4 Wend. 45.

101. A vessel injured by a peril of the sea cannot be abandoned merely because materials to make full repairs cannot be procured at the place where she happened to be; if the vessel is not injured to a moiety of her value, it is the duty of the master to make her seaworthy, and to proceed on the voyage, and the underwriter will be bound to furnish a complete indemnity for any additional expense subsequently incurred in completing the repairs. But in making the estimate of the probable expense of the repair of a vessel, so as to ascertain whether the injury sustained will authorize an abandonment, the expense is to be estimated with reference to the cost of repairs at the port of necessity. *Ibid.*

102. Where there is an insurance upon a ship, and she sustains injury to an amount exceeding half her value, the assured cannot abandon as for a technical total loss, if he is the owner of the freight and cargo, and the freight and cargo be liable to such an amount of general average contribution as, when deducted, reduces the estimated expense of repairs below half the value of the vessel, allowing the deduction of one-third new for old; he is only entitled to recover as for a partial loss. *Pezant v. The National Insurance Company*, 15 Wend. 453.

103. Where a vessel arrives at her port of destination, at which her owners reside, in a repairable state, the assured have no right to abandon as for a technical total loss. *Ibid.*

104. It is not necessary that the injury to a vessel by the perils insured against should in all cases exceed one-half her value, to justify an abandonment as for a total loss; the inability of the master to procure the necessary funds to make repairs is a valid cause of abandonment, although the vessel be in the port of destina-

tion, and not in an intermediate port or port of necessity, *J. Bronson* dissenting. *American Insurance Company v. Ogden*, 15 Wend. 532.

VIII. Preliminary proofs.

105. In an action on a policy of insurance upon a ship, it appeared that when the underwriters were applied to for payment for a total loss, they replied that they would not settle the claim in any way. *Held*, that this was a waiver of preliminary proof of interest in the assured. *Francis v. Ocean Insurance Company*, 6 Cow. 404.

106. What shall be sufficient preliminary proof of loss within the proposal or condition attached to a valued policy of insurance on goods against fire, requiring the assured to deliver in as particular an account of the loss or damage, &c. as the nature of the case will admit of, and make proof thereof by their oath or affirmation, and by their books of account and other vouchers, as shall reasonably be required. *Norton v. The Rensselaer and Saratoga Insurance Company*, 7 Cow. 645.

107. Where all the papers furnishing details were consumed with the goods; *held*, that a statement of the gross amount lost, with the circumstances of the loss, were sufficient. *Ibid*.

IX. Adjustment of losses.

108. On *assumpsit* upon a policy of insurance in adjusting the claim for a partial loss, where any of the ship's materials are sacrificed, one-third new for old is to be deducted from the balance of the new materials, &c., after first deducting therefrom the value of the old materials. *Byrnes v. National Insurance Company*, 1 Cow. 265.

109. And the insurer has no right first to deduct the one-third new for old from the gross amount of the repairs, then the value of the old materials, and make the last balance the measure of the damages. *Ibid*.

110. Thus, where a part of the old copper sheathing was taken off, and replaced by new sheathing of copper; *held*, that in adjusting the loss, you must first deduct the value of the old copper from the value of the new, then deduct one-third new for old from the balance, and that the remainder formed the measure of damages. *Ibid*.

111. The old materials in such a case belong to the assured. *Ibid*.

112. The deduction of one-third new for old is made in this state, without regard to the distinction which prevails in England between a new and an old vessel. *Ibid*.

113. The contract of the underwriters is one of indemnity merely. *Ibid*.

114. Where part of a cargo is sold at a port of necessity, to defray the expenses of repairs upon a ship, this creates no lien upon the ship for such expense. *Depau v. Ocean Insurance Company*, 5 Cow. 63.

115. When a general average is fairly settled in a foreign port, though not the port of necessity, but the port of destination, which the assured is obliged to pay, this is conclusive as between him and the underwriters. *Ibid*.

116. If the defects in a vessel, existing pre-

vions to effecting a policy of insurance, be not such as to render her unseaworthy, they cannot be taken into consideration in determining whether the expense of her repairs exceeds half her value. *Ibid*.

117. All losses and expenses necessarily, prudently, or reasonably incurred, in respect to property saved from shipwreck, from the time of the shipwreck to the time when the property can be directly transported to the place of its ultimate destination, are proper charges upon the property so transported, and are, when the property has been insured, to be borne by the insurers. *Bridge v. The Niagara Insurance Company*, 1 Hall, 423.

118. Sums paid for transporting the master and crew, and for their support, during the same period, while they are guarding the property, are also to be borne by the insurers. The master and seamen, after becoming separated from the vessel by the shipwreck, are entitled to compensation as labourers or salvors, for their services in transporting and saving the property, to be allowed according to the nature of the services. *Ibid*.

119. Where dollars taken by the master and crew from a stranded vessel, carried on shore, and buried in the sand, were afterwards stolen before they could be reclaimed, they were not considered as landed in "good safety," and the loss was *held* to fall upon the underwriters. But the expenses incurred by the master in searching for the dollars are to be apportioned on the dollars alone. *Ibid*.

120. Where the adjustment of a loss is referred to a referee by a stipulation in a case, the referee is to be satisfied as to the character of the charges, in such manner as he may think reasonable; and in case of difficulty, application is to be made to the Court for directions. *Ibid*.

121. If a vessel, during the prosecution of her voyage, be stranded near her port of destination, and, for the purpose of relieving her, the cargo is put into lighters, and forwarded to such port, and during the passage in the lighters, a part of it sustain damage, such loss is a proper subject of general average. *Levi v. Williams*, 1 Hall, 430.

122. A vessel on her voyage from New York to Mobile, having on board goods belonging to the plaintiff and the defendant, was stranded near Mobile Point. While in this situation all the goods on board were put into lighters by the master, and forwarded to Mobile, with instructions to his agent not to deliver them to their respective consignees until the general average was secured. The goods all arrived at Mobile, but on their passage from the vessel to that place in the lighters, those belonging to the defendant were damaged to an amount exceeding \$3000. In adjusting the general average at Mobile, the loss on the defendant's goods was taken into the account, and the proportion assessed upon those belonging to the plaintiff amounted to \$86.76. This sum the agent of the captain exacted from the plaintiff's consignee before he would deliver the goods to him, and it was paid accordingly under that compulsion. The brig was shortly afterwards

got off, and proceeded up the bay, but was driven back by a gale of wind and again stranded, when she was abandoned to the underwriters. *Ibid.*

123. Upon an action brought to recover the amount thus paid by the plaintiff to the defendant; *it was held*, that this was a proper case for a general average; that the loss upon the defendant's goods was correctly taken into the account in making the adjustment, and that the plaintiff was not entitled to recover. But if this were not so, *it seems*, that the adjustment made at Mobile would be conclusive, upon the ground, that Mobile, in relation to New York, is to be considered, upon a question of average, as a foreign port. *Ibid.*

X. Return of premium.

124. Where a chartered vessel is lost by the perils insured against, the charterer's interest in a policy on freight, *eo nomine*, never attaches; and if the premium has been paid, it can be recovered back in an action for money had and received. *Nemeth v. National Insurance Company*, 1 Hall, 462.

XI. Action on the policy.

125. Evidence is admissible, to show whose interest is intended to be embraced in a policy of insurance effected "on account of the owners," without a designation of the persons intended to be assured; and where two of three owners of a cargo cause an insurance to be effected for their separate benefit, they may maintain an action in their own names on the policy, without joining the other owner as a plaintiff. *Cutlett v. Pacific Insurance Company*, 1 Wend. 561.

126. If one of three partners in a cargo goes out in a vessel in which the same is embarked as supercargo, his power and authority as partner is merged, from the time of the commencement of the voyage, in his character as supercargo. If the voyage is broken up before the arrival of the vessel at the port of destination, and the master, after an abandonment of the cargo by the assured, who thus became the agent for the insurers, delivers it to the supercargo, such delivery constitutes him the agent of the master, and the subsequent acts of the supercargo are to be considered as the acts of the master. *Ibid.*

127. An averment in a declaration that a large quantity of specie, to wit, 30,000 Spanish milled dollars were laden on board the vessel for the contemplated voyage, and that the plaintiffs were "the owners of and interested in the said specie to a large amount; to wit, the amount of all the money by the said plaintiffs insured thereon," and that the policy was made on their account, and for their sole use and benefit, is supported by proof that the assured were the owners of \$90,000, shipped on board the vessel, and the plaintiffs will be entitled to recover the whole sum insured, and not merely five-sixths thereof. *Pacific Insurance Company v. Cutlett et al.* 4 Wend. 75.

128. The owner of the remaining one-sixth of the cargo, who had gone out in the vessel as supercargo, and under whose control the cargo

had been left by the master of the vessel at the port of necessity, having sold the cargo, and invested the proceeds in other merchandise for the purpose of remittance; *it was held*, that the right to abandon of the other owners of the cargo, who had insured their separate interest, was not destroyed, if, under the circumstances of the case, it would have been the duty of the master to have made the same investment for the benefit of whom it might concern. *Ibid.*

129. No one but the owners can sustain an action on a policy of insurance entered into *in behalf or on account of the owners* of a cargo. But one whose interest was not intended to be insured cannot claim the benefit of an insurance effected by others, although, by the terms of the policy, his interest would seem to be covered. *Ibid.*

130. In an action on a policy of insurance, by the assignee of the assured, against an incorporated company, by the terms of whose act of incorporation he may bring an action on the policy in his own name, if the subject insured has been transferred to him, it is necessary that the plaintiff aver in his declaration that he has become the purchaser or assignee of the subject insured; a general averment that the plaintiff became and was interested in the buildings insured, and that the assured transferred all his right and interest in the policy to the plaintiff, is not sufficient. *Granger v. Howard Ins. Co.* 5 Wend. 200.

131. An assured who, after the exhibition of his proof of loss and interest, presents a statement of his demands less in amount than what he is legally entitled to recover, is not estopped from claiming a larger amount, if a settlement is not made in pursuance of such statement. *Am. Ins. Co. v. Griswold*, 14 Wend. 399.

XII. Insurance against fire on buildings, goods, &c.

132. Construction of the clause in a policy of insurance against loss by fire, providing for only a rateable payment, in case of other policies on the same subject. *Lucas v. Jefferson Ins. Company*, 6 Cow. 636.

133. Where there are several policies containing this clause, they are all, and each, liable to pay the rateable portion mentioned in the clause, though it happen that some have paid more than their share, and even enough to cover the whole loss; and this, whether they had knowledge of all the policies at the time or not. *Ibid.*

134. There is no contribution between policies containing this clause. *Ibid.*

135. Where, however, there are several policies, and one only contains this clause, and the others pay to the extent of their subscriptions, which is more than their rateable share, this will be a defence *pro tanto* in an action against the underwriters, on the policy containing that clause; and if the policies without the clause have paid enough to cover the loss, it is a complete defence for the others; for they are liable to contribute to the underwriters who have paid. *Ibid.*

136. And so, where all the policies are without this clause. *Ibid.*

137. If underwriters, sued on a policy containing this clause, seek to defend themselves on the ground that other policies without it have paid the whole loss, or more than their rateable share, it lies with them to show affirmatively the other policies without the clause. This is matter of defence; and the absence of the clause in the other policies will not be intended. *Ibid.*

138. Where there are several policies on the same subject without this clause, it is double insurance; they are all deemed but one policy; the insured can recover but one indemnity; and contribution prevails between the insurers. *Ibid.*

139. The description of the property insured in a policy against loss by fire is a warranty that the property is as described; and if untrue in substance, the policy is void, though the misdescription arise through mistake, and there be no fraud. *Fowler v. The Elina Fire Ins. Company*, 6 Cow. 673.

140. Thus, where a policy of this kind described the subject insured, as the stock in trade of the insured contained in a two story frame house filled in with brick, No. 152 Chatham street; the house No. 152 being a frame house not filled in with brick; held, that the policy was void. *Ibid.*

141. A party in possession of premises under a contract of sale, and who has made valuable improvement, and a payment of interest in pursuance of the contract, has an insurable interest in the premises. *McGinney v. Phoenix Fire Ins. Company*, 1 Wend. 85.

142. Where the words "gunpowder is not insurable, unless by special agreement," were inserted in the proposals annexed to a policy of insurance, at the foot of a clause headed "extra hazardous," in an enumeration of goods, trades, &c. considered "not hazardous," "hazardous," and "extra hazardous; it was held, that gunpowder must be considered as included in articles enumerated as "extra hazardous," and that as the building insured in this case was declared to be privileged to contain "extra hazardous" goods, the policy was not forfeited by the fact that gunpowder was stored in the building at the time of its conflagration. And it was further held, that the words "gunpowder is not insurable," &c., were simply a declaration that gunpowder would not be insured under the class of extra hazardous goods at the rate specified in that class, and would be excluded from an estimate of loss unless specifically insured. *Duncan v. Sun Fire Ins. Company*, 6 Wend. 488.

143. Whether the powder was in the building with or without the knowledge or agency of the assured, had it been prohibited, would, it seems, have been immaterial. *Ibid.*

144. The proposals and conditions attached to a policy form part of the contract, and have the same force and effect as if contained in the body of the policy. *Ibid.*

145. Stipulations in policies are considered express warranties, and it is not requisite that the circumstance or act warranted should be material to the risk; an express warranty in this respect being distinguishable from a representation. *Ibid.*

146. A grocery may be kept in an insured building, if the business of a grocer is not speci-

fied as a prohibited occupation in the policy of insurance; and keeping spirituous liquors, oil, and other articles commonly dealt in by grocers, in the building, for the purpose of retailing them, is not storing those articles so as to vitiate the policy under a clause therein suspending the policy, if such articles be stored in the building. *N. Y. Equitable Ins. Co. v. Langdon*, 6 Wend. 633.

147. An application for insurance, describing a building, is not a warranty as to the state of the building, unless inserted in the policy. *Jefferson v. Colwell*, 7 Wend. 72.

148. Although the description in the representation may differ very considerably from the actual state of the property insured, yet, if such variation was not fraudulently intended, and did not change the actual risk, it is not material, and will not avoid the policy. *Ibid.*

149. Where a policy insured two individuals by name, and then the words or whom it may concern were added, and a clause was inserted in the policy that the loss, if any occurred, should be paid to the individuals named; it was held, that an action might be maintained in their names, and that they were entitled to recover the whole sum insured, although it appeared that they were owners of but one-half the building insured, and that the other half belonged to a third person not joined as plaintiff. *Ibid.*

150. Where, in a policy of insurance, a building, in which property insured was contained, was described as "a frame house filled in with brick; it was held, that it was competent for the assured to prove a usage, as between the insurers and the insured, as to the particular meaning of those words, though different from that which the words themselves might generally be understood to import. *Fowler v. Elina Fire Ins. Company*, 7 Wend. 270.

151. In an action on a policy of insurance, notice of loss, by an assignee of the policy, the policy having been assigned with the assent of the insurer, is a compliance with the condition that all persons insured shall forthwith give notice, &c. *Cornell v. Le Roy*, 9 Wend. 163.

152. Where preliminary proofs were made forthwith after a fire, and delivered to the insurer, at his request, before copies were taken, and he subsequently, after repeated evasions, finally refused to furnish copies; it was held, that a new set of preliminary proofs, furnished nearly four months after the fire, was, under the circumstances of the case, in season. *Ibid.*

153. Slight proof that the justice granting the certificate, &c. is the most contiguous to the premises insured, is *prima facie* sufficient. *Ibid.*

154. The certificate of the magistrate, that he is not concerned in the loss, is sufficient; proof of the negative fact is not required. If he be interested, it is for the defendant to establish the fact. *Ibid.*

155. Where a policy of insurance is effected by a mortgagor, and the policy, with the assent of the insurers, is assigned to the mortgagee, and a loss occurs, in an action on the policy by the mortgagee, in the name of the mortgagor, it is no bar to a recovery, that subsequent to the assignment, the mortgagor effected a second assurance, and neglected to give notice to the

first assurers, although there be an express condition that the policy shall be void in case of second assurance and neglect of notice by the insured or his assigns. *Traders' Ins. Co. v. Robert*, 9 Wend. 401.

156. In such action, it is not necessary to aver that the suit is prosecuted by the direction of, and for the benefit of the assignee of the policy. *Ibid.*

157. A mortgagor and mortgagee may each insure the same building; their particular interest in the subject insured need not be described, but may be described generally as the property of the insured. *Ibid.*

158. Where a mortgagor has obtained an insurance on the property mortgaged, and assigns his policy to his mortgagee, and a loss happen, and a suit is brought on the policy, in the name of the mortgagor, for the benefit of the mortgagee, and a judgment obtained, and subsequently the mortgagee compels the mortgagor, by filing a bill in Chancery for foreclosure, to pay and satisfy the mortgage; notwithstanding such coercive payment, the mortgagor will not be considered as an assignee of the judgment, but the assurers will be discharged from the payment of the judgment, on paying to the mortgagee all his taxable costs growing out of the suit prosecuted by him against the assurers. *The Traders' Ins. Co. v. Robert*, 9 Wend. 474.

159. Taxable costs is the extent of what will be required of assurers in such case; they will not be compelled to pay counsel fees expended by the mortgagee in the suits at law, nor to satisfy an equitable claim of his against the mortgagor, nor to assume the payment of a note accepted by the mortgagee in part payment of the mortgage. *Ibid.*

160. In an action on a policy of insurance against fire, where the conditions annexed to the policy, and referred to therein, require that the assured, sustaining loss or damage by fire, shall forthwith give notice thereof to the insurer, an averment of notice, on the 2d of April, of the destruction of insured property by fire on the 23d of February previous, is not good. *Inman v. The Western Fire Ins. Company*, 12 Wend. 452.

161. The provision in the condition of a policy, that notice shall be forthwith given, *if seems*, will be construed as imposing no more than due diligence, under all the circumstances of the case; but there must be no *lack* or unnecessary procrastination or delay in the giving of the notice. *Ibid.*

162. A *bona fide* equitable interest in property, of which the legal title is in another, may be insured under the general name of property, or by a description of the thing insured, unless there be a false affirmation, or representation, or a concealment, after inquiry, of the true state of the property; and the applicant for insurance is not bound to state the particular interest he has in the premises to be insured, unless special inquiry be made about it by the insurer. *Tyler v. The Etina Fire Insurance Company*, 12 Wend. 507.

163. The condition in a policy of insurance, that notice of all previous insurances upon the property insured shall be given, or the policy

be void, applies only to previous insurances effected by the assured or his assigns. *Ibid.*

164. A building erected upon a leasehold premises, being insured against fire to the amount of \$800, was destroyed by that element about a fortnight before the expiration of the lease. By the terms of the lease, the lessee had the option of renewing it, or removing his building at the end of the term. The building, if suffered to remain, was worth \$1000; but if removed, not more than \$200; and at the time of the fire, the lessee had given no notice of any intention to renew the lease. *Held*, nevertheless, that the plaintiff was entitled to recover the full amount of his insurance, as it did not exceed the value of his building. *Laurent v. The Chatham Fire Ins. Company*, 1 Hall, 41.

165. The sum insured is the extent of the insurer's liability, not the measure of the assured's claim; and the assured has no right to the specific sum mentioned in the policy as liquidated damages in case of a total loss. *Ibid.*

166. A policy of insurance against fire is a contract of indemnity; it is an open policy upon interest; and the actual loss sustained by the assured is the measure of indemnity to which he is entitled. *Ibid.*

167. In the principal case, the intrinsic value of the building at the time of the fire was the measure of the loss within the meaning of the contract, and is the standard by which the indemnity is to be adjusted. *Ibid.*

168. A commission merchant, having the goods of his principal or consignee in his possession, deposited with him for sale, has an interest in the property which entitles him to insure the same against fire, in his own name, to the full value of the goods. *De Forrest v. The Fulton Fire Ins. Company*, 1 Hall, 84.

169. In declaring upon such a policy, the pleader may set forth the facts as to the ownership according to the truth of the case, and conclude "to the damage of the plaintiff." *Ibid.*

170. A commission merchant is, to all intents, the owner of the goods in his possession as to all the world, except his principal. *Ibid.*

171. An insurance effected by a commission merchant upon goods, "as well the property of the assured, as held by them in trust or on commission," covers the whole value of the property, and not the mere interest of the party effecting the insurance. *Ibid.*

172. At the trial of this cause, the plaintiffs were permitted to prove that it was the usage of commission merchants in the city of New York to effect insurance on goods consigned to them for sale on commission, without express orders from their consignors; and it was held, that the proof of such usage was rightly admitted. *Ibid.*

173. An insurable interest, in mercantile language, does not necessarily import an absolute right of property in the thing insured. A special or qualified interest is equally the subject of insurance; and each distinct interest in the same subject may be protected by a separate policy on the subject, for the party interested in it. *Ibid.*

174. The keeping of oil and spirituous liquors by a grocer, in his store, for the "purposes of

ordinary retail, and in quantities not unusually large," is not "storing" of them within the meaning of that clause of the policies of insurance against fire, commonly used in the city of New York, which prohibits the appropriation of the building insured for the purpose of "storing therein" any goods denominated hazardous or extra hazardous, in the memorandum of special rates annexed to the policies. *Langdon v. The N. Y. Equitable Ins. Co.* 1 Hall, 226.

175. The defendants, by a policy bearing date the 12th of May, 1836, insured the plaintiffs to the amount of \$5000, for seven years, on "fixtures" placed or to be placed in buildings of their subscribers. By another policy, dated the 2d of December, 1825, the defendants had insured the plaintiffs to the amount of \$3000 on "gas meters, placed, or to be placed, in the city of New York, for three years." At the date of the first policy, the plaintiffs had placed gas meters to the amount of \$2000; but at its expiration, their amount had been increased to \$20,000. When the policy on the "fixtures" was made, their value was estimated at \$5000; but this amount was afterwards increased to \$100,000, and upwards. *New York Gas Light Co. v. The Mechanics' Fire Ins. Company*, 2 Hall, 108.

176. The gas meters and fixtures were subsequently injured by fire to the amount of \$2500, a part of which was upon the "gas meters and fixtures" placed at the date of the policies, and a part upon those which were established afterwards. Held, that by the true construction of the policies, they covered all "fixtures" to the amount of \$3000, whether erected before or after the date of the policies. *Ibid.*

177. Held, also, that parol evidence was inadmissible to prove a verbal representation made by an agent, at the time the policies were effected, as to the value of the fixtures intended to be placed by the plaintiffs. *Ibid.*

178. The plaintiff effected a policy of insurance against fire on goods contained in his counting-room, and after a loss had happened, he made an assignment of his property for the benefit of certain creditors, and among other things, assigned his claim on the defendants without their consent. Held, that the transfer did not render the policy void, under the fourth condition of insurance. *Brichta v. The Lafayette Ins. Company*, 2 Hall, 372.

179. Among the items of loss allowed by the jury, were certain advances made by the plaintiff upon some musical instruments, watches, &c., belonging to other persons, which had been deposited with him for sale. As these articles were not stated to be held upon "trust or commission," according to the third condition of insurance; it was held that they were not covered by the policy. *Ibid.*

180. The terms "stock in trade" when used, in a policy of insurance, in reference to the business of a mechanic, (a baker for instance,) include, not only the materials used by the mechanic, but the tools, fixtures, and implements necessary for the carrying on of his business. *Moodinger v. The Mechanics' Ins. Company*, 2 Hall, 490.

181. The terms "false swearing," (it seems,) as used in the conditions annexed to a policy,

mean an intentional and corrupt misstatement under oath, for the purpose of proving the existence of property not lost, or of overcharging the property destroyed, or concealing that which was saved. *Ibid.*

182. It seems, also, that silver spoons and articles of a like kind, used by a family upon ordinary occasions, are not necessarily excluded from the risk by the eighth condition relative to plate annexed to the policy, but may be included in the terms "household furniture." *Quare*, whether family portraits are excluded by the same condition as paintings, to be specified in the policy? *Ibid.*

183. Where the jury adopt the plaintiff's statement, as to the loss, furnished by the preliminary proofs, without sufficient evidence to support it, the Court will grant a new trial, and compel the plaintiff to prove the amount of his loss. *Ibid.*

184. A description of buildings to be insured, filed in the office of an insurance company, and referred to in the policy in general terms, as a report of the situation of the premises, is not to be considered as incorporated into the policy, or as amounting to a warranty that the premises insured shall conform in all respects to the description referred to. Buildings represented as finished in an application for insurance, must correspond substantially with such representation; for a material misrepresentation avoids the policy. *Delonguemare v. The Trademans' Ins. Company*, 2 Hall, 689.

185. A carpenter employed constantly in a china factory, in making the racks, shelves, &c. necessary for the proper conducting of the business therein, is not to be considered as a "carpenter at work in his own shop," within the meaning of the memorandums as to the clauses of hazards and rates of premiums attached to the policy; and the employment of such a workman by the plaintiff, in the ordinary and necessary business of his manufactory, was held not to avoid his policy. The plaintiff was also allowed interest on the amount insured, from the time the loss became payable, according to the terms of the policy. *Ibid.*

186. A representation as to the situation of buildings to be insured in relation to other contiguous buildings, made by the assured at the time of his application for insurance, does not amount to a warranty that such buildings are, or that they shall remain, during the continuance of the risk, in the situation described by the representation, unless such representation appear upon the face of the policy. *Stebbins v. The Globe Ins. Company*, 2 Hall, 639.

187. If, upon an application for insurance, the assured describe the premises to be insured by a diagram, or otherwise, and represent the ground contiguous to such premises as "vacant," such representation does not amount to a warranty that the contiguous ground shall remain vacant during the continuance of the risk; neither is the assured prevented from building upon such vacant ground, by any prohibition in the policy, express or implied. *Ibid.*

188. A fraudulent concealment of circumstances material to the risk will vitiate the

policy; and the assured cannot recover in any case where the loss is occasioned by his own fraudulent, improper, or negligent acts. *Ibid.*

189. Evidence as to a usage existing at New York, that upon the occurring of any circumstance whereby the risk is increased by the act of the assured after the effecting of the insurance, notice thereof shall be given to the assurers, so that they may have the option of continuing the policy, or annulling it, cannot be received to alter the legal effect or operation of the contract. *Ibid.*

INSURANCE COMPANIES.

1. Where an insurance company, on being applied to for a loan of a sum of money, agree to make the loan on condition that the borrower would effect an insurance with the company, and such insurance is made, and a premium paid not exceeding the usual rate of charges in such cases, such facts do not amount to evidence of usury. *Utica Insurance Company v. Cadwell et al.* 3 Wend. 296.

2. Where an insurance company, having a right to loan money by way of investing their surplus funds, but not to issue notes for circulation, called in a part of their capital for the express purpose of making loans by checks prepared and intended for circulation like bank notes; it was held, that a note taken upon such a loan was void. *Ibid.*

3. The money lent may, however, be recovered on the common count, and checks drawn and received as money will be considered as money, especially where it appears that all the checks presented have been paid. *Ibid.*

4. An insurance company, authorized to take and hold securities *bona fide*, pledged to them to secure the payment of debts contracted with them, cannot loan money on the hypothecation of stock, and the taking of a note as collateral security for the payment of a loan, when by the act of their incorporation they are prohibited from discounting notes. *North River Insurance Company v. Lawrence*, 3 Wend. 482.

5. Where a power to loan money in a particular mode is given to a corporation, all other modes are necessarily excluded, and all securities other than those allowed to be taken by the act of incorporation are void. *Ibid.*

6. An insurance company may make a valid promissory note, which will be held good until the contrary be shown. *Barker v. Mechanics' Fire Insurance Company*, 3 Wend. 94.

7. A note by which J. F., as president of an insurance company, promises to pay a sum certain, is not the note of the company, but of the maker alone. *Ibid.*

8. The president of the North River Insurance Company, incorporated by the statute, (sess. 35, ch. 23.) the ninth section of which requires one-third of the directors to constitute a quorum for doing business, &c., has no power, as president, to waive the preliminary proof upon a policy of insurance; or, in general, to do other business for the company. *Dawes v. North River Insurance Company*, 7 Cow. 462.

9. The general rule is, that a corporate body can act only in the mode prescribed by the law creating it. *Ibid.*

10. The rule that strict preliminary proof may be waived in a case of fire insurance, the same as in case of marine insurance, recognised. *Ibid.*

11. Where an insurance company in the City of New York appointed R. a surveyor in Savannah, (Georgia,) and by their president, empowered him to make contracts of insurance, to take effect from the time when the premium should be paid, and should be received at New York; provided the office should recognise the rate of premium, and be otherwise satisfied with the risk; and R. advertised at Savannah the terms on which the company would insure, and subscribed himself as agent of the company at Savannah, mentioning that they would insure through him, &c., and P. paid the usual premium of insurance on certain goods, on the 5th January, 1820, to R., who gave P. a receipt for the money, describing himself as agent of the company, and specifying the consideration and object of the receipt; but before the premium was received at New York, the goods were consumed by fire; and P. afterwards tendered the premium to the company, and demanded that they should indemnify him, or execute the contract of insurance; held, that they were bound to comply, though the premium had not been received by them before the loss; and that the premium being according to their established rates, it did not lie with the company arbitrarily to say they would not recognise the rate of premium; or would not be satisfied with the risk; and they were accordingly decreed to indemnify the assured. *Perkins v. The Washington Insurance Company*, 4 Cow. 645.

12. One may become the agent of a corporation in the same manner as he may of an individual, without any deed or writing. *Ibid.*

13. A mere warrant of survey given by an insurance company does not authorize the surveyor to do any act binding upon them. *Ibid.*

INTEREST.

I. On what debts, and when interest is recoverable.

II. Interest on verdict and judgment.

III. Usury; what transactions are usurious, and how far usury affects the security.

I. On what debts, and when interest is recoverable.

1. Interest is not allowable on any unliquidated account, for work, labour, and services, especially where the account was rendered before suit brought, and where a greater sum was claimed than was allowed after a hearing by referees. *Doyle's Administrators v. St. James's Church*, 7 Wend. 178.

2. Rule for casting interest where the bond is payable by instalments, and the interest, though it runs from the date, is not demandable till the instalment falls due, and a payment is made

on an instalment not due and payable. *Williams v. Houghtaling*, 3 Cow. 86.

3. On the 1st of May, 1813, the president, &c. of the Rensselaer Glass Factory, a company engaged extensively in the manufacture of glass, entered into copartnership for a year with R. and A., two stockholders, in conducting the concern, R. and A. to make the necessary advances in money, and receive interest. On the 1st of May, 1813, the company appointed R. their general agent, large advances being necessary to carry on their business. No salary was agreed on; but a previous agent had received a salary of \$1250 per annum, and this was no more than a reasonable compensation for R.'s services while agent, until the factory was destroyed by fire on the 3d of May, 1816. R. continued agent from the first of May, 1813, till his death in August, 1821, residing in the vicinity of his principals, who occasionally met at his house. During the period of his agency he made necessary cash advances in and about carrying on the concerns of the company, to more than \$100,000, which he had charged in an account of more than five hundred items, and had received in cash nearly the same amount, which he credited in the same book, in upwards of seven hundred items. He never rendered any account to the company; nor did he apprise them that they were in arrears until the 2d of January, 1819, when he was requested by one or more of the directors to present his account, which request was afterwards repeated by one or more of the directors, but never complied with. On his death, his personal representative claimed interest on the advances, as well as on the salary or compensation for his services. *Held*, that she should recover interest upon the advances to the 2d of January, 1819, when he was requested to make out his account, but not after; *held*, also, that she should not recover interest on the salary. *Reid v. Rensselaer Glass Factory*, 3 Cow. 393. S. C. 5 Cow. 587.

4. As a general rule, interest is allowable on cash advances, though they rest in the form of a mutual, current, unliquidated account. *Ibid*.

5. Whether such charges come strictly within the definition of an account? *Quære. Ibid*.

6. Interest is not allowable on an unliquidated account for work and labour. *Ibid*.

7. General rule of the Supreme Court, as to casting interest, where partial payments are made at different times, with the American cases on this subject generally. 3 Cow. 87, note (a).

8. The word account has no definite legal meaning; and, *it seems*, that a demand lying in account is not the criterion for determining whether it shall carry interest. The question is, whether the demand itself be liquidated? *Per Sanford*, Chancellor. *Ibid*.

9. The authorities requiring or authorizing the allowance of interest on a debt or demand, classified and arranged under their respective principles, of, I. An agreement express or implied; and the latter considered in reference, 1. to the usage of business; 2. to the case where the principal is to be paid at a specified time, and there is a default as to the payment; 3. an account liquidated, &c.; 4. an account rendered and not objected to, &c.; 5. the giving of

a void note or bill, or offering security, &c. II. The allowance of interest by a jury in their discretion under the direction of the Court; 1. in actions arising *ex delicto*; 2. in actions arising *ex contractu*; with various instances and illustrations under each head; and remarks on the evidence applicable to some of the heads. *Per Spencer*, Senator. *Ibid*.

10. There is no case to be found where attorneys or solicitors have advanced money for their clients, allowing interest on their account before it is liquidated. *Per Cray*, Senator. *Ibid*.

11. A note payable on demand carries no interest till a demand is made by suit or otherwise. *Per Spencer*, Senator. *Ibid*.

12. In trover, the plaintiff may recover interest on the value of the goods from the time of the conversion. *Bissel v. Hopkins*, 4 Cow. 53.

13. Interest is not allowable on an unliquidated account for goods sold and work done, unless there be an agreement express or implied to allow interest. *Van Buren v. Van Gaasbeck*, 4 Cow. 496.

14. And where the defendant owed the plaintiff's testator, on a security drawing interest, which lay unpaid for more than thirty years, and, during all this time, the defendant had an account accumulating against the plaintiff's testator for work done and goods sold, at short periods, which had never been liquidated or settled, amounting, in the end, to more than the principal sum due by the bond; *held*, that interest should be allowed on the bond, but not on the account; and that the latter should not, in adjusting the balance, be allowed, from time to time, as payment on the bond. *Ibid*.

15. Payment of the amount of principal money due from a debtor to his creditor will not prevent an action for the amount of the interest, unless the payment be made and received specially in extinguishment of the principal. If made generally, it applies first to extinguish the interest, and the balance may be sued for as principal. *People v. County of New York*, 5 Cow. 331.

16. Interest is not allowable on an unliquidated account for goods sold and delivered, where no time is fixed for payment, and there is no agreement to allow interest express or implied. *Tucker v. Ives*, 6 Cow. 193.

17. Interest cannot be charged by forwarding commission merchants on items of an account for freight, wharfage, and storage; but they are entitled to interest on cash advances. *Trotter et al. v. Grant et al.* 2 Wend. 413.

18. Instead of allowing interest to their customers on all the moneys received, these merchants may apply such moneys to the satisfaction of annual balances, unless otherwise directed, and allow interest only on the excess beyond the charges. *Ibid*.

19. An account consisting of items on the part of the plaintiff, and only of credits of payments on the part of the defendant, is an unliquidated running account, which does not carry interest without an agreement either express or implied. *Wood v. Hickok et al.* 2 Wend. 501.

20. The testimony of a witness, that it is the uniform practice of grocers to charge interest on

goods sold after ninety days, unless a special agreement to the contrary is made, does not amount to proof of the usage of a particular trade, of which all dealers in that line are bound to take notice, and are presumed to be informed. *Ibid.*

21. A merchant or manufacturer, whose uniform custom it is to charge interest after ninety days upon articles sold or manufactured by him, may recover such charge from those who are in the habit of dealing with him. *M'Allister v. Reab*, 4 Wend. 483.

22. Interest is recoverable on contracts for the payment of money from the time when the principal ought to have been paid. *Williams v. Sherman*, 7 Wend. 109.

23. Interest may be given by way of damages in trover; and where the suit is by an infant, the time is not limited to six years. *Hyde v. Stone*, 7 Wend. 354.

24. Entries in the account books of a firm in the handwriting of one of the partners, exhibiting a debit and credit side of an account, from which it appears a balance is due from the firm, although no balance is struck in the books, is proof sufficient of the original indebtedness, and entitles the creditor to interest from the time that the parties inspected the accounts while in that situation. *Patterson v. Choate*, 7 Wend. 441.

25. A bank, which by law is limited to six per cent. interest upon all discounts, is entitled to recover at the rate of seven per cent. per annum from the time that the debt becomes due. *United States Bank v. Chapin*, 9 Wend. 471.

26. A party receiving money belonging to another, and refusing to pay it over, is chargeable with interest, although he has a set-off, and the precise amount due from him is not liquidated previous to the commencement of the suit. *Greeny v. Hopkins*, 10 Wend. 96.

27. Where the endorsee of a note files a bill in Chancery against the payee and a third person, complaining of combination to defraud in respect to the note, and obtains an injunction, not only restraining the defendants from receiving payment of the note, but also forbidding the maker to pay it to the defendants or to any other person, and serves such injunction upon the maker, the endorsee, in a suit subsequently brought by him upon the note against the maker, is not entitled to recover interest upon the note subsequently to the service of the injunction. *Stevens v. Barringer*, 13 Wend. 639.

28. After payment of the principal of a debt, an action will not lie for the interest. *Ibid.*

29. An action may be sustained for the recovery of interest, although the principal of a debt has been paid, where the payment of interest is stipulated for in the contract. *Ibid.*

30. It is only when interest is not stipulated for in the contract, and is recoverable merely as damages, or as an incident to the debt, that a creditor is precluded from sustaining an action for its recovery after accepting the principal. *Ibid.*

31. Although money be paid into Court to the credit of the United States, yet if no application be made to have it invested nor any bene-

fit accrues from it, the United States shall not be charged with interest upon the amount. *Morton v. Ludlow*, 1 Edw. 639.

II. Interest on verdict and judgment.

32. On verdict and judgment for the plaintiff in trover, error and judgment of affirmance, the defendant in error has both interest from the time of the judgment below, and also double costs, the execution being actually delayed by the writ of error. *Bissel v. Hopkins*, 4 Cow. 53.

33. In assessing the damages for the breach of a contract, the jury may allow interest by way of damages. *Dox v. Day*, 3 Wend. 356.

34. Interest may in all cases be collected by action of debt on judgment; and where the judgment is rendered on contract, it may be collected by directing its levy upon the execution. *Sayre et al. v. Austin et al.* 3 Wend. 496.

III. Usury; what transactions are usurious, and how far usury affects the security.

35. Judgment by confession on bond and warrant set aside for usury, the usury being sworn to by the defendant, and not directly and positively denied by the plaintiff. *Lansing v. M'Killup*, 1 Cow. 35.

36. Whether a bond to pay compound interest upon a debt is usurious? *Quere. Ibid.* note (a).

37. The cases of practice in relation to setting aside judgments for usury referred to. *Ibid.* note (b).

38. The rule is this: taking interest in advance is allowed for the benefit of trade, though it exceed the legal rate of interest. The instrument thus discounted must be such as will, and usually does, circulate in the course of trade, viz. a negotiable instrument, and payable at no very distant day. Under this restriction, taking interest in advance, either by a bank or incorporated company without banking powers, or an individual, is not usurious. *The New York Firemen Ins. Company v. Ely and Parsons*, 2 Cow. 678.

39. A usage among banks to cast interest at a year for three hundred and sixty days; one-half a year for one hundred and eighty days; one-quarter of a year for ninety days; one-sixth of a year for sixty days; and the three days of grace at one-tenth of a month, would not prevent its being usurious, though such usage were universal. *Ibid.*

40. The legal year is three hundred and sixty-five days; the legal half year is one hundred and eighty-two days; and the legal quarter ninety-one days, the law paying no regard to the odd hours. *Ibid.*

41. A statute cannot be abrogated or controlled by the custom or usage of a particular trade. *Ibid.*

42. To constitute usury, there must be a corrupt agreement. *Ibid.*

43. Payment and receipt of usurious interest is *prima facie* evidence of a corrupt agreement. *Ibid.*

44. This may be repelled by showing that it was by mistake. Examples of mistake, mis-cast, miscount of money, &c. *Ibid.*

45. But the adoption of an erroneous principle of calculation, which gives more than seven per cent. per annum, and receiving the discount or interest according to that principle, is usury, though the lender believe that he has a legal right to do so. *Ibid.*

46. The former is a mistake of the fact, the latter of the law. *Ibid.*

47. An agreement to pay more than legal interest, through ignorance of the law, is void. *Ibid.*

48. Whether there be a corrupt agreement, so as to constitute usury, is a question of fact; but where the facts are proved beyond dispute, the law fixes the interest. *Ibid.*

49. This distinction considered and illustrated. *Ibid.*

50. Three things necessary to constitute usury; a loan, taking more than lawful interest, and a corrupt agreement. *Bank of Utica v. Wager*, 2 Cow. 712.

51. Taking the interest in advance on discounting a note is not usury; though it was formerly held otherwise. *Ibid.*

52. But, *it seems*, this is confined to bankers, and those who deal in commercial paper by way of trade. *Ibid.*

53. The cases upon the two last points considered. *Ibid.*

54. A bank, having established certain days for discounting notes, discounts a note at ninety days, taking the interest in advance. At the discount day nearest the day when the note falls due, but previous to the latter, the note is renewed, the interest being again taken in advance; and the note is renewed the same way a third time; so that for part of the time for which the note runs, interest is taken at the rate of fourteen per cent. per annum, owing to a lapse of the note. This is not usury, unless there was an agreement upon the first loan, either expressed or implied, that the note should be thus renewed, or it otherwise appears that the transaction was a cover for usury. *Ibid.*

55. In taking interest in advance on discounting a note, it is lawful to include the three days of grace in the computation. *Ibid.*

56. To every practical purpose, the days of grace are a part of a promissory note. *Ibid.*

57. But to take interest in advance upon discounting a ninety day note, calculated at a quarter of a year for ninety days, is usurious, and the note is void. *Ibid.*

58. Receiving usurious interest intentionally is sufficient evidence of a corrupt agreement. *Ibid.*

59. The policy of the statute of usury vindicated. *Ibid.*

60. Custom or usage will not be received to sanction usury. *Ibid.*

61. S. P. as to usury, custom, discount, &c. *Bank of Utica v. Smalley*, 2 Cow. 770.

62. Discounting a note at seven per cent., and taking the interest in advance, is not usury, either in bankers or others. *New York Firemen Insurance Company v. Sturges*, 2 Cow. 664.

63. Where a trifling excess is taken, on discounting a note, beyond the legal interest, it will be presumed to be by mistake, and not by

the adoption of an erroneous rule of calculation, until the latter is shown. *Ibid.*

64. Taking beyond the legal interest by mistake is not usurious. *Ibid.*

65. Though, *it seems*, it would be otherwise, where the excess arises from the voluntary adoption of an erroneous rule of calculation. *Ibid.*

66. Casting interest upon the principle that thirty days are the twelfth of a year, sixty days the sixth, ninety days the fourth of a year, and the three days of grace the tenth of a month, and discounting a note upon such a calculation, is usurious; and the note consequently void. *New York Firemen Insurance Company v. Ely*, 2 Cow. 678.

67. The right to take interest in advance on discounting a note is not confined to banks, bankers, and merchants discounting bills in the fair course of commercial business, but extends to individuals, and others having a general right to discount. *Ibid.*

68. A bond dated July 26th, 1815, with condition to pay \$3000, with interest, as follows: \$500 with interest on the whole sum unpaid from the 1st October, 1815, on or before the 1st October, 1816; and \$500 more thereof, with interest on the whole sum unpaid from the 1st day of October next, on or before the 1st October, 1817; the residue expressed to be payable in instalments of \$500 yearly in like manner; *held*, not usurious on the face of the condition, though, upon one construction, every instalment would draw interest from the 1st October, 1815, notwithstanding it might have been previously paid; and thus the second instalment might draw fourteen per cent. interest, the third twenty-one per cent., and so in that progression to the last; but to avoid this consequence, *held*, that the words "with interest on the whole sum unpaid" should rather be deemed to refer to the interest as well as the principal, and to mean that \$500 was payable on the 1st October, 1817, together with the interest that accrued on the balance of principal subsequent to the 1st October, 1815, and remained unpaid. *Archibald v. Thomas*, 3 Cow. 384.

69. Where a contract admits of two significations, that should be adopted which renders it operative, rather than that which renders it void. *Ibid.*

70. If a contract is susceptible of two constructions, one of which will bring it within, and the other without the statute of usury, the latter construction should be adopted. *Ibid.*

71. A contract reserving more than legal interest on its face is *prima facie* evidence of a corrupt agreement, which is the foundation of usury; but this may be repelled by showing that more than legal interest was reserved by mistake, *e. g.* a mistake of the scrivener in wording the bond, whether such mistake be of the fact or of the law. *Ibid.*

72. The Court have the exclusive power of deciding whether a contract be usurious on its face. *Ibid.*

73. A contract to pay interest, generally, means the legal standard of interest. *Ibid.*

74. M. requested I. to procure a loan of money for the former, stipulating to pay I. three per cent. per month. I. accordingly borrowed the money of W., M. gave his promissory note with an endorser. M. paid I. the three per cent. for his sole benefit. *Held*, that the note was not usurious. *Coster v. Dilworth*, 8 Cow. 299.

75. To take interest in advance upon discounting a ninety day note, made to be discounted, the interest being calculated at one fourth of a year for the ninety days, is usurious; and the note therefore void. *Bank of Utica v. Wager*, 8 Cow. 398.

76. Giving and receiving designedly more than legal interest is, without any express corrupt agreement, usury. Per *Colden*, Senator. *Potwells v. Waters*, 8 Cow. 669.

77. Selling cows, &c. on a contract to return double the same number and description at the end of four years, is not usurious. *Spencer v. Tilden*, 5 Cow. 144.

78. So of sheep, to double in three years. *Holmes v. Wetmore*, note (a), 5 Cow. 149.

79. When the sale of an article which is of fluctuating value, to be repaid in kind, with more than the legal rate of interest for forbearance on the price at the time of sale, shall be deemed usury. *Hamlin v. Fitch*, Kirb. Conn. Rep. 260; substance of the case given in note (a), 5 Cow. 149.

80. Of the evidence necessary to make out usury. *Jackson v. Smith*, 7 Cow. 717.

81. The lender stating that he had made a usurious loan to the borrower in one year, at a certain rate and on certain security, and that such were his usual terms, will not authorize a jury to presume that a loan in the next year to the same borrower, for a different sum, on the same kind of security, was usurious; or that a security in the same form taken the next year, for a different sum, was a renewal of the former security, or in any manner connected. *Ibid*.

82. The general character or habit of a usurer is not a foundation for presuming usury in a particular loan. *Ibid*.

83. One who contracts to buy land of another, and enters under such contract, is, in ejectment, estopped to show title out of the vendor. *Ibid*.

84. But, *semble*, he may do so, if the contract be usurious. *Ibid*.

85. An agreement to pay more than legal interest for money loaned on note, such agreement being made at the time of the loan, is usurious, and renders the note void, though the note on its face be for the mere amount lent, with legal interest only. *Merrills v. Law*, 9 Cow. 65.

86. But if the agreement to pay more than legal interest be subsequent to the time of the loan, though such agreement be usurious, yet it will not avoid the note. *Ibid*.

87. Where R. was applied to by P. for a loan of money, but not having it, referred P. to his son-in-law, whose usage he said it was to receive seven per cent. besides legal interest, and by arrangement between himself and P., received P.'s note with an endorser, and procured the money of his son-in-law, at the rate mentioned by him, on his own note, which he afterwards paid, and gave P. credit from time to

time on P.'s successive endorsed notes, holden by R. himself; *held*, that R. must be considered the lender; that he did not stand in the light of a mere surety of P., and that the note taken by him was void. *Reed v. Smith*, 9 Cow. 647.

88. Where the original loan is usurious, all the securities therefor, however remote or often renewed, are void. *Ibid*.

89. Where one as agent lends money for another, at a usurious rate of interest, and afterwards pays him, and takes security from the borrower in his own name, it is void, though he derive no benefit from the loan, and the premium go to the exclusive benefit of the principal. *Ibid*.

90. It would be void even in the hands of a bona fide holder. *Ibid*.

91. Whether a surety, knowingly becoming bound for and paying a usurious loan, may recover over against his principal? *Quære. Ibid*.

92. A note given on the settlement of an account, in which compound interest is charged, is not usurious. *Kellogg v. Hickok*, 1 Wend. 521.

93. Interest calculated and received upon a note, upon the principle of three hundred and sixty days being a year, is *prima facie* usurious, and renders the note void. *Utica Insurance Company v. Tillman*, 1 Wend. 555.

94. Where A. and B. exchange notes, for the purpose of raising money, and A. obtains the note of B. to be discounted at a premium exceeding the lawful rate of interest, such transaction is not usurious, and cannot be set up in bar of a recovery in an action by the purchaser of the note against B. the maker. *Rice v. Mather*, 3 Wend. 62.

95. Interest taken in advance by a banking institution on discounting a note is not usury. *Bank of Utica v. Phillips*, 3 Wend. 408.

96. If a company, not possessing banking powers, take interest in advance on discounting a note, this does not render the loan usurious. *Utica Insurance Company v. Bloodgood*, 4 Wend. 652.

97. The letting of a two year old heifer and calf, the heifer to be returned at the end of four years, with another heifer three years old, is not usurious. *Cummings v. Williams*, 4 Wend. 679.

98. A note reserving usurious interest is void, though given for a pre-existing valid debt; such debt, however, may be recovered, notwithstanding the invalidity of the security. But where the agreement between parties is usurious, (though such agreement be founded on a good consideration,) it is void. *Rice v. Welking et al.* 5 Wend. 595.

99. A mortgage taken on a loan of money, including a former usurious loan, is void; the taint of usury destroys the whole security. *Jackson v. Packard*, 6 Wend. 415.

100. Where a usurious note has been transferred for a valuable consideration and without notice, and a new note taken by the holder, the usury of the first note cannot be set up in bar of a recovery on the second note. *Kent v. Walton*, 7 Wend. 256.

101. Discounting a business note at more than

seven per cent. interest, is not a usurious transaction; a note valid in its inception may be bought and sold as a chattel, at its value, real or supposed. *Ibid.*

102. A promissory note for the payment of a particular sum, with interest from a day anterior to the date of the note, in itself affords no evidence of usury. *Marvin v. Feter*, 8 Wend. 533.

103. Nor is it usurious, on selling a note payable at a future day, to take a note for the principal and interest of the note sold computed to the day of sale, without making a rebate of interest. *Ibid.*

104. A loan company, authorized by its charter to loan money on pledges of goods and chattels, and to charge interest for a full month where the loan is for a period over fifteen days and less than one month, is not entitled, where a loan for twenty days remains unpaid, to demand interest at the same rate for any subsequent time; the interest on the debt due at the expiration of the twenty days must be computed as on ordinary contracts. *Macomber v. Dunham*, 8 Wend. 550.

105. Where, after the expiration of twenty days, interest was charged for a subsequent period at the same rate, and a promise for the payment thereof exacted and made at the same time that a bond was taken for the sum actually lent; it was held, that the interest thus computed was usurious, and that the agreement for the payment thereof, though not included in the bond, rendered it void for usury. *Ibid.*

106. In an action by the endorsee of a promissory note against the maker, usury may be set up as a defence, unless it be shown that the plaintiff is an innocent holder for a valuable consideration, and became possessed of the note before maturity. *Hackley v. Sprague*, 10 Wend. 113.

107. The maker of a note is not precluded from setting up the defence of usury against the endorsee, if the note was made and became payable previous to January 1st, 1830, although transferred after the revised statutes went into effect, and for a valuable consideration. *Ibid.*

108. The including of one per cent. in a promissory note as the difference in the rate of exchange between the place where the payee of a promissory note resides and the place of payment, is not *per se* evidence of usury, where the note is thus made payable for the accommodation of the maker. *Merritt v. Benton*, 10 Wend. 116.

109. The eighth section of the act relative to usury, (dispensing with the payment or offer to pay interest, on the filing of a bill in Chancery for a discovery of the money, &c., received in violation of the provisions of the act,) does not abrogate the established principle of a Court of equity, that on filing a bill of discovery on an allegation of usury, the complainant must pay or offer to pay the principal or the sum actually lent; and a bill of discovery not containing such offer is bad on its face, and may be demurred to. *Livingston v. Harris*, 11 Wend. 329.

110. The provision in the same section, forbidding a Court of equity to require or compel payment or deposit of the principal sum as

a condition of granting relief, applies only to cases where the complainant, although he can prove the usury without resort to the oath of the lender, has no opportunity of setting up the defence, in consequence of the nature of the securities executed by him; as for instance, a judgment entered on bond and warrant, or a mortgage with power to foreclose under the statute. *Ibid.*

111. A surety, it seems, is a borrower within the meaning of the statute, and is entitled to avail himself of its provisions. *Ibid.*

112. Where a usurious security is given in part for a *pre-existing valid debt*, such debt is not destroyed by the illegal security. But although a usurious contract contains a good consideration in fact, as where money is actually lent and received by the borrower, yet the security being absolutely void, no action can be maintained upon it; nor is it evidence of indebtedness, upon the strength of which the law will imply a promise on the part of the borrower to pay the amount actually received by him. *Hammond v. Hopping*, 13 Wend. 505.

113. If, however, the contract be mutually abandoned, and the securities are cancelled or destroyed, so that they can never be made the foundation of an action, and the borrower subsequently promises to pay the amount actually received by him, such promise is legal and binding. *Ibid.*

114. Where there is a usurious agreement upon the loan of money, it is immaterial whether the unlawful excess be actually paid, or only promised to be paid; in either case the contract is void. *Ibid.*

115. Where the pleadings give notice to a party to be prepared to produce a particular instrument at the trial, formal notice is not necessary. *Ibid.*

INTERPLEADER.

1. On a bill of interpleader, a decree that it is properly filed is the only decree which the complainant is interested in obtaining. *Atkinson v. Manks et al.* 1 Cow. 691.

2. It is a final decree within the meaning of the statute, (1 R. L. 134, s. 9.) and the party may appeal after fifteen days. *Ibid.*

3. Where it goes on to order a reference to a master, by consent of the parties, upon principles calculated to adjust the rights of those called upon to interplead, it will be considered a substitute for the ordinary proceeding by actual interpleader. *Ibid.*

4. An appeal from the final decree necessarily opens for consideration all prior orders or decrees any way connected with the final decree. *Ibid.*

5. Thus an appeal from a decree upon exceptions to a master's report, relative to the rights of the parties called upon to interplead, which report was made under an order of reference by consent, or an appeal from a decree allowing costs to the complainant, involves an inquiry into the decree that the bill of interpleader was properly filed. *Ibid.*

6. And consequently admitting the decree that the bill was properly filed to be an interlocutory decree, an appeal from the decree, relating either to the exceptions or costs, brings up the decree that the bill was properly filed. *Ibid.*

7. The nature and object of a bill of interpleader considered. *Ibid.*

8. It lies where two or more persons claim the same debt or duty of the complainant, by separate interests. *Ibid.*

9. The complainant should have no beneficial interest in the thing claimed. *Ibid.*

10. And it must appear that he cannot determine the right without hazard to himself. *Ibid.*

11. The complainant must make affidavit that he does not collude with either claimant. *Ibid.*

12. And bring the money or thing claimed into Court. *Ibid.*

13. The amount or origin of the fund claimed, &c., is not the object of inquiry as against the complainant, except in reference to fraud or collusion on his part. *Ibid.*

14. These rules applied to the particular case. *Ibid.*

15. But the amount and origin of the fund must be material, as between those called upon to interplead. *Ibid.*

16. Where one having funds accepts a bill of exchange drawn by A. in favour of B., and C. claims the same funds, a bill of interpleader will not lie against B. and C., because the acceptor is bound to pay at all events. *Ibid.*

17. But an order drawn by A. in favour of B. upon another, for A.'s goods or the proceeds of his goods, in the hands of the drawee, is not a bill of exchange, or equivalent to a bill of exchange. *Ibid.*

18. And if accepted by the drawee for a stated sum, he having no goods or proceeds of the goods of the drawee in his hands, he is not bound by his acceptance. *Ibid.*

19. For it is without consideration. *Ibid.*

20. So, if he accept for a sum beyond the goods or proceeds thereof, there is a want of consideration for the excess. *Ibid.*

21. And if A. afterwards draw another order in favour of C., for all A.'s funds in the hands of the drawee, and both B. and C. claim certain funds in the drawee's hands under their respective orders, as belonging to A., and covered by their respective orders, the drawee may maintain a bill of interpleader against the payees. *Ibid.*

22. And this, though he may have accepted the first order for a certain amount. *Ibid.*

23. For a general acceptance of such an order would merely be evidence that the proceeds of the goods, received after the date of the acceptance, were received to the use of the payee. *Ibid.*

24. If a bill of interpleader be properly filed, the complainant is entitled to have his costs allowed him out of the fund in Court. *Ibid.*

25. And under special circumstances, it is right to allow the defendants to have their costs respectively to be deducted from the same fund. *Ibid.*

ISLANDS.

1. The proprietors of islands separated by a stream in which the tide does not ebb and flow own respectively to the centre of the stream, unless the language of the grants under which the islands are held is such as clearly and unequivocally to show that the intent of the parties was, that the grants should not extend beyond the water's edge; but where the stream is navigable either for boats or rafts, the public have a right to use it for these purposes, and the rights of the adjoining proprietors are subject to the public easement. *The People v. Canal Appraisers*, 13 Wend. 355.

2. If, in the improvement by the state of a navigable river by the erection of a dam, a waterfall in a tributary stream, not navigable, is overflowed and destroyed, he is entitled to compensation for the injury sustained. *Ibid.*

JEFFERSON COUNTY BANK.

1. Upon the general issue, or *multi* corporation, pleaded in an action by the Jefferson County Bank, incorporated by the statute, (sess. 39, ch. 231.) it is not sufficient for the bank merely to produce the act of incorporation; but certain steps were required by the statute to be taken before the corporation had existence; *e. g.* opening books, subscription and distribution of stock, the choice of directors, and by them a president and cashier, &c. Yet producing the books, showing the election of officers, and the affidavit required by the first section of that act, are *prima facie* sufficient to prove that all the previous steps required by the statute were taken. *Wood v. Jefferson County Bank*, 9 Cow. 194.

JOINT DEBTORS.

1. A. and B. give a joint and several instrument of indemnity to C., who, being sued for the act indemnified, gave notice of the suit to A. Judgment having been given against C., he sued B. for indemnity. *Held*, that notice of the suit against C. was necessary to be given to A. and B.; but that notice to one was sufficient to charge either or both of them. *Bartlett v. Campbell*, 1 Wend. 50.

2. Where one of two parties makes a settlement of a debt of the firm by way of compromise, it is not competent for the creditor to authorize such partner to keep the original claim alive, and enforce it, by action in the plaintiff's name, against the other partner. *Grant v. Shuster*, 1 Wend. 148.

3. The nonjoinder of parties defendants can be taken advantage of only by plea in abatement. *Le Page v. M'Crea*, 1 Wend. 164.

4. In an action against joint debtors, in which the plaintiff proceeds under the statute, as if all the defendants were brought into Court, and takes judgment against all, an action of debt on that judgment lies against a defendant not brought into Court. *Carman v. Townsend*, 6 Wend. 206.

5. A denial of *joint liability* by a defendant not brought into Court in the first action, is a good and valid plea in an action on the judgment. *Ibid.*

6. In a suit against several *joint debtors*, where only one is brought into Court, and the plaintiff proceeds under the statute as if all were brought in, and the defendant brought in succeeds in establishing a *personal defence*, e. g. *infancy*, although the plaintiff's cause of action was fully proved, he is not entitled to judgment against the other defendants named in the original process who were not brought into Court. *Leggett v. Boyd*, 6 Wend. 500.

7. Nor is the plaintiff, in such case, entitled to *discontinue without costs* as to the defendant brought into Court, having proceeded to trial with a full knowledge of the defence, and put the defendant to the expense of proving his infancy. *Ibid.*

8. Where a suit is commenced by declaration against joint debtors, and the declaration is served on only one of the defendants, he may confess judgment, and bind the joint property of all the defendants in like manner as if process had been issued and served on one of the defendants. *Pardee v. Haynes*, 10 Wend. 630.

9. Under the statute against *joint debtors*, authorizing a plaintiff to proceed to judgment, where all the defendants have not been brought in, judgment may be entered as well where the defendant not brought in is an *infant* as where he is an *adult*; and, consequently, a judgment thus entered against an infant defendant will not be revoked upon a writ of error, *coram vobis*, although such judgment was entered without the appointment of a guardian to the infant. *Mason et al. v. Denison*, 11 Wend. 612.

10. A private agreement or understanding between parties can in no way vary the rights of third persons or the public, legally flowing from the general arrangement under which they hold themselves out as jointly interested, and by which they participate in the profits of the concern. *Boatwick v. Champion*, 11 Wend. 571.

JUDGE.

1. Where the testimony is contradictory, and the credibility of witnesses in question, it is the peculiar province of the jury to weigh and determine upon it. The Court will not therefore interfere with their verdict on the sole ground that it is against the weight of evidence. *Sargent v. —*, 5 Cow. 106.

2. A first judge of the county, being a counsellor, &c. of the Supreme Court, may take acknowledgments of deeds, which may be registered in any county in the state without a certificate of the county clerk that he is a first judge. *Jackson v. Chapin*, 5 Cow. 485.

3. Where facts are not disputed, the law on those facts is to be declared by the Court. But where the law and the fact are so blended that they cannot be separated, the jury pass on both under the advice of the Court. *Jackson v. Bett*, 9 Cow. 208.

4. A circuit judge has an absolute authority to hold circuits in any part of the state. *Child*

v. The Fulton Bank, 7 Cow. 513. *Eagle Bank v. Holley*, 7 Cow. 514. S. P.

5. Nor is it an objection that circuits, both on the law and equity side, are holden at the same time in the same county. *Child v. Fulton Bank*, 7 Cow. 513.

6. S. P. Counsel being absent and suffering an inquest against them, on the ground that they supposed the circuit irregular, with an affidavit of merits, allowed as a ground for setting the inquest aside, on payment of all costs. *Eagle Bank v. Holley*, 7 Cow. 514.

7. When there are facts to be passed upon, and the material evidence from which a conclusion is to be drawn is not clear and explicit, such evidence should be left to the jury. *Hyde v. Stone*, 9 Cow. 230.

8. It is not competent for a judge to direct a verdict subject to the opinion of the Court, unless by consent of parties. *Ibid.*

9. A judge has no authority to receive a verdict in the absence of the plaintiff, unless with his *express assent*. *The People v. The Mayor's Court of Albany*, 1 Wend. 36.

10. A circuit judge may insert in a case such facts as he deems necessary to render his charge intelligible: he may state his charge as he deems correct; if no charge was delivered, but opinions expressed by him in the hearing of the jury in the progress of the trial, he may with propriety state such opinions in the settlement of the case. *Walworth v. Wood*, 7 Wend. 483.

11. A judge of the county Courts, not being a justice of the peace, cannot act as a member of a Court of Special Sessions, except where the offender is brought before him on the warrant by virtue of which he is arrested, and requests to be tried, or omits to give bail. *The People v. Tracy*, 9 Wend. 365.

12. If in any other case he acts as a member of such Court, the proceedings are *coram non iudice*, and a person guilty of false swearing before such tribunal, thus illegally constituted, cannot be punished as for perjury. *Ibid.*

13. In an action of tort, where a defendant asks to put off the trial of the cause for the want of a material witness, on its being made to appear, to the satisfaction of the judge, that there is reason to apprehend that the defendant may die previous to the next circuit, the judge is warranted to impose, as a condition to the putting off the trial, that the defendant shall stipulate that his death shall not abate the suit. *Ames v. Webbers*, 10 Wend. 575.

14. A judge of the county Court, who attends at the clerk's office on notice from the clerk to witness the drawing of juries, is entitled to compensation for such attendance, the amount to be fixed by the supervisors of the county. *The People v. Supervisors of Albany*, 12 Wend. 257.

15. It is discretionary with a circuit judge whether he will permit new witnesses to be examined after counsel have summed up the cause. *Matthews v. Whitney*, 12 Wend. 396.

16. The provision of the revised statutes which deprives a judge of the power of acting as such, when he is related to either of the parties by affinity or consanguinity, does not ex-

tend to a case where a relative of the judge is only a formal party to the suit or proceedings, and has no personal interest in the subject-matter of the litigation, or in the decision to be made therein. *In the matter of Hopper*, 5 Paige, 489.

JUDGMENT.

- I. *Lien of judgments and executions.*
- II. *Priority of judgments.*
- III. *Satisfaction of a judgment.*
- IV. *Vacating a judgment.*
- V. *Arrest of judgment.*
- VI. *Judgment of another state.*

I. *Lien of judgments and executions.*

1. A judgment for costs in partition is within the first proviso of the first section of the act concerning judgments and executions, and is a lien on the land for ten years only. *Lansing v. Fischer*, 1 Cow. 431.

2. Where a defendant in partition made a written agreement to sell his share to R., who had notice of the lien, and agreed to pay the costs; and R. afterwards assigned the contract to another for a valuable consideration without notice of the lien, no execution having issued within ten years after the judgment; *it was held*, that the assignee was a *bona fide* purchaser, and protected against the judgment, although he did not actually receive a deed from the defendant until after the execution issued. *Ibid.*

3. A judgment is not a lien on a term for years. *Merry v. Hallet*, 2 Cow. 497.

4. Which, when sold on an execution, is irredeemable after one year. *Ibid.*

5. A judgment creditor cannot redeem a term for years. *Ibid.*

6. A judgment created upon full consideration, though for the express purpose of enabling the creditor to redeem, is valid. *Snyder v. Warren*, 2 Cow. 518.

7. A sale of land upon a judgment and executions, though for only a part of what is due upon the judgment, with the lapse of fifteen months from the time of sale, and a conveyance by the sheriff, destroys the lien of the judgment, even for the balance remaining due; and the judgment creditor for the balance cannot therefore redeem the land from a purchaser under a senior judgment, within the statute. (Sess. 43, ch. 184, s. 3.) *Ex parte Stevens*, 4 Cow. 133.

8. Such a sale and conveyance also destroys the lien of all junior judgment creditors; so that they cannot redeem from a purchaser under any judgment older than the one upon which the conveyance is made. *Ibid.*

9. Thus, where M. had judgment, then C., and then S., all against F., which bound his land; C. sold the land for part of his judgment, then M. sold; C. waited fifteen months from his (C.'s) sale, and took a conveyance, and then within fifteen months from the time of M.'s sale paid M. his bid, &c., and claimed to redeem as creditor for his (C.'s) balance; and S. also in proper time paid M.'s bid, &c., and claimed to redeem; *held*, that both C.'s lien for his balance and S.'s lien by judgment were divested

by the sale and conveyance on C.'s judgment, and that neither could redeem. *Ibid.*

10. A *fi. fa.* delivered to the sheriff takes preference of an attachment levied before the *fi. fa.*, but after the delivery of the *fi. fa.* to the sheriff. *Wells v. Marshall*, 4 Cow. 411.

11. To recover in ejectment under a purchase at sheriff's sale, on a judgment against a party not in possession, the plaintiff must prove against the one found in possession, that the party against whom the judgment was rendered had some right, title, or interest in the premises sold; and *it was held* not enough to show that such party held adversely for less than twenty years, but abandoned the premises before judgment, to which she never returned; though a few months after abandoning, she conveyed to the defendant in the ejectment, who afterwards entered under the conveyance. *Jackson, ex dem. Stewart, v. Town*, 4 Cow. 599.

12. An equitable or legal seisin must be shown, on which a judgment can attach, and be a lien, in order to warrant a sale of real estate under it. *Ibid.*

13. Where the party against whom the judgment is recovered is the actual possessor, this is sufficient of itself; for actual possession is *prima facie* evidence of title; and he cannot show title in another. *Ibid.*

14. Even if the deed be founded on natural love and affection, it will not be void within the 13 Eliz. as against creditors, if it be not shown that the grantor was indebted to such a degree, that the settlement will deprive the creditors of an ample fund for payment of their demands. *Ibid.*

15. And a deed upon such a consideration is good within the 27 Eliz., as against a subsequent purchaser. *Ibid.*

16. But not in either case, if a fraudulent use be made of it. *Ibid.*

17. A judgment is not a lien upon a mere equity, and such an interest cannot be sold on execution. *Jackson v. Chapin*, 5 Cow. 485.

18. Thus, where R. conveyed lands to B., who held as R.'s trustee, but under an equitable obligation to convey to another; *held*, that a judgment against R. was not a lien on his interest, and that it could not be sold on execution. *Ibid.*

19. The issuing of an execution before the ten years after docketing a judgment have expired, and a note under it after the ten years, will not extend the lien of the judgment as against subsequent judgment creditors, &c. *Roe v. Swart*, 5 Cow. 294.

20. A levy on a *fi. fa.* by the deputy of a sheriff, is a constructive levy on the same property of a subsequent *fi. fa.* delivered to another deputy of the same sheriff. And this, though the property first levied upon be afterwards, before the delivery of the second execution, removed into another state, and remain there till after the return day of the second execution. *Russell v. Gibbs*, 5 Cow. 390. See also *Marsh v. Lawrence*, 4 Cow. 461.

21. A *fi. fa.* does not become dormant or fraudulent as to subsequent executions, by the mere indulgence or negligence of the sheriff to proceed and sell, without any act of the plaintiff. *Ibid.*

22. A plaintiff bidding on his own execution is not bound to pay the money. *Ibid.*

23. But if there be a dispute between him and other creditors as to which execution the money is to apply, *semble*, the sheriff may refuse the plaintiff's bid, or refuse to deliver the property till the money be paid, and proceed to sell again if it be not paid according to the bid made. *Ibid.*

24. But if he sell and deliver the property to the plaintiff, he cannot maintain an action for the price bid. *Ibid.*

25. Where a *fi. fa.* was levied in the autumn on hides, which were in the vats undergoing the process of tanning, and could not therefore be sold till spring without great sacrifice, and the plaintiffs therefore directed the officer to delay a sale till spring; *held*, that this did not render the *fi. fa.* dormant or fraudulent as to subsequent executions. *Power v. Van Buren*, 7 Cow. 560.

26. One who is in possession of land under a contract of purchase has a real estate in the land within the statute, (1 R. L. 500.) which is bound by a judgment in a Court of record; and therefore, if he assigns his interest and possession after judgment, though before a *fi. fa.* levied, yet the lien of the judgment continuing, his interest may be sold upon the execution.

27. The docketing of the judgment is notice to the purchaser, as in other cases. *Jackson v. Parker*, 9 Cow. 73.

28. Where one, after a judgment is obtained against him, alienates a part of his real estate on which the judgment is a lien, on motion to the Court in which judgment was obtained, or on filing a bill in Chancery, the judgment creditor will be compelled by order or decree to exhaust the estate remaining in the debtor's hands, before selling the part so aliened. *Clowes v. Dickinson*, 9 Cow. 403.

29. A judgment at law is a lien upon the interest of a *cestui que trust*, and such interest may be sold by execution where the *cestui que use* has the whole beneficial interest, and the trustee only a naked and formal title. *Jackson v. Bateman*, 2 Wend. 570.

30. A person who obtains a judgment against another, and sells the land of his debtor, becoming himself the purchaser at an amount exceeding the judgment, has no right to redeem the premises purchased by him from the operation of a sale anterior to that under which he purchased; the sale of the land under his execution having extinguished the lien of his judgment, he is no longer a judgment creditor having a lien. *The People v. Easton*, 2 Wend. 297.

31. A judgment against administrators upon a bond and warrant of attorney, executed by them, does not bind the estate of the intestate, so that it can be taken upon an execution issued thereon: nor can such judgment be pleaded by the administrators in support of a plea of *plene administravit præter, &c.* *Pinney v. Administrators of Johnson*, 8 Wend. 500.

32. A judgment after ten years from the time it is docketed ceases to bind, or be a charge or lien upon real estate, as against encumbrances subsequent to such judgment by mortgage, judg-

ment, decree, or otherwise, and that although the subsequent encumbrance be accepted with a full knowledge of the existence of the prior judgment, and that it remains unpaid. *Little v. Harcey*, 9 Wend. 157.

33. To save the lien, not only must the execution issue, but the sale must take place within the ten years, unless the plaintiff has been restrained by injunction or writ of error. *Ibid.*

34. The fact of the execution being tested within the ten years, when not delivered to the sheriff until after the ten years, will not help the plaintiff. *Ibid.*

35. A judgment on a warrant of attorney to confess, &c., may be entered after the death of the defendant, provided it be entered as of the term in which he dies, if the death happen during a term; and if it happen during a vacation, that it be entered as of the term immediately preceding the death. *Nichols v. Chapman*, 9 Wend. 452.

36. Such judgment, however, does not bind the real estate of the deceased; it is merely a debt having a preference, to be paid in the usual course of administration. *Ibid.*

37. Nor can execution issue upon such judgment, or upon any other judgment, where the defendant dies after judgment and before execution, until one year after the death of the defendant. *Ibid.*

II. Priority of judgments.

38. Among several judgments, that in which the record is first filed takes preference. *Lemon v. Heirs of Staats*, 1 Cow. 592.

39. And to determine this, the Court will inquire into the fractional parts of a day. *Ibid.*

40. A judgment of more than ten years, standing, its lien as to *bona fide* purchases and junior judgments having expired within the act of 1813 concerning judgments and executions, (R. L. 500, s. 1.) ranks, in effect, as a judgment junior to later judgments; and may redeem from a sale under them according to the statute. (Sess. 43, ch. 184.) *Ex parte The Peru Iron Co.* 7 Cow. 440.

41. It continues a lien as to the judgment debtor and his heirs. *Ibid.*

42. Under the act (sess. 43, ch. 184, s. 3.) a senior judgment creditor may redeem from a sale upon a junior judgment. *Ibid.*

43. A levy, in virtue of an execution upon a judgment obtained as a collateral security for another judgment, is not a satisfaction of the latter. *Ontario Bank v. Hallett*, 8 Cow. 193.

44. The priority to which a judgment in favour of the United States is entitled does not extend to create a prior lien on real estate; it merely gives a right of prior payment out of the general funds of the debtor in the hands of the assignee. *Forsyth v. Clark*, 3 Wend. 637.

III. Satisfaction of a judgment.

45. Bringing debt upon a judgment, and recovering and perfecting a judgment thereon is another Court, is no satisfaction of the first. *Mumford v. Stocker*, 1 Cow. 178.

46. The second judgment must be satisfied in fact, to warrant a motion for entry of satisfaction upon the record in the first. *Ibid.*

47. Where a judgment is set off on trial, and allowed against a still larger claim, and judgment is entered in the second action, the judgment so set off is satisfied, and the Court will discharge a party imprisoned thereon, and order the entry of satisfaction; but this cannot be done where a case is made, and a motion for new trial is pending in the second cause. *Schroeppe v. Jewell*, 1 Cow. 208.

48. A levy on personal property sufficient to satisfy a *fi. fa.* is an extinguishment of the judgment on which it issued. *Ex parte Lawrence*, 4 Cow. 417.

49. The judgment, therefore, ceases to be a lien on real estate, and the judgment creditor has no right, as such, to redeem under the act. (Sess. 43, ch. 184, s. 3.) *Ibid.*

50. A levy on sufficient personal property to satisfy a judgment, though the execution be returned unsatisfied by the direction of the plaintiff, or the assignee of the judgment, extinguishes the judgment; and a sale of land under a subsequent execution thereon is void, especially if the purchaser, at the sale be not a *bona fide* purchaser. *Jackson v. Bowen*, 7 Cow. 13.

51. Although a levy under an execution on property sufficient to satisfy the same is ordinarily a satisfaction of the judgment, yet it is not so when the property is fraudulently withdrawn, by the defendant, from the possession of the officer. *Mickles et al. v. Hashin*, 11 Wend. 125.

IV. Vacating a judgment.

52. A judgment of more than five years' standing cannot be vacated by the plaintiff. *Barheydt ad. Adams*, 1 Wend. 101.

53. Technical nicety or legal precision is not required in the pleadings before justices; but it will be sufficient, if there appear a good ground of action within the justice's jurisdiction, and that the merits of the cause have been tried. So, where it clearly appears that the plaintiff had no right to recover, the Supreme Court will set aside a judgment, though rendered on a verdict of a jury. *Stuart v. Close*, 1 Wend. 438.

54. After a lapse of ten years, a judgment will not be set aside for irregularity, or on the merits, where the defendant was duly arrested, and there is no complaint of fraud or circumvention. *Soulden et al. v. Cook*, 4 Wend. 217.

55. In a suit by an executor, where the declaration contained a count on a promissory note given to the testator, and also the common money counts, stating the indebtedness to the plaintiff in his own right, and a general verdict was found for the defendant, who entered judgment for costs without previously applying for leave to do so, the judgment was set aside as irregular. *Palmer v. Palmer*, 5 Wend. 91.

56. Where a party agrees to accept a *specific article* of property in payment of a judgment, and it is delivered and accepted, such acceptance is an *appropriation* in satisfaction, in judgment of law. *Brown v. Feeder*, 7 Wend. 301.

57. The fact of a party's receiving the *surplus* of the avails of his property, sold under an execution *illegally issued*, does not deprive him of his right of action for the unlawful suing out of the process. *Ibid.*

58. The Court will not entertain a motion to set aside a judgment on the objection of fraud, where it appears that the same matter is pending in Chancery. *M'Laren v. M'Laren*, 6 Wend. 537.

59. A judgment entered on a *cognovit* given by an attorney of this Court, as the attorney of two parties, when in fact he was employed by only one of them, on whom a declaration had been served, the other being wholly ignorant of the commencement of the suit, will not be set aside as unduly entered, where all fraud and collusion between the parties is denied, and there is no allegation that the attorney giving the *cognovit* is irresponsible. *Gruzebrook v. M'Creddie*, 9 Wend. 437.

60. The Court will, however, in such case, stay the proceedings on the judgment, and permit the party complaining to put in a plea, and contest the validity of the demands of the plaintiff. *Ibid.*

61. Where such judgment was confessed, in violation of an injunction of the Court of Chancery this Court refused to set it aside on that ground, leaving it to that Court to vindicate its own authority. *Ibid.*

62. An attaching creditor, under the absent debtor act, until the appointment of trustees, cannot move to set aside a judgment alleged to have been fraudulently confessed by the debtor. *Fort v. Fort*, 9 Wend. 442.

63. A judgment in the Common Pleas, by confession on bond and warrant of attorney, where the condition of the bond exceeds \$500, is not valid, if the costs be taxed and record signed by a judge of the county, not being the first judge, or of the degree of counsel in the Supreme Court. *Butler v. Lewis*, 10 Wend. 541.

64. Such judgment will be set aside on the application of a junior judgment creditor, and an amendment will not be allowed by the signing of a record *nunc pro tunc* by a proper officer. *Ibid.*

65. A judgment in the Common Pleas, by confession on bond and warrant of attorney, where the condition of the bond exceeds \$500, is not valid, if the costs be taxed and record signed by a Common Pleas judge, not being the first judge of the county, or of the degree of counsel in the Supreme Court. *Judges of Lewis Common Pleas v. The People*, 15 Wend. 110.

V. Arrest of judgment.

66. Where the defect or objection appears upon the face of the declaration, the remedy is by motion in arrest; not for a new trial, even though, upon a motion for a nonsuit at the circuit, the judge reserved the point. *Sargent v. —*, 5 Cow. 106.

67. A motion in arrest of judgment must be noticed for some day within the first four days of the term next after the trial. If noticed for a day after that, it comes too late, and cannot be heard. *Norris v. Durham*, 9 Cow. 151.

68. A motion in arrest was made on the ground, that the fourth count of the declaration in *assumpsit* was defective in not stating any promise, which was true as to the copy of the declaration served; but the draft of the declaration and the *ni prius* record contained that

clause. The motion was denied, as coming too late; but the Court said, if in season they would have allowed an amendment. *Ibid.*

69. Where one of the several counts is bad, and the verdict general, judgment will be arrested, unless it be amendable by the judge's notes, so as to apply the verdict to the good counts. This may be done on hearing the motion. *Ibid.*

70. A judgment in a criminal case cannot be arrested for a variance between the indictment and the proof. *The People v. Onondaga General Sessions*, 1 Wend. 296.

71. A judgment in an action of slander, for charging the plaintiff with altering a note, will not be arrested because the plaintiff avers in his declaration that the note charged to be altered is a true note; such averment being equivalent to the ordinary averment of innocence of the crime imputed. *Harmon v. Carrington*, 8 Wend. 488.

72. Where there are several breaches, some good and some bad, and the evidence given on the trial is applicable to the good breaches, the judgment will not be arrested. *Richert v. Snyder*, 9 Wend. 416.

73. A judgment will not be arrested after the verdict in an action of slander on a charge of false swearing, where the words charging false swearing relate to a trial in a Justice's Court in a civil cause, in which an oath was administered to the party complaining of the slander, for want of an averment in the declaration that the justice had jurisdiction of the suit, and that the evidence was given upon a point material; thus it was held, where the words were, "I cannot enjoy myself in a meeting (*i. e.* a religious meeting) with Sherwood, for he has sworn false, and I can prove it, and if you (addressing the bystanders) do not believe it, you can go to Esquire Bassett's and see it, in a suit between A. B. plaintiff, and C. D. defendant." *Sherwood v. Chace*, 11 Wend. 38.

74. After verdict, on a motion in arrest, the Court will intend that every material fact alleged in the declaration, or fairly inferrible from what is alleged, was proved on the trial; but if the plaintiff totally omits to state a good title or cause of action, even by implication, there is no room for intendment or presumption. *Addington v. Allen*, 11 Wend. 374.

VII. Judgment of another state.

75. The judgment of a Court of general jurisdiction in any state in the union is equally conclusive upon the parties in all other states as in the state in which it was rendered; unless it appear by the record that the defendant was not served with process, and did not appear in person or by attorney. *Skumway v. Stillman*, 6 Wend. 447.

76. If the record sets forth that the defendant did appear by attorney, the defendant is at liberty to disprove the fact; but if he does not disprove it, the record is conclusive. *Ibid.*

JUDICIAL AUTHORITY.

1. A majority of judges to decide. *Ex parte Rogers*, 7 Cow. 526, and note (a).

JURISDICTION.

1. Our Courts may take cognisance of torts committed on the high seas on board a foreign vessel, when both parties are foreigners. *Johnson v. Dalton*, 1 Cow. 543.

2. But on principles of comity, as well as to prevent the frequent and serious injuries that would result from doing this in all cases indiscriminately, they have exercised a sound discretion in entertaining jurisdiction or not according to circumstances. *Ibid.*

3. Accordingly the great inconveniences which would arise from it have induced them to decline interference in ordinary cases, and leave the parties to seek redress in the Courts of their own country. *Ibid.*

4. But where a seaman is legally discharged from the vessel in this country, he may maintain an action in our Courts for a tort committed by the master on the high seas while the relation of master and seaman existed. *Ibid.*

5. *E. g.* for an assault and battery. *Ibid.*

6. But where a seaman at one of our ports quits the ship by the express permission of the master, who declares to him that he is discharged, and does not belong to the ship, though both are foreigners, and employed in the ship of a foreign nation, this forms an exception to the general rule; and the seaman may sue the master in our Courts for a tort previously committed while the relation of master and seaman existed; though the voyage specified in the shipping articles be not ended. *Ibid.*

7. To give a justice jurisdiction of a cause upon attachment, proof must be made that the defendant is concealed, or has departed, &c. And if the attachment issue without such proof, and be executed, the whole proceeding being void, the justice and the plaintiff are trespassers. *Adkins v. Brewer*, 3 Cow. 206.

8. So *come scemle*, if security by bond be not given, or mere blank bonds executed by the surety. *Ibid.*

9. In trespass against a justice for issuing attachments and executions, &c. which were void, it appeared that the constable who levied and sold under these had several other executions older than the void ones, upon which he levied and sold at the same time, and the sale was under all the executions indiscriminately; but the void executions as well as the others were satisfied by the sale, and the money paid to the plaintiff; held, that trespass lay against the justice and the party. *Ibid.*

10. Where the justice wants jurisdiction, he is liable as a trespasser; otherwise, where he has jurisdiction, and errs in the exercise of it. *Ibid.*

11. In trespass against an officer for issuing process, by virtue of which the plaintiff's goods are taken, to justify the taking, the officer must show affirmatively on his part that he had jurisdiction; especially where, from the plaintiff's proof, there is reason to presume that the proper steps were not taken to confer jurisdiction. *Ibid.*

12. An objection to the jurisdiction on the ground that a perfect remedy existed at law,

should be raised by demurrer to the bill, or insisted on by the defendant in his answer. It is too late to make the objection at the hearing; unless the Court be wholly incompetent to afford the relief sought by the bill. *Hawley v. Cramer*, in the fourth circuit in equity, 4 Cow. 717.

13. Where Courts of equity once had jurisdiction of a case, they still retain it, though the original ground of jurisdiction, the inability of the plaintiff to recover at law, no longer exists. *Ibid.*

14. Courts of equity have concurrent jurisdiction with Courts of law in all matters of account. *Ibid.*

15. Where a Court of equity has gained jurisdiction of a cause for one purpose, it may retain it generally. *Ibid.*

16. The principle that a record cannot be impeached by pleading is not applicable where there is want of jurisdiction. *Latham v. Edgerton*, 9 Cow. 227.

17. The want of jurisdiction makes a record utterly void, and unavailable for any purpose. *Ibid.*

18. The want of jurisdiction is a matter that may always be set up against a judgment when to be enforced, or where any benefit is claimed under it. *Ibid.*

JURY.

I. Challenge to the jury.

II. How the jury are to be made up, and deliver their verdict.

III. Irregularities and misdemeanours of the jury for which their verdict will be impeached.

IV. Discharging the jury.

V. Struck jury.

VI. Foreign jury.

L Challenge to the jury.

1. Challenges when made to the array, polls, *propter affectum, propter defectum, propter delictum*, when and how made, form of entry on record, how tried. *Pringle v. Huse*, 1 Cow. 432; note (i), 436.

2. On the trial of a juror upon a challenge by the plaintiff, for having expressed an opinion in favour of the defendant, the juror challenged may be called as a witness by the defendant. *Ibid.*

3. Where it appears probable that the plaintiff cannot have a trial by an impartial jury, he may refuse going to trial, and will not for that cause be nonsuited. *Ibid.*

4. Thus, if in the course of drawing a jury at the circuit, he discover that the box, having been left open by the clerk, the ballots therein have been arranged with apparent design of procuring a favourable jury, with other suspicious circumstances, he may withdraw his record, and on motion for judgment, as in case of nonsuit, will be excused from paying costs. *Ibid.*

5. A challenge of a juror for having given

an opinion is a principal one, and should be tried by the Court. *Ibid.*

6. It is, in general, highly improper for jurors, after they are summoned, to express opinions in causes which may come before them. *Ibid.*

7. It is improper for the clerk of the circuit to leave the ballots unrolled in an open box, or to draw them in this situation. *Ibid.*

8. In debt against the toll-gatherer of a turnpike company, for the penalty imposed by the sixteenth section of the act relative to turnpike companies, (1 R. L. 276.) for shutting the gate, and taking or demanding toll, after the commissioners of inspection have ordered it to be opened; it is not a principal cause of challenge to a juror, that he is a stockholder of the company. *Williams v. Smith*, 6 Cow. 166.

9. The company are not accountable in any event on account of the recovery; though otherwise as to a recovery upon the ninth section. *Ibid.*

10. A challenge of a juror for principal cause becomes part of the record, and may be received on error. *The People v. Vermilyea*, 7 Cow. 108.

11. A challenge because the juror has expressed an opinion is a challenge for principal cause, and need not be accompanied with personal ill-will to render it valid. *Ibid.*

12. Where such a challenge is made and decided upon by the Court, who pronounce it insufficient; this is equivalent to a decision on demurrer and joinder, and should be so entered by the clerk on the record. *Ibid.*

13. If it be not entered in that form, yet on *certiorari*, if the particular facts appear upon the return, the Court will treat it as a decision on a regular issue in law, and set it aside as erroneous. *Ibid.*

14. The juror himself may be questioned on oath touching his opinion. *Ibid.*

15. Mere matter of evidence against a juror, on a challenge to the favour, is no cause for setting aside a verdict, unless it appear that he was in fact influenced in his verdict by the cause-alleged. *Cain v. Ingham*, 7 Cow. 478.

16. That a juror's father had married the defendant's brother's widow, the father being dead at the time of the trial, is no ground for principal challenge by the plaintiff. *Ibid.*

17. Where affinity is the cause of principal challenge, see note at the end of this case. *Ibid.*

18. A challenge for principal cause may be demurred to, or issue may be taken upon it. *Ex parte Vermilyea*, cor. *Woodworth, J.*, vacation, 6 Cow. 555.

19. When the facts are admitted and referred to the Court, this is, in substance, a demurrer, and should be entered on the record as such. *Ibid.*

20. If a juror have expressed an opinion against the party, though from his knowledge of the cause, and not from any favour or ill-will, yet this is a principal cause for challenge. *Ibid.*

21. So, if *seems*, if his opinion be grounded on the information of those who are acquainted with the facts. Otherwise, where this opinion is grounded on mere rumour. *Ibid.*

22. It is not a good ground of principal challenge, at the circuit, that the circuit clerk is attorney for one of the parties, and was so at the time of drawing, making, and arraying the panel. *Wakeman v. Sprague*, 7 Cow. 720.

23. A challenge to the array will not be allowed on the ground that, in the selection of grand jurors, all persons belonging to a particular fraternity or association were excluded, if those who are returned are unexceptionable, and possess the qualifications required by statute. *The People v. Jewett*, 3 Wend. 314.

24. It is good cause of exception to a grand juror, that he has formed and expressed an opinion as to the guilt of a party whose case will probably be presented to the consideration of the grand inquest; so, also, a grand juror's having evinced feelings of hostility towards such party is good cause of exception; but those exceptions must be taken before the indictment is found, and will not afterwards be heard. *Ibid.*

25. A juror who has formed an opinion of the guilt of the accused is not competent to serve, although he declares that if the circumstances on which his opinion is founded are not supported by proof, his opinion of the guilt of the accused will be removed. *People v. Mather*, 4 Wend. 299.

26. Where the facts on which a challenge rests are disputed, the proper course is to submit the question to triors; but if neither of the parties ask for triors, and submit their evidence to the judge, they cannot afterwards object to his competence to decide that issue. Although the determination of the judge should be against the weight of evidence, a new trial will not be granted for that cause when the defendant is acquitted, in analogy to the principle that if, on the main question in a criminal case, the defendant is found not guilty, there cannot be a new trial. *Ibid.*

27. Where an accused party waived his right to object to a juror, against whom good cause of challenge existed on his part; *it was held*, that the public prosecutor could not insist upon having the juror excluded under an agreement that all should be considered as challenged by both parties. *Ibid.*

28. It is no cause of challenge of an array of jurors, that two sets of jurors are drawn at the same time from the jury box, for two Courts, if they are kept entirely separate, and a distinct panel of each is given to the sheriff. *Crane v. Dygert*, 4 Wend. 675.

29. Nor is it cause of challenge that the jurors are drawn more than fourteen days before the sitting of the Court at which they are to serve. *Ibid.*

30. It is no cause of challenge to a juror that he is a freemason, where one of the parties to a suit at law is a freemason and the other not. *Purple v. Horton*, 13 Wend. 9.

II. How the jury are to be made up, and deliver their verdict.

31. The jury may be polled at any time before the verdict is recorded, at the instance of either party, whether it be a sealed or oral verdict. *Fox v. Smith*, 3 Cow. 23.

32. After a juror has been sworn in chief and taken his seat, if it be discovered that he is incompetent to serve, he may, in the exercise of a sound discretion, be set aside by the Court at any time before evidence is given; and this may be done even in a capital case, and as well for cause existing *before* as *after* the juror was sworn. *The People v. Damon*, 13 Wend. 351.

33. A person whose opinions are such as to preclude him from finding a defendant guilty of an offence punishable with death, is an incompetent juror on the trial of an indictment for an offence subjecting to that punishment; it is not the opinions on this subject of the religious denomination to which he belongs which exclude him, but his own opinions; and, therefore, if he entertains them, though he does not belong to a religious denomination, he is incompetent to serve as a juror. *Ibid.*

34. A juror who, upon a statement of facts submitted by a plaintiff, has expressed an opinion as to the liability of the defendant, is not indifferent, and upon challenge will be excluded from the panel. *Rogers v. Rogers*, 14 Wend. 131.

35. On the trial of a party for a misdemeanor, a juror may be withdrawn on the application of the public prosecutor, after the jury have been empannelled and sworn. *The People v. Ellis*, 15 Wend. 371.

III. Irregularities and misdemeanours of the jury for which their verdict will be impeached.

36. Where two jurors (after the jury had retired to consider of their verdict) separated from their fellows, and were gone some hours, but returned and joined in the verdict, there appearing to have been no probability of abuse, the Court refused to set aside the verdict. *Smith v. Thompson*, 1 Cow. 221.

37. It is irregular for a jury each to put down a sum which they find for the party, add the sums together, divide by the number of jurors, and adopt the quotient as their verdict. *Robert v. Faith*, 1 Cow. 238.

38. If a juror leave his seat for a short time, without the knowledge of the Court or parties, and he holds communication with no one on the subject of the cause, though this be a contempt of Court, yet it does not avoid the verdict. *Hill, ex parte*, 3 Cow. 355.

39. A jury, empannelled to try a prisoner upon an indictment for murder, were allowed to leave the Court-house during the trial, under the charge of two sworn constables, and having left the Court-house, two of them separated from their fellows, went to their lodgings, a distance of thirty rods, ate cakes, took some with them on their return, and drank spirituous liquor, though not enough to affect them in the least, and one of them conversed on the subject of the trial; they returned, heard the trial through, and joined in a verdict of guilty. *Held*, that the verdict should be set aside, and a new trial granted. *The People v. Douglass*, 4 Cow. 26.

40. The mere separation of a jury, though empannelled to try a capital offence, and though they separate contrary to the directions of the

Court, will not, of itself, be a sufficient cause for setting aside the verdict. *Ibid.*

41. But if there be the least suspicion of abuse, the verdict should be set aside. *Ibid.*

42. Where a jury procured their separation by pretending to the constable that they had agreed upon a sealed verdict, when, in truth, they had not; and conversations out of doors were afterwards carried on in the presence of some of them, relative to the suit, by persons not on the jury; and on assembling they were sent out again, though this was objected to by the plaintiff, and then they returned with a verdict for the defendant; *held*, that the verdict should be set aside. *Oliver v. Springfield Presbyterian Church*, 5 Cow. 283.

43. Where the jury improperly separate, and this is followed by the slightest suspicion of abuse, the verdict will be set aside. *Ibid.*

44. The statute relative to balloting for jurors (sess. 49, ch. 309, sec. 4.) is merely directory; and though it be violated, this is no ground for moving to set aside the verdict, unless the irregularity be objected to at the time, or there be some abuse or injury to the party moving. *Cole v. Perry*, 6 Cow. 584.

45. Where a juror engaged, in the course of a cause, and after it was committed to the jury, drank brandy, though in a trifling quantity, and, as he stated, to check a diarrhoea; yet, *held*, that the verdict should be set aside. *Brant v. Fowler*, 7 Cow. 562.

46. Where a judge directs a jury to bring in a sealed verdict, and gives them permission to separate after agreeing on the same, if no objection is made by the parties to such direction, they will be deemed to have assented to it; and if the jury separate after agreeing to such a verdict, but on coming into Court one of them dissents from it, who subsequently, on the jury being sent out again, agrees to the verdict as originally rendered, it will not be set aside for irregularity. *Douglass v. Trusey*, 2 Wend. 352.

47. Where the evidence is contradictory, the Court will not set aside a verdict as against the weight of evidence, although it seems to preponderate against the finding of the jury. *Ibid.*

48. Where a jury left it to *lot* whether the verdict should be for the plaintiffs or for the defendants, and the lot eventuated in favour of the defendants, and the jury found accordingly, the verdict was set aside. *Mitchell v. Ehle*, 10 Wend. 595.

IV. Discharging the jury.

49. The discharge of a jury in a criminal case, before they have agreed upon a verdict, is a matter resting on the sound discretion of the Court in which the trial is had; and the exercise of the discretion of the Court in this respect cannot be reviewed on a writ of error. *The People v. Green*, 13 Wend. 55.

V. Struck jury.

50. The testing the genuineness of a signature to a note is not a question of intricacy, for the trial of which the Court will grant a struck jury; nor will it be granted in a cause important only to the parties, though exciting

much interest in the county where the venue is laid. *Poucher v. Livingston*, 2 Wend. 296.

VI. Foreign jury.

51. A foreign or struck jury will not be granted but in extreme cases. *Patchin v. Sand*, 10 Wend. 570.



JUSTICES OF THE PEACE.

1. A justice's services, in examining and removing paupers from one town to another of this state, are a town and not a county charge. *Ex parte Bennet*, 1 Cow. 204.

2. If the return of a justice to a *certiorari* is evasive, and his conduct in relation thereto disingenuous, the Court will not only order him to amend, but to pay the costs of the application to compel him to amend, proper notice of the motion having been given to him. *Bird v. Silbie*, 1 Cow. 582.

3. The proviso to the first section of the §50 act, which denies jurisdiction to a justice of the peace of matters of account where the sum total of both parties, &c. amounts to \$400, extends to those accounts only which are open and unliquidated between the parties. *Abernathy v. Abernathy*, 2 Cow. 413.

4. Where they have been settled, the balance alone is the account between them. And unless this balance, with the other accounts, exceed \$400, the justice has jurisdiction. Accounts, as used in the proviso to the first section of the §25 act, have the same import as in the proviso to the first section of the §50 act. *Ibid.*

5. So in the proviso to the fifth section of the act concerning costs. *Ibid.*

6. Accordingly, where, on the trial of a cause at the circuit, the plaintiff proved a note of \$200 against the defendant, who then proved a note of \$1000 against the plaintiff, and that when the latter was given the plaintiff agreed to destroy the former; but the defendant claimed nothing as due upon the latter; *held*, that neither of these notes could be considered accounts between the parties; and the plaintiff having recovered \$50 upon other claims, *held* farther, that if the plaintiff could be entitled to costs in this Court, on the ground that the accounts of both parties proved at the trial amounted to \$400, neither of the said notes could be considered as part of such accounts. *Ibid.*

7. Form of commitment to jail, for further examination by a justice. *Ex parte Smith*, 5 Cow. 273.

8. A state magistrate may commit for further examination, touching a crime against the United States. *Ibid.*

9. Where a defendant appeared before a justice on a summons returnable at ten, A. M., and waited till about twelve o'clock, when the justice told him, he (the justice) must tax the plaintiff with the costs, upon which the defendant departed; but the justice afterwards adjourned the cause to another day, and gave judgment as upon the summons, with three or four dollars costs; and the defendant afterwards paid to the justice the amount of the note on which the suit was brought; and the jus-

tice demanded the costs, which the defendant refused to pay in full, but paid the justice twelve and a half cents; *held*, that this was extortion in the justice, for which he might be indicted, and punished criminally. *People v. Whaley*, 6 Cow. 661.

10. *Held*, also, that the motives of the justice, as whether corrupt, or whether he acted through a mistake of the law, were a proper question for the jury. *Ibid*.

11. *Held*, that he had a right to receive the money on the note as the agent of the plaintiff; but the extortion lay in receiving the twelve and a half cents under pretence of the judgment. *Ibid*.

12. Extortion is the taking of money by any officer by colour of his office, either where none at all is due, or not so much due; or where it is not yet due. *Ibid*.

13. Where a cause is discontinued before a justice, by the *laches* of a plaintiff, the justice has no jurisdiction; and if he proceeds in it, his proceedings are *coram non judge*, and void. *Ibid*.

14. Extortion may be laid generally in an indictment by colour of office. *Ibid*.

15. The Legislature have no power to shorten the constitutional term of office of a justice of the peace. *People v. Garcy*, 6 Cow. 643. S. C. 9 Cow. 640.

16. This cannot be done indirectly by the erection or division of counties. *Ibid*.

17. Where a town is transferred from one county to another, or a new county made out of several towns, the justices of these towns continue to hold their offices as justices of the town or towns in the new counties. *Ibid*.

18. The Legislature have power to enlarge or contract the territorial jurisdiction of justices of the peace. *Ibid*.

19. The office of justice of the peace is, under the new constitution, and the statute which it adopts, (sess. 41, ch. 60, s. 2.) a town office, though it has county powers. *Ibid*.

20. The appointment of more than four justices in a town would be void. *Ibid*.

21. It is error for a justice to receive the testimony of an interested witness for the plaintiff, with knowledge, at the time, that he is interested; though the proceedings be by attachment, and no objection is raised by the defendant, he being absent. *Finch v. M'Bowall*, 7 Cow. 537.

22. A justice of the peace, under the act of 1824, in amendment of the "act for suppressing immorality," has a right, upon his own personal view of offences committed against that act, to order the offender into the custody of a constable for safe keeping, (without issuing a warrant,) until the offender can be tried. *Farrell v. Warren*, 3 Wend. 253.

23. A justice of the peace has no right to deny an adjournment, because a defendant refuses to pay his fees for drawing a bond on the defendant's demanding an adjournment; and such a denial on the part of the justice will render him liable to an indictment for a misdemeanour. *The People v. Calhoun*, 3 Wend. 430.

24. A justice of the peace is not liable in an action for *false imprisonment* for issuing a war-

rant without oath against a freeholder, where it is not shown that he acted *male fide*. *Rogers v. Mulliner*, 6 Wend. 597.

25. A justice of the peace is not limited in the exercise of any official act which he is authorized to perform to the town for which he was chosen, except in the trial of civil causes. *Gurnsey v. Lovell*, 9 Wend. 319.

26. Where a justice acts in a matter within his jurisdiction, an error in judgment does not subject him to an action. *Hurst v. Wickwire et al*, 10 Wend. 102.

26*. Where a justice, having decided in favour of the defendant, upon the merits, taxes his costs, but includes in them a part of the costs of the plaintiff, and gives judgment for the whole amount, the judgment may be reversed as to the costs, and affirmed as to the residue. *Jones v. Archer*, 3 Hall, 345.

See JURISDICTION, § 10, 11.

LANDLORD AND TENANT.

1. Though a parol demise for seven years be void by the statute of frauds, yet it enures as a tenancy from year to year, if the tenant enter and hold under it; and it will regulate the terms of the tenancy in other respects, as the rent, the time of year when the tenant must quit, &c. *Schuyler v. Legg-ll*, 3 Cow. 660.

2. A tenancy at will is held to be a tenancy from year to year, merely for the purpose of a notice to quit. *Bradley v. Cowel*, 4 Cow. 242.

3. A shorter notice (e. g. three months) will terminate the tenancy; but in such case, where the holding is at a stated rent, the notice turns the tenancy at will into a tenancy from year to year, running from the expiration of the first notice, and imposes the necessity of giving a notice to quit of six months, terminating on a day in the year corresponding with the termination of the first notice, in order to warrant an ejectment, and the holding over upon the tenancy from year to year is at the former rent. *Ibid*.

4. Where a tenant holds over after such notice without any new stipulation, the law implies an agreement that it should be at the former rent. *Ibid*.

5. This case distinguished from *Abel v. Radcliff*, (15 Johns. Rep. 597.) *Ibid*.

6. The statute (sess. 36, ch. 63, s. 19, 1 R. L. 437.) providing that goods shall not be removed by execution from the demised premises till one year's rent paid, extends to all goods upon the premises, whether they belong to the tenant or any other person. The specific lien of the landlord on goods upon the premises for a year's rent is, under this statute, coextensive with his right of distress, i. e. goods which he might distrain cannot be removed by execution till the year's rent be paid. *Russell v. Doty*, 4 Cow. 576.

7. Rent may be payable in advance by contract, and may be distrained for, or will entitle the landlord to a specific lien against an execution under the statute. *Ibid*.

8. One need not be actually possessed of land in order to be enabled to give a lease of it. The undisputed right of possession is enough, as where one purchases land at sheriff's sale, and the defendant in the execution has not actually surrendered the possession, yet the purchaser may give a valid lease to a third person, before acquiring possession by ejectment. *Ibid*.

9. After a purchase of land on execution, if the defendant remains in possession, the presumption of law is between the purchaser and all

third persons is, that he remains in possession as tenant of the purchaser, and in subordination to his title. *Ibid.*

10. To sustain a plea of eviction in bar of an action for rent, the tenant must show an actual expulsion before, and that it continued till after the rent due. *Pendleton v. Dyett*, 4 Cow. 581.

11. That the landlord is guilty of a nuisance as bringing lewd women near the premises, which are so situate that the tenant and his family are broken of their rest, and otherwise so much annoyed that he is obliged to leave the demised premises, and keep away on that account, is not sufficient to bar the landlord's claim for rent. *Ibid.*

12. Eviction of the whole or any part of the demised premises is a good plea in bar to an action, either debt or covenant, for rent. *Ibid.*

13. Though a lease by parol be for a longer term than three years, and so void for the term within the statute of frauds; yet the tenant entering has an interest from year to year, regulated in every respect by the parol demise, except as to the tenor. *People v. Rickert*, 8 Cow. 226.

14. Such tenants hold a term for years, which should be so called in all legal proceedings. *Ibid.*

15. *E. g.* where he seeks to enforce his right under the statute of forcible entry and detainer. (1 R. L. 36, 38, s. 8.) *Ibid.*

16. Where one leases to another for years, the former cannot impair the rights of the latter by conveying the demised premises in fee, without excepting the term. *Ibid.*

17. An action upon the fourteenth section of the statute concerning distresses, rents, and the renewal of leases, (1 R. L. 437, 8.) for aiding and assisting a tenant to remove goods from the demised premises, &c., lies against two or more jointly, the offence being in its nature one and inseparable; but only one penalty follows, and is imposed on all the defendants, not on each and every of them. *Warren v. Doolittle*, 5 Cow. 678.

18. Where a statute declares that "any person" doing a certain act offends, and that every person so offending shall forfeit and pay, &c., it depends on the nature of the offence, as being entire or several, whether several persons jointly and simultaneously committing it are to be subjected, the whole to but one penalty, or each to the whole penalty. *Ibid.*

19. Where a statute gives double the value of goods, by way of penalty, to be recovered in debt, the jury may find the value of the goods, and the Court double the value in their judgment; and it is sufficient that the verdict say the value of the goods. This shall be intended the single and not the double value, and the verdict need not say *single* value in terms. *Ibid.*

20. In such case, if the declaration claim a certain sum, in conclusion referring to the statute by its title and date, or generally "contrary to the form of the statute," &c., and the jury find the value, this is sufficiently specific to warrant the Court in doubling the value. *Ibid.*

21. It is not necessary, in actions of debt for penalties of uncertain amounts, depending, for instance, on the value of goods, that the plaintiff should recover the precise amount laid in his declaration. *Ibid.*

22. Under the statute, (1 R. L. 437, 8.) the landlord can recover but one penalty either in a joint or separate action against several persons jointly concerned in aiding, &c. to carry away the goods. *Per Colden*, Senator. *Ibid.*

23. The practice of the Courts of law, in doubling or trebling damages or value, upon the statutes, on verdict finding single damages or value, approved. *Per Sandford*, Chancellor, and *Colden*, Senator. *Ibid.*

24. When the relation of landlord and tenant is once established, it attaches to all who may succeed the tenant immediately or remotely. *Jackson v. Davis*, 5 Cow. 123.

25. And the succeeding tenant is as much affected by the acts and acknowledgments of his predecessor as though they were his own. *Ibid.*

26. Though one purchase and take of a lessee, and in fact enter upon the premises under an absolute conveyance in fee, yet, in judgment of law, he enters as tenant to the lessor. *Ibid.*

27. The mere nonpayment and nondemand of rent for twenty years will not raise a presumption that the landlord's title is extinguished by a conveyance to the tenant or otherwise. *Ibid.*

28. Mere length of time will not raise a presumption in the nature of evidence. It must arise from some facts or circumstances within that time. *Ibid.*

29. Where the possession of one is not inconsistent with the title of another, a conveyance from that other is never to be presumed for the purpose of quieting the possession; *e. g.* the possession of a tenant consistently with a lease. *Ibid.*

30. The decision in *Jackson*, ex dem. *Waldron*, and *Elfre* his wife v. *Welden*, (3 Johns. Rep. 283.) giving effect to an attornment or purchase by a tenant with the consent of his landlord, in consequence of the land being awarded to another, under the act of 11th of March, 1793, (3 Greenleaf's ed. of Laws, N. Y., 81 to 84.) is confined to an actual attornment or purchase, with such consent; but where, after the award of the commissioners, certain proprietors of Van Schaick's patent, not parties to the act or award, declared, of land which they had leased, (before the act passed,) that by the award of the commissioners they had lost their title to it, and did not claim rent for it; but the tenant, instead of attorning to, or buying under another patent, to which the land was awarded, set the proprietors of both patents at defiance, claiming the land as a gore between them in ejectment by his landlord against him; *held*, that he was notwithstanding concluded, and could not dispute their title. *Ibid.*

31. In ejectment by a landlord against his tenant, the latter cannot show, in his defence, that the landlord has acknowledged by parol that the title was in another. *Ibid.*

32. But if he has actually purchased of or attorned to another, with his landlord's consent or encouragement, this throws the burden of proving title upon the landlord, the same as if the action had been against a stranger holding adversely. *Ibid.*

33. A conveyance in fee, by a tenant for

years, is a disseisin of the landlord or not, at his election. For the sake of the remedy, he may consider the grantee a disseisor; but the tenant cannot constitute himself so in spite of his landlord. *Ibid.*

34. Though a tenant cannot deny his landlord's title, yet he may show that it has terminated, either by its own limitation, or by conveyance, or by operation of law. *Ibid.*

35. An action will not lie for the penalty given by the fourteenth section of the statute concerning distresses, rents, and the renewal of leases, (1 R. L. 437, 8.) for the removal or concealment of goods not the property of the tenant, though they be liable to distress. *Strong v. Sebbins*, 5 Cow. 910.

36. The act contemplates physical aid or assistance, directly or indirectly, in the removal or concealment of the goods. Merely advising their removal will not subject to its penalty. *Ibid.*

37. Nor will the removal or concealment of a part of the goods subject to the penalty of removing or concealing the whole. *Ibid.*

38. A penal statute is not to be enlarged by construction. *Ibid.*

39. A tenant being in possession of goods, the intentment of law is, that he is the owner, and the onus of proving the contrary lies upon him who has removed them to avoid a distress. *Ibid.*

40. As between landlord and tenant, the latter may, during the term, remove copper stills, kettles, steam tubs, &c., erected by him for the purposes of carrying on the business of the distillery, though fixed to the building. *Reynolds v. Shuler*, 5 Cow. 323.

41. And he may sell or mortgage such articles. But if mortgaged, and the mortgagee takes possession, and remove them, the rent being unpaid, the landlord may follow and distrain them within thirty days thereafter. *Ibid.*

42. And if separated by the tenant or his agent, they are liable to distress. A mortgage of goods is not a sale of them *bona fide*, (so as to prevent their being followed as a distress,) within the proviso of the thirteenth section of the statute. (1 R. L. 437.) *Ibid.*

43. To warrant distraining goods removed off the demised premises, it is not necessary that the rent should have fallen due within thirty days next before their removal; but they may be distrained at any time within thirty days after their removal; or within thirty days after the rent shall have become due, if the rent did not fall due till after thirty days from their removal. *Ibid.*

44. A landlord cannot distrain goods for rent after the term has expired, and the tenant has removed from the premises, and abandoned the possession, though thirty days after the goods are removed have not expired. *Terboss v. Williams*, 5 Cow. 407.

45. But during the term, the landlord may distrain the tenant's goods within thirty days after they are removed from the demised premises, though more than thirty days have elapsed between the rent falling due and the distress. *Ibid.*

46. A lessor, after distraining for rent arrear,

though the distress be insufficient to satisfy it, cannot afterwards bring ejectment on account of the same rent, upon the clause of re-entry, under the twenty-third section of the statute concerning distresses, rents, and the renewal of leases. (1 R. L. 440, 1.) *Jackson v. Sheldon*, 5 Cow. 448.

47. The act of distraining waives the forfeiture. *Ibid.*

48. Where a forfeiture has accrued upon a clause of re-entry for rent in arrear, the forfeiture will be waived if the landlord afterwards do any act which amounts to an acknowledgment of a subsisting tenancy; as if he receive rent due at a subsequent quarter, or distrain for that in respect of which the forfeiture accrued. *Ibid.*

49. The executor of a lessor, who was seized of the demised premises in fee, cannot distrain for rent (though due on a lease for years) which accrued subsequently to the testator's death. *Wright v. Williams*, 5 Cow. 501.

50. Such rent goes to the heir or devise. *Ibid.*

51. An action does not lie on the statute, (1 R. L. 436, s. 9.) for double value of goods, &c., for distraining for more rent than is due, or for distraining for rent for which there is no right to distrain; but only for distraining where no rent whatever is due. If there be any the least rent due, it protects the distrainor, though he may be liable in some other form. *Peters v. Newkirk*, 6 Cow. 103.

52. Where rent is agreed to be paid at the end of the year, but before that time the tenant surrenders part of the premises, giving a due bill for the rent, payable presently; held, that the landlord may distrain for the rent immediately. *Ibid.*

53. Rent may be payable in advance, and may, in such case, be distrained for when due. *Ibid.*

54. A tenant cannot recover of his landlord for repairs done by the former to the demised premises, unless there be a special agreement by the latter to pay for them. *Munford v. Brown*, 6 Cow. 475.

55. Though a tender of rent is good on the land, yet a personal tender is also good off the land. *Hunter v. Le Conte*, 6 Cow. 728.

56. A personal tender before distress makes it tortious; and such tender afterwards, and before impounding, makes the detainer unlawful; but tender after impounding makes neither the one nor the other unlawful. *Ibid.*

57. In replevin, a plea of tender to an avowry or cognisance need not say *tout temps prius*; nor make a profert of the money in Court. *Ibid.*

58. A tender of rent takes away a right to distrain, till a subsequent demand and refusal. *Ibid.*

59. But a tender does not take away the right to sue for the rent as for a debt. It only saves interest and costs. *Ibid.*

60. A tender of rent makes a distress wrongful, though the tender be not made till after the rent day. *Ibid.*

61. But if costs have been incurred by the landlord as if he have drawn a warrant of dis-

treas, or, in the city of New York, made and filed the necessary affidavit, these costs must also be tendered, or the distress will be lawful. *Ibid.*

62. Where A.'s tenant, from year to year, takes a lease from B., the act is void; and cannot work an adverse possession against A. *Jackson v. Miller*, 6 Cow. 751.

63. As between landlord and tenant, property fixed to the premises by the latter, for manufacturing purposes, is personal property, and belongs to the tenant. *Raymond v. White*, 7 Cow. 319.

64. A conveyance of the demised premises by the landlord will not carry such fixture to the grantee, as appurtenant to the premises. *Ibid.*

65. Where a fixture appurtenant to premises on which the vendor has an equitable lien for the purchase money is wrongfully removed, and the vendee recovers in an action for the injury; *semble*, that a Court of equity would compel him to assign the judgment to the vendee, if the residue of the property was insufficient to satisfy his demand. *Ibid.*

66. Where the relation of landlord and tenant exists, a conveyance by the latter of the demised premises cannot operate as the basis of an adverse possession, so as to bar the former of his ejectment; whether the grantee know of the demise or not. *Jackson v. Harsen*, 7 Cow. 323.

67. But this rule means the continual relation of landlord and tenant, when some rent or return is, in fact, reserved to the former; not a relation arising from mere operation of law; as where one makes a grant, and by the omission of the technical word heirs, an estate for life only passes. *Ibid.*

68. In such case, after the death of the tenant for life, an adverse possession may commence running in favour of those who enter and claim in fee under him, which, after twenty-five years, will bar all claim of the reversioner and his heirs. *Ibid.*

69. Under the statute, (sess. 43, ch. 194, April 13, 1820, p. 176.) which gives a summary means to the landlord for ousting the tenant, wrongfully holding against him, by a proceeding before a judge of the Common Pleas, such judge has no power to adjourn on the motion of a party. *Nichols v. Williams*, 8 Cow. 13.

70. One seized of land sold and conveyed upon a *f. fa.* against him, and holding after sale, for an uncertain time, by consent of the purchaser, is a tenant at will within the statute. *Ibid.*

71. Though the act requires three months' notice to quit to be given to a tenant at will or sufferance, a tenant from year to year, not being mentioned by the act as entitled to notice, may be turned out of possession without any. *Ibid.*

72. Though a tenancy at will is considered, in ejectment, a tenancy from year to year, yet this is merely for the purpose of notice to quit. In every other respect, it retains its character of a strict tenancy at will. *Ibid.*

73. Process and forms of proceeding under the statute, (sess. 43, ch. 194, April 13, 1820, p. 176.) viz. petition of the landlord; his affi-

davit, with the affidavit of serving notice to quit; the notice to quit; notice from the judge to the tenant; affidavit of the tenant in order to procure a jury; venire; warrant to deliver possession. Note (b). *Ibid.*

74. Where the lessor was guilty of habitually bringing lewd women under the same roof with the demised premises, though in an apartment not demised, by which nocturnal noise and disturbance were made; and, in consequence, the lessee quitted the premises, and remained away, with his family; *held*, that this was evidence to go to the jury under a plea of eviction by the landlord, in answer to a declaration for the rent; and that the jury might, upon such evidence, find the plea true; and the lessor would thereby be barred of his rent, the same as on an actual or physical entry and expulsion of the tenant. *Dyett v. Pendleton*, 8 Cow. 727.

75. The usual plea in bar of entry and eviction would be sustained by such evidence. *Ibid.*

76. Legal eviction of the tenant, by a third person, excuses the payment of rent. So any eviction by the lessor. If the eviction be partial by a third person, the rent will be apportioned, but a partial eviction by the lessor excuses from the payment of the whole rent. *Ibid.*

77. A lessor erecting an intolerable nuisance, so as to deprive the lessee of his enjoyment, would be equivalent to an expulsion. Per *Spencer*, Senator. *Ibid.*

78. A party who deprives another of the consideration upon which his obligation is founded, cannot, in general, recover for a violation of that obligation. Per *Spencer*, Senator. *Ibid.*

79. The statute giving the action for use and occupation applies only where the relation of landlord and tenant exists, founded on an agreement either express or implied. *Featherstonhaugh v. Bradshaw*, 1 Wend. 134.

80. The landlord has probably his remedy in such a case by an action of trespass for the mesne profits, as for double rent under the statute. *Ibid.*

81. The assignment by the assignee of a term for years of his interest, by way of mortgage, for the security of a debt, does not divest him of his estate, and destroy the relation of landlord and tenant between him and his tenant, if the debt for which the term was mortgaged be paid or satisfied previously to the accruing of the rent. *Evertsen v. Sawyer*, 2 Wend. 507.

82. Nor does the sale of such an interest by virtue of a judgment and execution destroy such relation before the purchaser obtains possession; if, however, the tenant to the defendant in the execution disclaims the title of his landlord by attorning to the purchaser, though such act is void under the statute as an attornment, yet the disclaimer may be set up as a bar to the landlord's right to recover rent accruing after the time when the right of redemption has expired. *Ibid.*

83. Until the expiration of one year after the sale of lands and tenements, the defendant in the execution is entitled to the possession of the same, and to the rents and profits, without accountability to any one. *Ibid.*

84. A surety for the payment of rent to a

landlord, who engages, in case of default by the tenant, to make up the deficiency, and fully satisfy the conditions and agreements of the tenant, without requiring notice of nonpayment or proof of a demand being made of the tenant, has no right to call upon the landlord to distrain the tenant's goods, and is not exonerated from his covenant, though the landlord on request refuses so to do. *Ruggles v. Holden*, 3 Wend. 216.

85. Where there is a condition of re-entry reserved in a lease for nonpayment of rent, the reversioner is not entitled to re-enter without showing a compliance with the requirements of the common law, such as a demand, &c., or that by statute he is entitled to re-enter, for the want of sufficient property on the premises counter-vailling the rent. *Jackson, ex dem. Livingstons, v. Kipp*, 3 Wend. 230.

86. Where a party, after executing leases of portions of his farm to several tenants, granted the whole farm with the reversion of the demised premises to a tenant in fee, reserving an annual rent, and after such grant, entered upon the demised premises, and distrained the goods of the original tenant for rent accrued subsequent to the grant of the whole estate; *it was held*, that such entry and distress amounted to an eviction of the principal tenant, and worked a suspension of the whole rent until his restoration to the entire possession. *Lewis et al. v. Pagn*, 4 Wend. 423.

87. Where a tenant is thus evicted, the presumption of law is, that he continues out of possession; such presumption may, however, be rebutted by proof that he was subsequently restored to the possession. *Ibid*.

88. *Ricns in arrears* is the general issue to an avowry for rent, and under it an eviction may be shown. *Ibid*.

89. A tenant may show an outstanding title against his landlord, where the title of his landlord has expired or been extinguished since the relation of landlord and tenant existed between them. *Jackson v. Rowland*, 6 Wend. 666.

90. The relation of landlord and tenant does not exist between the tenant of a mortgagor and the assignee of the mortgagee, so as to entitle the former to notice to quit. *Ibid*.

91. A landlord has no right to distrain and sell the goods of his tenant for the use and occupation of demised premises, unless the rent by agreement of the parties is certain, either in money or services, or is such as may be reduced to certainty. *Valentine v. Jackson*, 9 Wend. 302.

92. A re-entry by a landlord on the demised premises will not be presumed, when by his own showing it is manifest that he did not enter in such right. *Ritchie v. Putnam*, 13 Wend. 524.

93. A mortgagee of a term who has not taken possession of the demised premises is not liable for rent. The law in this respect is different here from what it is in England. *Wallon v. Cronley's Administrator*, 14 Wend. 63.

94. A declaration of trust executed on the trial of a cause against the assignee, that the assignment was a mere security for the payment of money, is not proper evidence. *Ibid*.

95. Where there is an execution in the hands of the sheriff against a tenant of demised

premises, and the landlord gives notice of rent due, and the property of the tenant is subsequently sold under the execution, the sheriff, in an action against him for selling without paying the rent, is not at liberty to insist in defence of such action that the levy under which the property was sold was not made until after the return day of the execution. *Westervelt v. Pinckney*, 14 Wend. 123.

96. Where a farm is taken by a tenant for agricultural purposes, the manure made upon it belongs to the farm, and not to the tenant; at the expiration of his term, the tenant has no right to remove or dispose of it. *Middlebrook v. Corwin*, 15 Wend. 169.

97. An action lies in favour of a landlord against any person who so wrongfully and maliciously disturbs his tenants, that they abandon his premises, and the landlord thereby loses his rent. *Aldridge v. Skyeasant*, 1 Hall, 210.

98. The declaration set forth that the plaintiff was possessed of the unexpired term of a house, which he demised to certain persons, who entered and were in quiet possession of the same; that the defendant, knowing that they rightfully held possession as tenants of the plaintiff, and wrongfully and maliciously intending to injure him, so disturbed his said tenants that they were obliged to abandon the premises; whereby the plaintiff lost his rent, and the premises became injured for the want of occupation. Upon a demurrer to this declaration, *it was held*, that the plaintiff was entitled to judgment. *Ibid*.

99. Where a landlord demised premises for one year at a specified rent, and agreed that if the tenant continued to occupy the premises for seven years at the same rent, he would pay him money expended in repairs to the amount of \$50, and a sub-tenant surrendered the premises to the landlord fourteen days before the expiration of the seven years, paying him rent up to that day; *it was held*, that the landlord, for the residue of the term, must be considered quasi sub-tenant to the original tenant, and that at the expiration of the seven years, he was liable to his tenant for the payment of the \$50 expended in repairs. *Benson v. Rolles*, 8 Wend. 175.

100. A party, entering into the possession of lands by the consent or permission of a tenant, will be considered, in respect to the right of the landlord, as substituted in the place of the tenant by whose permission he enters. *Ibid*.

101. Where a party has a legal right to enter into possession of land, and does in fact enter, the law presumes that he entered under such right, and not as a trespasser. *Ibid*.

102. Where an agreement was entered into to demise a farm for one year, and further, that the tenant should have the said farm from year to year as long as the said farm is to be let, upon paying the rent annually in advance, or giving ample security for its payment; and at the expiration of the year the tenant was turned out of possession under the landlord and tenant act for holding over, and the landlord let the premises to a third person; *it was held*, that the tenant was entitled to sustain an action for the breach of the covenant, and that the proceedings had against him for his removal from

the farm were no bar to the action. *Walley v. Radcliff*, 11 Wend. 22.

103. Under the statute imposing a penalty upon every person who shall knowingly assist a tenant or lessee in removing his goods for the purpose of avoiding payment of rent, a third person does not incur the penalty by merely *advising* the removal of the tenant's goods; there must be some physical aid by himself or his servants. *Crafts v. Plumb*, 11 Wend. 143.

104. In an action for the penalty for assisting a tenant in concealing goods removed from demised premises, a party who detests a bailiff from taking the property by falsely denying the tenant to be the owner thereof, and alleging a third person to be the owner, subjects himself to the penalty. *Ibid.*

105. Where, however, in such case, there is evidence that the intent in the making of the false allegation is not to defraud the landlord, but for a different object, and the jury pass upon the intent, and acquit the defendant, the action being penal, the Court will not grant a new trial, unless the verdict be clearly against the evidence. *Ibid.*

LARCENY.

1. The true construction of the statute (sess. 42, ch. 246, s. 4.) providing that every person who shall be a second time convicted of petit larceny shall be adjudged to imprisonment in the state prison, is, that the second offence must be committed after a conviction for the first, in order to warrant the enhanced penalty. *People v. Butler*, 3 Cow. 347.

2. It is not enough that there be two successive petit larcenies by the same person, which are severally and successively prosecuted to conviction; though the second indictment charge the first conviction as a part of the crime. *Ibid.*

3. The receipt of goods taken by the sheriff in execution has not even a special property; and a larceny cannot be laid of the goods as the property of the receptor. *Norton v. The People*, 8 Cow. 137.

4. Goods were feloniously taken and removed in one's absence by his servant, and under his direction, and afterwards the principal was present, and aided in secreting the goods. *Held*, that this was not larceny in the principal, who was a mere accessory. *Ibid.*

5. It is felony for a man who elopes with another's wife to take his goods, though with the consent and at the solicitation of the wife. *People v. Schuyler*, 6 Cow. 572.

6. Larceny may be committed by a man stealing his own property, where the intent is to charge another with the value of it. *Palmer v. The People*, 10 Wend. 165.

7. Where property is levied upon by a constable, he acquires a special property in it, and, if stolen, it may be charged in an indictment or complaint as the property of the constable. *Ibid.*

8. A foreigner committing larceny abroad, coming into this state, and bringing the stolen

property with him, may be indicted, convicted, and punished, in the same manner as if the larceny had originally been committed here. *The People v. Burke*, 11 Wend. 129.

LEASE.

- I. *What is a lease, and its construction.*
- II. *Assignment and surrender of a lease.*
- III. *Covenants in and forfeiture of a lease.*
- IV. *Tenant holding over after expiration of the term.*

I. *What is a lease, and its construction.*

1. The reservation in a lease of all water-courses on the demised premises suitable for the erection of mills, with the right of erecting mills and other works thereon, with three acres of land adjoining thereto, gives the lessor a right to all the mill seats within the three acres on the demised premises, whenever he chooses to make a location. It is the same as reserving all the mill seats on the demised premises with the three acres; but, *it seems*, would not authorize the lessor to erect a mill or mills on any adjoining lot, flowing three acres on the demised premises. *Russell v. Scott*, 9 Cow. 279.

2. A lease was of a lot in fee, reserving seven acres and all water-courses suitable for the erection of mills, with the right of erecting mills and other works thereon, with three acres of land adjoining thereto. Then the lessor demised in fee the seven acres to another lessee; *held*, that this last lease did not carry to the lessee the lessor's reserved rights in the first lease. Such rights were not appurtenant to the reserved land. They were all incorporeal hereditaments, which will pass only by express grant. *Ibid.*

3. A written declaration endorsed on the lease after the date by the lessor, that he intended to demise a greater interest than the lease expresses, is not operative to convey any interest. *Ibid.*

4. A reservation of a part of a lot demised leaves that part precisely as though it had not been a part of the land demised, but had originally belonged to an adjoining lot. *Ibid.*

5. Proof of the execution of a lease, and that the defendant had been for more than twenty years in possession of one-half of the demised premises, is *prima facie* sufficient to charge him in an action of covenant as assignee for the nonpayment of rent; but the defendant, under a plea denying that he held by assignment, may prove that he is not assignee, as by showing that the estate created by the lease declared on ceased before his entry. *Williams v. Woodard*, 2 Wend. 487.

6. A power of attorney authorizing the nominee to bargain, sell, convey, and assure a tract of land, confers authority to execute a lease for life, containing a provision for the eventual sale of the land. *Ibid.*

7. A lease to one, his executors, administrators, and assigns for ever, conveys a life estate only. *Ibid.*

8. Whether an instrument shall be considered

a lease, or only an agreement for one, depends on the intention of the parties, as collected from the whole instrument. The law will rather do violence to the words than break through the intent of the parties by construing such an instrument as a lease, when the intent was manifestly otherwise. *Jackson v. Delacroix*, 2 Wend. 433.

9. An instrument respecting the letting of premises, though with words of *present demise*, contained an agreement by the owner to make certain alterations and improvements, and by the other party to take a lease when the premises should be so altered and improved, and it was stipulated that the term should commence from the day that the premises should be altered and improved in the manner agreed on. Subsequently, alterations and improvements were made, but of a different character from those stipulated; and it was held, that the party with whom the contract was made, though willing to waive an exact compliance with it, was not entitled to demand possession of the premises, the instrument not being a lease, but only an agreement for a lease. *Ibid*.

10. It seems, that a lease of premises from the first day of May in one year, to the first day of May in the succeeding year, excludes the first day. *Wilcox v. Wood*, 9 Wend. 346.

11. Proof of a local custom, that a lease in those terms expires at noon of the last day, is admissible; and the Court suggested that such a custom would be highly convenient. *Ibid*.

12. Where an action of trespass *quare domini* was brought by an outgoing tenant for the tearing down a partition wall in the house on the first day of May, before noon, and before he removed from the premises, and the defendant pleaded *liberum tenementum*, but did not prove his plea, and the plaintiff was nonsuited, the nonsuit was set aside, and a new trial ordered. *Ibid*.

13. An agreement to sow different kinds of grain upon a farm, and to yield a certain proportion of each crop to the landlord, is an agreement to work on shares, and not a lease to render rent, for which an action will lie against the tenant. *Caswell v. Districh*, 15 Wend. 379.

II. Assignment and surrender of a lease.

14. An assignment by the lessee of all his legal and equitable interest in the demised premises, in possession or expectancy, with the hereditaments and appurtenances thereunto belonging, passes the equitable interest in a covenant by the lessor, contained in the lease, to pay for buildings to be erected by the lessee during the term. *Thompson v. Rose*, 8 Cow. 266.

15. But it does not pass the legal interest; therefore the assignee must sue on the covenant in the name of the lessee. *Ibid*.

16. A covenant by the lessor to pay the lessee (without saying his assignee) for buildings not in case at the time of the demise, but to be erected during the term, does not run with the land; and an assignment of such covenant by the lessee, therefore, will not carry the legal interest. Otherwise, where the covenant is to the lessee or his assigns. *Ibid*.

17. A lessor covenanted to pay for buildings,

and bound himself by a penalty. In an action on the covenant; held, that the plaintiff might recover beyond the penalty. *Ibid*.

18. The assignee of a covenant chose in action, who had assigned it to another, admitted as a witness for his assignee, without objection on account of interest. *Ibid*.

19. Where a lease is surrendered as to part of the premises, the right to distrain continues as to the residue. *Peters v. Newkirk*, 6 Cow. 103.

20. The acceptance by a tenant of a new lease of the same premises, during the term of the first lease, is deemed a virtual surrender of the first lease. Such presumption arises from the acts of the parties, which are supposed to indicate an intention to that effect; but when such intention cannot be presumed, without doing violence to common sense, the presumption will be supported. *Van Rensselaer's Heirs v. Penniman*, 6 Wend. 569.

III. Covenants in and forfeiture of a lease.

21. The words, "and these presents are upon this condition," viz. that the lessee shall suffer the lessor to enjoy a way reserved through the demised premises without obstruction, are sufficient in a durable lease to make the estate a conditional one, without an express clause of re-entry; and if the way be obstructed, ejectment lies. *Jackson v. Allen*, 3 Cow. 220.

22. To make a receipt for rent operate as a waiver of a forfeiture of the estate demised, the rent must not only be received after the forfeiture is incurred, but such rent as received must have accrued after that time. *Ibid*.

23. And this validates the lease only to the time when the rent so received accrued; but will not operate as a waiver of a forfeiture incurred by continuing the original cause of the forfeiture after the day on which the rent received fell due. *Ibid*.

24. The word grant, in a lease for years, is a warranty of the lessor's title. *Grannis v. Clark*, 8 Cow. 36.

25. The word demise, in a lease for years, implies a covenant of power in the lessor to give the lease. *Ibid*.

26. In an action on these covenants, it is not necessary to aver an eviction. An action lies though the lessee was prevented from taking possession. *Ibid*.

27. But it must be shown expressly, in assigning breaches, that the lessee was kept out by a title existing in a third person (showing whom) at or before the time of the execution of the lessee. *Ibid*.

28. The implied covenants may be set forth in declaring, in the same manner as if they were set down and expressed in the lease; for such is the effect of the lease. *Ibid*.

29. Where proceedings are had, and a verdict is found for the tenant, under the statute authorizing a summary proceeding by a landlord to oust his tenant, (secs. 43, ch. 194, p. 176.) the original affidavit cannot be used as the foundation of a new proceeding under that act. And where it was so used, and the tenant turned out of possession; held, that the proceedings were *coram non judice*, and void; that

trespass lay against both the landlord and judge. *McCoy v. Hyde*, 8 Cow. 68.

30. A lessor may assign the rent and covenant for rent without the reversion, or the reversion reserving the rent and covenant for rent; and in the former case, the assignee may sue in his own name for rent accruing subsequent to the assignment; and the lessor may sue in his own name on the other covenants in the case. *Demarest v. Willard*, 8 Cow. 206.

31. A lessor for a term, with covenant by the lessee to pay rent, and covenants against certain injuries to the premises, and to surrender them in good repair at the end of the term, made an endorsement on his lease, assigning the rent and "within lease." *Held*, that no interest in the reversion passed beyond the term; and the right of action not accruing on the covenants as to injuries and repairs till the term had expired, and the reversion then being in the lessor, the right of action was in him; but the right of action for rent which became due and in arrear after the assignment was in the assignee. *Ibid*.

32. The statute (1 R. L. 363.) respects the assignment of the reversion; not the rent without the reversion. *Ibid*.

33. Rent arrear is a chose in action, and is, therefore, not assignable, so as to give an action in the name of the assignee. *Ibid*.

34. But rent yet to grow due is assignable; and a covenant to pay it runs with the land, and may pass to the assignee, who may sue upon it in his own name. *Ibid*.

35. A covenant to repair runs with the land. *Ibid*.

36. A demise was to W. S., his heirs and assigns, erecting, building, and keeping in repair a certain shed, which he, the said W. S., is to erect and build, &c. for the use of a mill, &c., with a covenant by W. S., for himself and his heirs, to erect and build the shed, and keep it in repair. The shed was built, but stopped up, and not kept in repair for the use mentioned; *held*, that the remedy was on the covenant alone; and that the words "erecting, building, and keeping in repair," &c., did not create a condition. *Jackson v. McClellan*, 4 Cow. 295.

37. These and the like words in a demise, as paying rent, making up the hedge again, paying the rent and performing covenants, &c., do not, *per se*, create a condition where there is an express covenant to pay or perform, &c. Otherwise, *it seems*, where there is no remedy by covenant. *Ibid*.

38. A covenant by a lessor, that if the lessee or his assigns shall be minded to sell or dispose of their interest, they may do so, first giving the pre-emption to the lessor, and paying one-tenth of the purchase money to him; provided, that if these be not done, the lease shall be forfeited, is valid, and extends not only to an immediate assignment by the lessee, but to his assignee, either by operation of law or voluntary sale; and if the latter assign without offering the pre-emption, and paying the tenth of the money, the lease is forfeited. *Jackson v. Groat*, 7 Cow. 245.

39. Where a covenant is contained in a lease, that on the payment of a specified sum of money

within ten years, the lessor will convey an estate in fee simple to the lessee, payment of the money will not be presumed; it must be shown affirmatively that payment was made or tendered and refused, and then the remedy is in Chancery. *Williams v. Woodward*, 2 Wend. 487.

40. Where there is a condition of re-entry reserved in a lease for nonpayment of rent, the reversioner is not entitled to re-enter without showing a compliance with the requirements of the common law, such as a demand, &c., or that by statute he is entitled to re-enter, for the want of sufficient property on the premises counter-vailing the rent. *Jackson v. Kipp*, 3 Wend. 230.

41. A sale under an execution does not entitle the reversioner to demand a fifth of the consideration money under a covenant that, on every sale or assignment, such proportion of the purchase money shall be paid to him, if it be *bona fide* an adversary proceeding on the part of the creditor, and not collusive with intent to defeat the condition in the lease. *Ibid*.

42. Where it is a condition in a lease of personal property that the lessee shall keep it upon particular premises, and remove it therefrom, a removal of such property by the lessee operates as a forfeiture of the term, and divests his title, so that no interest in the property removed remains in him that can be sold by execution. *Otis v. Wood*, 3 Wend. 499.

43. Where, in a lease executed by both parties, is contained a covenant that on the lessee's being removed from the demised premises, or dispossessed, he shall be paid the value of the buildings and improvements made by him, and that on such payment, he shall yield up the possession of the demised premises, an *agreement* by the lessor will be *implied* that the lessee may retain possession until such payment be made, notwithstanding that the term for which the premises were demised has expired. *Van Rensselaer's Heirs v. Penniman*, 6 Wend. 569.

44. A demise to A. B., his heirs and assigns, for such term of time as he pays rent, &c., he, on his part, *covenanting* for himself and his heirs, &c., to pay rent and perform covenant, is a perpetual lease. The lessor, but not the lessee, may elect, on default, to consider it forfeited. *Folls v. Huntley*, 7 Wend. 210.

45. The appropriation of a *mill privilege* (the subject of a *demise*) by the canal commissioners is not an *eviction* by title paramount, so as to relieve the lessee from the payment of rent and performance of covenants; being entitled to compensation, the premises cannot be deemed as taken from the lessee by title paramount. *Ibid*.

IV. Tenant holding over after the term.

46. A tenant holding over after a lease expired cannot controvert his landlord's title. *Jackson v. Tucker*, 1 Cow. 575.

47. Nor if he take a lease from a third person, on being ejected, will that third person be allowed to defend as landlord. *Ibid*.

48. The latter, claiming under the tenant, has no greater right to a defence than the tenant would be entitled to. *Ibid*.

49. Where a tenant for a year holds over after the expiration of his term without the permission of his landlord, he may be removed from

the demised premises in the manner prescribed by the statute authorizing summary proceedings to recover the possession of land, without having been served with a month's notice to quit; he is not, within the meaning of this statute, a tenant at sufferance. *Rowan v. Lytle*, 11 Wend. 616.

50. To entitle such tenant to a notice of a month to remove from the premises, the holding over must be continued for such length of time after the expiration of the term as to authorize the implication of assent on the part of the landlord to such continuance: and where a landlord waited three months and twelve days before instituting proceedings under the statute; it was held, that he was not chargeable with laches, especially as it appears that he had attempted to obtain possession without recourse to coercive measures. *Ibid.*

51. A tenant proceeded against under this statute cannot set up title to the premises acquired by him since the taking of his lease, in bar of the landlord's claim to be put into possession. *Ibid.*

52. Where the owner of land agrees that his creditor may occupy a dwelling house belonging to him for the term of one year, and until he pays a mortgage which the creditor holds against him, the relation of landlord and tenant exists between the parties, and on the payment of the money after the first year, and refusal of the creditor to yield up the possession, the owner may institute proceedings against the creditor under the statute authorizing summary proceedings to obtain possession of land. *Hunt v. Comstock*, 15 Wend. 665.

53. It is, in such case, at the election of the owner to put an end to the term at any time after the first year, by paying the mortgage, although the money is not due, according to the terms of the mortgage, under four years. *Ibid.*

54. Where, instead of a reservation in a lease of a certain rent, or what may be rendered certain, the tenant is only bound to yield a proportion of the grain raised by him, or, in other words, is to work the farm on shares; the landlord, upon a noncompliance with the terms of the lease, cannot remove the tenant from the possession of the demised premises by availing himself of the statute authorizing summary proceedings. *Oakley v. Schoonmaker*, 15 Wend. 226.

55. Nor can such proceedings be instituted on the ground of the expiration of the term by forfeiture; the expiration of the term mentioned in the statute means expiration by lapse of time. *Ibid.*

LEGACY.

I. Payment of legacies.

II. Action for a legacy.

III. When a legacy operates as the satisfaction of a debt.

IV. Construction of a legacy.

I. Payment of legacies.

1. Where the testator, having real and personal estate, by his will provided a support for

his wife out of his estate, requiring her to pay his debts; and then bequeathed certain specific legacies; then devised his farm to his son, and directed in terms that he should pay certain pecuniary legacies to other children, and the will then said, "also, J. H. is to have \$250, also, F. H. \$100," and appointed the devisee of the farm one of the executors; held, that the direction of the devisee to pay applied to all the legacies, and charged the land, but not so as to exclude the aid of the personal estate, it not appearing on the face of the will that all the personal estate had been bequeathed; and though this might have in fact been so, yet parol evidence could not be received to vary the construction as it stood on the face of the will, there being no latent ambiguity. *Tule v. Hardy*, 6 Cow. 333.

2. A latent ambiguity is that which arises from evidence *dehors* the instalment. It may then be explained by such evidence. *Ibid.*

3. Though a legacy be charged upon land devised, or on a devisee in respect of the land, yet this does not exclude the aid of the personal estate from the payment. This is always the primary fund for the payment of legacies, unless it be excluded by express words in, or necessary implication to be derived from, the will itself on its face. Such a construction cannot be established by matter *dehors* the will. *Ibid.*

4. What is sufficient proof of assent to a legacy by an executor. *Ibid.*

II. Action for a legacy.

5. An action at law lies for a legacy directed by will to be paid by a devisee of lands, and expressly charged on the lands, if the devisee has entered upon the lands, and promised to pay it. *Kelsey v. Deyo*, 3 Cow. 133.

6. Part payment is conclusive evidence of such a promise. *Ibid.*

7. So, where from the whole will it appears to have been the intention of the testator that the legacy should be a charge on the land demised, although the land was not expressly charged with its payment. *Ibid.*

8. Where a testator bequeathed his personal estate to his wife for life, and what should remain of this at her decease, over, to be equally divided between all his children; and then devised his real estate to one of his sons; and bequeathed certain legacies in money to his other children, to be paid by his son, the one-half to be paid in two years after his (the testator's) decease, and made his son the devisee, with others, executors; and his son entered into possession, and paid part of one of the legacies; held, that an action lay for the residue of this legacy. *Ibid.*

9. An action of *assumpsit* lies against a devisee for a legacy charged exclusively on the land devised, or on his person in respect to the land, if he enter, and promise to pay. But the aid of the personal estate must be excluded expressly, or by necessary implication, on the face of the will. *Tule v. Hardy*, 6 Cow. 333.

10. Evidence that a third person was in possession of the land, to whom the devisee, before his promise, gave directions as to remaining, and quitting the possession, is sufficient evidence

as to the entry and possession of the latter, to sustain an allegation to that effect in the declaration, and support a promise to pay the legacy charged, especially where, after the promise, the devisee took actual possession. *Ibid.*

11. The assent of the executor is not necessary to a legacy charged on land. *Ibid.*

12. A Court of law has no jurisdiction of an action to enforce payment of a legacy charged on land devised, or on the devisee in respect of the land, though he may have entered and promised to pay, unless the land be exclusively charged. Where this is not so, jurisdiction belongs to a Court of equity. *Ibid.*

13. In an action on a promise by a devisee to pay a legacy charged on the land, or on the devisee in respect of the land, the value of the land is immaterial, and cannot be inquired of at the trial. *Ibid.*

III. When a legacy operates as the satisfaction of a debt.

14. It is a general rule that a legacy given by a debtor to his creditor, which is equal to or greater than the debt, shall be considered as a satisfaction of it; but this does not apply to a debt existing in an open unliquidated account. *Williams v. Crary*, 5 Cow. 368.

15. The plea of a legacy in satisfaction should always aver, either that the bequest was made in satisfaction of the debt, or was intended as such. Merely pleading the bequest, and showing it equal to or greater than the debt, is bad as an argumentative plea. *Ibid.*

16. A general bequest of a sum of money to a debtor, equal to, or exceeding the debt due, though it stand in an unliquidated account, as a satisfaction, if it appears either on the face of the will, or by evidence *alunde*, to be so intended. *Williams v. Crary*, 8 Cow. 246.

17. Thus, where W. was indebted to the testatrix on bond and mortgage \$4000, and the testatrix owed him on account less than \$2400, and she declared by her will, that on W.'s paying \$1600, the bond and mortgage should be discharged, which was done accordingly; and it appeared by conversation between W. and the testatrix, that she intended the bequest should go to discharge the debt due to W.; *held*, that it operated as his payment. *Ibid.*

18. Parol evidence to show the intent of the testatrix, *was held* not to be objectionable, as going to vary or contradict the will, but to be consistent with it. *Ibid.*

19. A legacy by a creditor to the wife of a debtor is not a satisfaction of the debt due the testator. *Clarke v. Bogardus*, 12 Wend. 67.

20. The acceptance of a legacy will not operate as the extinguishment of a debt due from the testator to the legatee, unless the circumstances of the case are such as to warrant the conclusion that such was the intention of the testator. *Mulheran's Executors v. Gillespie*, 12 Wend. 349.

IV. Construction of a legacy.

21. Chattels or money may be limited over after a life interest, but not after a gift of the absolute property. *Paterson v. Ellis*, 11 Wend. 260.

22. Where a legacy is given when the legatee attains the age of twenty-one, if the deviser directs the interest of the legacy to be applied in the mean time for the benefit of legatee, there being an absolute gift of the interest, the principal will be deemed to have vested. *Ibid.*

23. A legacy will be deemed vested, if it be left to the discretion of a trustee to pay the legacy sooner than the time specified in the will; and it seems, that the mere appointment of a trustee for the legatee during the minority will have the same effect. *Ibid.*

24. Where the limitation over of personal property is such as would create an estate tail, either by express words or by implication, in the legatee first named, if real estate was the subject of the limitation, the gift to the first legatee is absolute by operation of law, notwithstanding the manifest intent of the deviser to the contrary; such intent, being in contravention of the settled rules of law, must yield to the law. *Ibid.*

LEX LOCI.

1. Covenant will not lie in this state, on a contract to be performed in Pennsylvania, with a scrawl and word seal in the *locus sigilli*, though, by the law of that state, this constitutes a seal. *Andrews v. Herriott*, 4 Cow. 508.

2. The form of the action relates to the remedy, and is governable by the *lex loci*. See note at the end of this case. *Ibid.*

LIBEL.

I. What is a libel, and of the publication of a libel.

II. Justification of a libel.

III. Action for a libel.

I. What is a libel, and of the publication of a libel.

1. A libel is a malicious defamation, made public either by printing, writing, signs, or fixtures, tending to blacken the memory of one who is dead or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule. *Root v. King*, 7 Cow. 613.

1°. Malice is generally to be inferred from the libelous nature of a publication, or its falsity; and it is to be taken as false till proved to be true, but the truth is a good defence, though the publication be malicious. *Ibid.*

1†. A memorial presented to a board of excise, remonstrating against the granting of a license to a particular individual to keep a tavern, charging him with stirring up justice's suits with a view of having the causes tried at his tavern, is a privileged communication; and no action lies as for the publication of a libel, unless express malice be proved. *Vanderzee v. M'Gregor*, 12 Wend. 545.

2. The circulation of the memorial, for the purpose of obtaining signatures thereto, is within the privilege. *Ibid.*

II. Justification of a libel.

3. In an action for a libel, the publication in a newspaper of rumours cannot be justified by the fact that such rumours existed, though it may be given in evidence in mitigation of the damages. *Skinner ad. Powers*, 1 Wend. 451.

4. A charge of misconduct of a specified kind is not justified by proving the plaintiff

guilty of misconduct of a similar character. *Ibid.*

5. The defendant's justification must be as broad as the charge; the proof of the truth of one out of many charges will not constitute a justification. *Ibid.*

III. Action for a libel.

6. In an action for a libel, the defendant cannot, either in bar of the action, or in mitigation of damages, give in evidence other libels published of him by the plaintiff not distinctly relating to the same subject; nor, if so relating, in palliation of the offence on the ground of provocation. *Beardsley v. Maynard*, 4 Wend. 336.

7. It is not allowable to ask a witness *how he understood the libel*. *Ibid.*

8. In an action for a libel, a previous publication by the plaintiff cannot be given in evidence by the defendant, unless the publication complained of as libellous is manifestly an answer to, or commentary upon, the previous publication. *Maynard v. Beardsley*, 7 Wend. 560.

9. Evidence of such previous publication will not be received in mitigation of damages on the ground of provocation, unless not only the connexion between the publications be manifest, but also the provocation be so recent as to induce a fair presumption that the injury complained of was inflicted during the continuance of the feelings and passions excited by the provocation. Under other circumstances, libellous publications by the plaintiff affecting the defendant are inadmissible in mitigation, the only remedy of the party being by cross action. *Ibid.*

10. The defendant may mitigate damages by showing the plaintiff a *common libeller*; but it must be done in the same way that a *general reputation* is proved. *Ibid.*

11. In an action for a libel, it is not admissible for a witness to state his understanding or construction of the publication; he can testify only to facts, and not to his opinions or conclusions. *Ibid.*

12. In an action for a libel, the defendant may give in evidence previous publications by the plaintiff, where their admission is necessary to a due understanding of the purport and object of the publication alleged to be libellous, or where their tendency is to give a character to it, by softening its asperity, or mitigating its severity; but such previous publications are not admissible in evidence for the purpose of showing provocation, unless of so recent a date as to afford a fair presumption that the article alleged to be libellous was published under the impulse of passion excited by them; nor are they admissible to prove the plaintiff a *common libeller*, or that the publication complained of as a libel was the retort of severe crimination. *Gould v. Weed*, 12 Wend. 12.

13. In every action for a libel, a publication of the libellous matter must be distinctly averred; and it will not be sufficient to allege that the defendant composed, wrote, and delivered to the plaintiff, a certain false, malicious, and defamatory libel; but it must appear upon the face of the declaration that the libel was in some

form made public. *Waistel v. Holman*, 2 Hall, 173.

14. It is not necessary, however, to aver in direct terms that the libel was communicated to third persons; but it will be sufficient to allege that the defendant published, and caused to be published, a certain libel, although it also appear that it was addressed to the plaintiff. *Ibid.*

LIEN.

1. Where a brickmaker manufactured a quantity of brick on a brickyard furnished by one who likewise supplied the wood and all other necessities to carry on the work, and who agreed to pay the workman \$1.75 for every 1000 bricks made and shipped, on the return of the vessel in which the same were carried to market; it was held, that the brickmaker had a particular lien on the article manufactured by him, until he had parted with the possession of it. *Moore v. Hitchcock*, 4 Wend. 292.

2. Where it is agreed that the owners of a saw mill shall have a lien for their charges in sawing logs into boards, that the boards shall be removed a short distance from their premises, but that the lien shall continue until payment, and the boards are sawed and piled accordingly a short distance from the mill, the lien of the owners of the mill is as perfect as if the boards were in their millyard; the possession of the owner of the boards is their possession. *Wheeler et al. v. M'Farland*, 10 Wend. 318.

3. Where, under such circumstances, a sheriff, by virtue of an execution against the owner of the boards, levied upon the boards after being apprized of the lien, and advertised the whole property, and not merely the right of the defendant to the property subject to the lien; it was held, that the parties entitled to the lien might sue out a replevin. *Ibid.*

4. It seems, that the interest of a defendant in personal property subject to the lien might be levied on and sold, without subjecting the officer to responsibility. *Ibid.*

5. Where a contract is entered into, by which a party agrees to manufacture boards for another, and to transport them to market at a stipulated price, and provision is made by the contract, giving the manufacturer a lien upon the boards which shall be delivered by him, after the delivery of a specified quantity; if the whole quantity of boards made is not sufficient to enable the manufacturer to deliver the specified quantity and satisfy his lien, and such inability is caused by the omission of the other party to supply him with a sufficient number of saw logs out of which to manufacture boards, the common law lien attaches to the last quantity manufactured, notwithstanding the special agreement. *Mount v. Williams*, 11 Wend. 77.

6. In an action by a mechanic or labourer, under the lien law in the city of New York, to charge the owner of a building for moneys due by the contractor to the mechanic for work done, it is incumbent upon the plaintiff to show

that under the contract between the owner and contractor, there are moneys due from the former to the latter; the *onus probandi* lies on the plaintiff in such a case. Such a contract must be in writing, and the work for which the owner is sought to be charged must be done in pursuance of such contract. *Haswell v. Goodchild*, 13 Wend. 373.

7. In proceedings under the statute giving a lien for damages upon a vessel doing injury to another, where the former has been discharged from seizure upon the execution of a bond to pay, &c., and an action is brought upon the bond, the defendant may tender amends on the ground that the injury was casual or involuntary; but whether it was so or not must be certified by the judge presiding at the trial. *Slack et al. v. Brown et al.* 13 Wend. 390.

8. In such an action, the plaintiff is entitled to a verdict for the sum tendered as damages, although he refused to accept the same when tendered; if he recover no more than the sum tendered, the defendant is entitled to the costs accrued subsequently to the tender; but in case the plaintiff after such refusal elect to accept the sum tendered, and if the defendant neglect to pay the same within a reasonable time after a demand thereof, the costs accruing thereafter will be deducted from the costs to which the defendant is entitled. *Ibid.*

9. Where the plaintiff claims in his declaration only for damage done to the vessel, he cannot recover consequential damages. *Ibid.*

10. Whether such consequential damages are a lien on the vessel under the statute? *Quære. Ibid.*

11. The lien of a mechanic for work done by him is discharged by an agreement on his part to look to the personal credit of his debtor, or another, for satisfaction of his demand. *Bailey v. Adams*, 14 Wend. 201.

12. Whether a third person can avail himself of a lien in favour of a mechanic, in the defence of an action of trover brought for the recovery of a chattel? *Quære. Ibid.*

13. The owner of a ship has, by the general rules of law, a lien on the cargo for his freight, although the vessel may be hired to another, provided he continues in the actual or constructive possession and control of it. But if he part with his possession to a charterer, the latter is considered as the owner for the voyage, and the former has no lien for the freight. *Lander v. Clark*, 1 Hall, 355.

14. By covenant of charter party, the owner of the brig Holly let her to the plaintiff for a voyage from Boston to the east coast of South America, and back to Boston. The master of the vessel was to be appointed by the plaintiff; and he stipulated to pay the owner \$600 per month for the hire of the vessel, to pay all port charges and pilotage during the voyage, and to "deliver the brig," on her return to Boston, to the owner or his order. The vessel proceeded to Rio Grande, and having delivered her cargo there, took on board another, partly the property of the plaintiff, and partly on freight for New York. She likewise received the defendant on board at Rio Grande, as master for the homeward voyage. He was directed to

proceed to New York, and there deliver such part of the cargo as was taken on freight for that place, and there await the orders of the plaintiff. Among the articles taken on freight, was a quantity of hides, &c., consigned to one Whitlock of New York. Before the arrival of the vessel at New York, the charterer became insolvent, and immediately on her arrival the owner took possession. Whitlock paid the freight of the property consigned to him to the defendant; and he, with the full knowledge of the charter party, and of the claims of the plaintiff, paid over the money to the owner of the vessel; held, that the charterer might recover back the freight thus paid over to the owner, in an action of *assumpsit* against the master, the defendant; held, also, that the deviation of the vessel from the direct route from Rio Grande to Boston, for the purpose of delivering freight at New York, could not be considered by the owner such a violation of the charter party as would authorize him to treat it as a nullity, resume the possession of his vessel at New York, and claim a right of lien for the freight of the goods found on board. *Ibid.*

LIMITATION OF ACTIONS.

- I. *When the statute of limitations is a bar.*
- II. *Exceptions in the statute, and what will revive the right of action.*

I. *When the statute of limitations is a bar.*

1. The shortest period which a Court of equity is bound to consider an absolute bar to a suit respecting real estate, in analogy to the limitation of actions at law, is twenty years. *Hawley v. Cramner*, 4 Cow. 717.

2. In cases of implied trusts in relation to personal property, or to the rents and profits of real estate, where persons claiming in their own right are turned into trustees by implication, the right of action in equity will be considered as barred in six years, in analogy to the limitation of similar actions at law. *Ibid.*

3. *Non assumpsit infra sex annos* to a declaration on a promise of indemnity is bad in substance; and though issue be taken thereon, and there be a verdict found for the plaintiff, subject to the opinion of the Court; and the evidence be plainly against the plaintiff upon the issue; if the cause be in other respects with him, he shall have judgment; and although such an issue be found for the defendant, the plaintiff shall have judgment *non obstante veredicto*. *Hale v. Andrus*, 6 Cow. 225.

4. *Semble*, that on a promise to indemnify, one action may be brought, and a recovery had for a breach or breaches; and then a subsequent action on the same promise for another breach or breaches happening after the first recovery. *Ibid.*

5. Where a note was endorsed by the holders to a bank for collection, whose notary negligently omitted to charge a prior endorser by giving notice of nonpayment; and the bank was sued by their endorsers for neglect, and compelled to pay damages; in an action of as-

sumpsit against the notary; *held*, that the cause of action arose immediately on the omission; and the bank, not having sued till more than six years after, were barred by the statute of limitations. *Utica Bank v. Childs*, 6 Cow. 238.

6. And this, though the former suit and recovery thereon against, and payment of damages by the bank to the holders, were all within six years of the suit against the notary. *Ibid.*

7. *Held*, also, that the notary, not having notice of the former suit, could, in no way, be affected by it, even as to the amount of damages. *Ibid.*

8. *Seemle*, it would be otherwise as to the mere amount of damages, if he had had notice; but still he must have been sued within six years from his omission. *Ibid.*

9. Error lies at any time within five years, though the money be paid and accepted upon the judgment below. Per *Spencer and Colden*, Senators. *Cloves v. Dickerson*, 8 Cow. 328.

10. A party may appeal from a final decree of Chancery at any time within five years, though he have accepted the money awarded by the decree. *Ibid.*

11. But the right to appeal may be waived by agreement or stipulation. *Ibid.*

12. The erection of a mill dam on one's own land, and flowing a neighbour's land for more than twenty years uninterruptedly, bars all right of action in the neighbour; but only for the dam as it stood. If it be raised and the flow increased within twenty years, an action lies. *Russell v. Scott*, 9 Cow. 279.

13. *One item* of an account within six years before suit brought will not draw after it items beyond six years, so as to protect them from the statute of limitations, unless there have been *mutual accounts and reciprocal demands* between the parties. *Kimball v. Brown*, 7 Wend. 322.

14. Where a note is payable whenever a certain mortgage holden by the maker shall be collected, a cause of action accrues thereon when the mortgagee enters into possession of the mortgaged premises by virtue of a foreclosure, and his title thereto becomes absolute, provided the mortgaged premises are equal to the value of the debt; the mortgage, then, in judgment of law, is collected, and unless a suit is brought upon the note within six years after the happening of the above events, the plaintiff will be barred by the statute of limitations. *Morgan v. Plumb et al.* 9 Wend. 287.

15. So also, a count for negligence, in omitting to collect the amount of the mortgage, is barred by the statute, unless suit be brought within six years from the time when the money might have been collected, had the maker of the note used diligence. *Ibid.*

16. A former suit for the same cause of action, in which the defendant obtained a verdict, is a bar to a second suit, although such verdict was rendered on the erroneous ground that the plaintiff's cause of action had not then accrued, when in fact the plaintiff had at the time a good and perfect cause of action. *Ibid.*

17. A promise to the holder of a chose in action, taking a case out of the statute of limitations, is available in an action by a subse-

quent holder. *Soulden et al. v. Van Rensselaer*, 9 Wend. 293.

18. Where a surety, an accommodation endorser, pays part of a judgment obtained against him, and gives his note for the balance, which is accepted by the plaintiff in satisfaction of the judgment, and in full of his claim, the cause of action of such surety against his principal to recover as for money paid is perfect, and the statute of limitations begins to run; so that, under the circumstances of a given case, a plea of *actio non accrevit* will bar a recovery by the surety against the principal, although, counting from the time of the actual payment of the note thus given for the balance, the statute would not run. *Rodman v. Hedden*, 10 Wend. 498.

II. *Exceptions in the statute, and what will reverse the right of action.*

19. An inventory and affidavit of a debt, made by an insolvent before a commissioner in order to obtain his discharge, (which is granted,) under the insolvent act, is a sufficient acknowledgment to take the debt out of the statute of limitations. *Bryar v. Willocks*, 3 Cow. 159.

20. In Chancery, a pure plea of the statute of limitations, in answer to a bill charging circumstances to take the case out of the statute, is no bar, unless it be supported by an answer denying or destroying the force of those circumstances. *Bloodgood v. Kane*, 8 Cow. 360.

21. The disability which entitles a party to the benefit of the proviso in the statute of limitations, must exist when the right of entry or action first accrues; and if several disabilities exist together, the statute does not begin to run till the whole are removed. *Jackson v. Johnson*, 5 Cow. 74.

22. If several disabilities exist together in the owner of an estate, as infancy and coverture, when the adverse possession commences against her, she, or if she die, her heirs, have at least ten years within which to enter or bring an action, after both disabilities are removed; and they are entitled to full twenty years for this purpose from the time when the adverse possession commences. Thus if the disabilities should be removed within three years after the adverse possession commenced, they would not be barred under seventeen years. So if the disabilities should not be removed till twenty years after the adverse possession began, they would still have ten years to enter or bring ejectment. And thus thirty years' adverse possession, or more, may be necessary to bar an entry or ejectment. *Ibid.*

23. And though these disabilities be removed, if the right of entry or ejectment be suspended by the intervention of a particular estate, existing at the time of their removal, as a tenancy by the courtesy initiate, during their existence, and consummate *eo instante* that they determine, the owners still have ten years to enter or bring ejectment after the particular estate-determined. *Ibid.*

24. Cumulative or successive disabilities, such as are mentioned by the proviso in the statute of limitations, are not allowed to stand in the way of the statute; but the intervention

of a particular estate is not within the rule. Thus, if the disseisin happens during infancy and coverture, and afterwards, before or at the determination of these disabilities, an estate by the courtesy intervene, it is not within the rule; but the rightful owner shall have yet ten years to enter or bring ejectment after the estate by the courtesy is determined. *Ibid.*

25. The statute of limitations does not run against remainder-men or reversioners during the continuance of the particular estate. It was aimed at those who may be guilty of *laches* in omitting to enter or bring actions; which cannot be said of remainder-men and reversioners, who have no right in law to do either. And this, whether the particular estate exist at the time of the disseisin, or arise subsequently; provided that, in the latter case, it be immediately preceded by a disability or disabilities within the proviso of the statute. *Ibid.*

26. A *capias ad respondendum*, to save the statute of limitations, is mere matter of form; and may be delivered to the sheriff, with instructions to return it *non est*. *Beckman v. Satterlee*, 5 Cow. 519.

27. If it be, by mistake, issued in favour of the plaintiff as executor, and the *pluries* be in the plaintiff's individual character, *semble*, this is no objection. *Ibid.*

28. But if otherwise, the first *capias* may be amended, even after verdict. *Ibid.*

29. An account, many items of which arose six years before suit, is not barred by the statute of limitations as to those items which arose more than six years before suit. And this rule extends as well to the defendant's account, introduced by way of set-off, as to the plaintiff's. *Tucker v. Ives*, 6 Cow. 193.

30. To save the statute of limitations, on the ground of unexecuted process within the six years, the plaintiff must reply that process was sued out, and returned *non est inventus*; and connect it, by continuances, with the immediate process on which the defendant was arrested; and this replication must be sustained by evidence. *Baskins v. Wilson*, 6 Cow. 471.

31. It is not enough to show that process was sued out, without being delivered to the sheriff or returned. *Ibid.*

32. The continuances may be entered at any time. *Ibid.*

33. An endorser is an incompetent witness for the endorsee, in a suit by him against the maker, even to prove the defendant's confession of the debt, so as to take it out of the statute of limitations, after the maker's signing has been proved by another. And where the endorser deposed that he had disposed of all his interest in the note, and believed that he had not been made responsible; *held*, that this was not sufficient to do away the presumption of law that he was interested. *Ibid.*

34. But, *semble*, that if he be not responsible as endorser, he would not be so far interested, by reason of an implied warranty of the genuineness of the note, as to preclude his being a witness to show the maker's confession, so as to take the note out of the statute of limitations, after the maker's signature had been proved by another. *Ibid.*

35. An acknowledgment of a debt, in order to take it out of the statute of limitations, must clearly refer to the very debt in question between the parties. *Clarke v. Dutcher*, 9 Cow. 674.

36. Where there is no dispute what the facts are, which are insisted on as taking a debt out of the statute of limitations, their effect is a question of law; otherwise, where the facts are doubtful upon the evidence; the question is then one mixed of law and fact. *Ibid.* *S. P. Read v. Hurd*, 7 Wend. 408.

37. A lessor had, for a great number of years, received from his tenant annually a few shillings more rent than was due; and his tenant at length sued him before a justice for the excess he had paid; some having been paid more, and some less than six years before suit brought. The lessor asked the tenant before declaration put in, why he had sued him? who told him he had sued him for the excess of four or five shillings per year; and the lessor replied, "It has been an old custom of mine to take so much." The tenant asked him if custom made law? He said he did not know that it did in this case. *Held*, that this did not amount to such an admission as would take the claim out of the statute of limitations. *Ibid.*

38. The acknowledgment of a defendant, to take a case out of the operation of the statute of limitations, must be an unequivocal and positive recognition of a subsisting claim in favour of the plaintiff; it must be an admission of a previous subsisting debt, which he is liable and willing to pay; and must not be accompanied by circumstances repelling the presumption of a promise to pay the debt. *Purdy v. Austin*, 3 Wend. 187.

39. Where the maker of a promissory note, barred by the statute of limitations, on the presentation of the note to him for payment, said, that he had paid it in services done for the payee; *it was held*, that this declaration was not such an admission of a subsisting indebtedness from which a promise could be implied. *Bradley v. Field*, 3 Wend. 272.

40. A plaintiff cannot, to save the statute of limitations, avail himself of a *capias* which was issued within the six years, regularly returned, entered on a continuance roll, and the continuances carried down to the time of the issuing of the process on which the defendant was arrested, unless the plaintiff shows that such process is a continuation of the process originally issued, as that it is an *alias* or *pluries*. The continuation of the suit must be proved, and will not be presumed. *Soulden et al. v. Van Rensselaer*, 3 Wend. 472.

41. Where a plea of *non assumpsit infra sex annos* was put in, and the plaintiffs replied a new promise, and gave evidence in support of the replication on the trial of the cause; *it was held*, that the issue, though informal, was not immaterial, and that the defect was cured by the verdict. *Ibid.*

42. An acknowledgment which is to have the effect of taking a stale demand out of the operation of the statute of limitations, ought to be clear and explicit in relation to the subject or demand to which it refers. *Stafford v. Bryan*, 3 Wend. 532.

43. If effect can be given to the declarations or admissions which may be proved to have been made by a defendant, without referring them to the demand upon which the suit is brought, they will not be considered as referring to such demand, and as evidence of a new promise to pay it, especially where the defendant, in an answer to a bill of discovery, denies under oath that he has ever acknowledged or promised to pay the demand. *Ibid.*

44. The statute of limitations cannot be set up in bar to a recovery against the grandchildren of a person dying seised, against whom there was no adverse possession, where, at the decease of the grandfather, the mother of the lessors, through whom the estate descended to them, was under coverture, against whom the statute had not began to run; and the action is brought within ten years after the decease of their father, the tenant by the courtesy. *Moore v. Jackson*, 4 Wend. 59.

45. The crime of an accessory before the fact to a murder is murder, and is not barred by the statute of limitations. *People v. Mather*, 4 Wend. 229.

46. The former statute of limitations, though not containing such an express exception, is no bar to a recovery in an action of *assumpsit* by an executor, although more than six years had elapsed after the cause of action accrued before suit brought, if it be shown that a suit, prosecuted for the same cause of action, by the testator, within six years after the accruing of the same, abated by his death; and that within one year after his death, his executor commenced the present suit. *Schermerhorn et al. v. Schermerhorn et al.* 5 Wend. 513.

47. A stipulation not to plead the statute of limitations, in a prosecution for any balance that may be due on a note particularly described, may be used in support of the money counts, though the note be adjudged illegal and void. *Utica Insurance Company v. Bloodgood*, 4 Wend. 652.

48. To save the running of the statute of limitations, by the issuing of process and continuances, the issuing and return of the first process must be shown, and the process on which the defendant is arrested must be produced, so that it may be connected with the first process by the continuances entered on the record. *Davis et al. v. West*, 5 Wend. 63.

49. A plea of the statute of limitations of the state where the contract is made is no bar to a suit brought in a foreign tribunal to enforce the contract; but a plea of the statute of limitations of the state where the suit is brought is a good bar. *Lincoln v. Battelle*, 6 Wend. 475.

50. A law of a foreign country, authorizing proceedings calling on creditors to present their demands against a debtor by a specified day, and declaring the effect of omission to be, not only to take away the remedy, but to extinguish the debt, will be considered, where there is no insolvency and no surrender of property, in the nature of a statute of limitations, affecting the remedy, and not the validity of the contract. *Ibid.*

51. The statute of limitations is not a bar to an action of debt upon an award, under the hands and seals of arbitrators, although the sub-

mission be not under seal. *Smith v. Lockwood*, 7 Wend. 241.

52. Where a debtor virtually admitted a demand barred by the statute of limitations to be unpaid, but instead of promising to pay it, or expressing a willingness to pay it, declared his inability to do so, that he hoped to see his creditors, and to do something about it; it was held, that what was thus said was not such an acknowledgment of a subsisting debt as to authorize the implication of a new promise. *Hancock v. Bliss*, 7 Wend. 267.

53. A promise is not to be implied, if from all the conversation the presumption of a promise is repelled. *Ibid.*

54. To entitle a party to the protection of the proviso in the statute of limitations in favour of infants, &c., the infancy, and the bringing of the suit within the time limited after disability removed, must be specially pleaded. *Hyde v. Stone*, 7 Wend. 354.

55. The acknowledgment of a previous debt due from a firm, made by one partner after the dissolution of the partnership, binds the other so far as to prevent him from availing himself of the statute of limitations: such acknowledgment is admissible to repel the presumption of payment of a debt which is shown to have once existed against the firm, although not competent to create a debt; so held, in this case, where the admission was made twelve years after the dissolution. *Patterson v. Choate*, 7 Wend. 441.

56. Where the testimony was, that the partner said that the balance was due at the time of the dissolution, and had not been paid to his knowledge, and then the witness added, on examination, that the expression was "that the balance was due at the time of the dissolution, and still is due," or "that it was then due, and had never been paid;" held, that it amounted to an admission of a subsisting indebtedness. *Ibid.*

57. The limitation to actions of ejectment for dower, created by the revised statutes, requiring a widow to demand her dower within twenty years after the death of her husband, does not apply when the husband died previous to the revised statutes going into effect. *Seyre v. Wisner*, 8 Wend. 661.

58. A statute is never construed to operate retrospectively, so as to take away a vested right. *Ibid.*

59. Where, from the commencement to the termination of an account, charges have been made at least as often as once in six years, and the last item is within six years anterior to the commencement of a suit, the whole of the account is to be allowed, notwithstanding that the statute of limitations is interposed as a bar. Accordingly, where a defendant was sued in 1829 on a demand accruing in 1826, and he proved an account against the plaintiff by way of set-off, consisting of items accruing, some in 1826, others in 1822, and others in 1818; it was held, that the items accruing in 1826 drew after them the previous charges, and saved them from the operation of the statute. *Chamberlin v. Cuyler*, 9 Wend. 126.

60. The fact that the transactions to which the charges relate are of separate and distinct natures does not affect the principle. *Ibid.*

61. The statute of limitation of two years for suing out a writ of error commences running from the time of the entry of the rule for judgment, and not from the time of filing the record. *Fleet v. Youngs*, 11 Wend. 522.

62. Where a writ of error is sued out after the expiration of the two years, the remedy of the defendant in error is not by motion to quash, but by plea. *Ibid*.

63. The statute of limitations is no bar to a suit against an executor, or administrator, for a demand not barred at the death of the decedent, provided such suit be commenced within eighteen months after his death. *Wenman v. The Mohawk Insurance Company*, 13 Wend. 267.

64. The statute begins to run against a note payable on demand from the day of the date of the note; but it is otherwise as to one payable at a given day after demand; in the latter case, it commences running only from the time of the demand.

65. The giving of a note, to secure the payment of interest, accrued on another note previously given, is a sufficient acknowledgment of the existence of a debt to take a case out of the operation of the statute. *Ibid*.

66. Previous to the provisions of the revised statutes, requiring a *capias* sued out, to prevent the running of the statute of limitations, to be issued to the sheriff of the county where the defendant resides, a *capias* issued to the sheriff of a county different from that in which the defendant resided was a good commencement of the suit to save the statute. *Jackson v. Brooks*, 14 Wend. 649.

67. To revive a debt barred by the statute of limitations, there must be either an express promise or an acknowledgment of a present indebtedness; a subsisting liability and a willingness to pay. *Allen v. Webster*, 15 Wend. 284.

68. An estate upon condition vests, if the condition be performed in substance; a literal performance need not be shown. *Livingston v. Livingston*, 15 Wend. 290.

69. The statute of limitations may be pleaded by an attorney in a suit against him by his client: the doctrine that a trustee cannot plead the statute does not apply to such case. *Staford v. Richardson*, 15 Wend. 302.

70. A demand barred by the statute is revived only by an express promise, or an admission of a subsisting debt, which the debtor is willing to pay. *Ibid*.

71. An action against an attorney, for moneys collected by him, must be brought within six years after the money is received by him, or the plaintiff will be barred by the statute of limitations; the fact that a demand was not made within six years before suit brought will not save the statute. *Ibid*.

72. The rule requiring a demand before suit is for the protection of the attorney against costs, and cannot be converted into a means of annoyance. *Ibid*.

73. The payment of a running account down to a particular period, and the taking of a receipt for such payment, is not such a transaction as will bring a case within the exception of the statute of limitations as to mutual accounts,

so that an item within six years will draw after it items beyond six years, extinguished by such payment. *Edmondstone v. Thomson*, 15 Wend. 554.

74. The case of *Chamberlin v. Cuyler*, 9 Wend. 126, declared to have been decided solely upon the principle of the mutuality of accounts. *Ibid*.

75. Where a defendant is proceeded against by declaration under the statute, instead of *capias*, the suit is not considered as commenced until the defendant is personally served with the declaration; the filing of it, entry of the rule to plead, and efforts to serve it, will not suffice to save the statute. *Ibid*.

76. Where, from the evidences relied on for a new promise, to save the statute of limitations, it appears that the defendant denied all indebtedness to the plaintiff, nothing that was said by the defendant can be construed into a new promise, or recognition of indebtedness from which a promise may be implied. *Graylord v. Van Loan*, 15 Wend. 308.

77. It seems, however, even previous to these statutory provisions, if the delivery of the writ was accompanied with instructions to the sheriff not to serve it, or other facts existed showing that the plaintiff intended that the process should not be served, that the suing out of such writ under such circumstances would not save the statute, and consequently that the decision of *Beekman v. Satterlee*, 5 Cow. 519, is questioned. *Ibid*.

LOCATION.

1. A practical location by a party, or his recognition of a line, giving him less land than the actual courses and distances in his deed, may be valid, though he do not know at the time that it will have such an effect. *Rockwell v. Adams*, 7 Cow. 761.

2. To bind him, there need not be an express agreement. Acquiescence for a length of time is evidence of such an agreement; and when the line has been acquiesced in for a great number of years by all the parties interested, it is conclusive evidence of an agreement to the line. *Ibid*.

3. P. conveyed to C. "150 acres of land, being and lying in township No. 1, west of said Genessee river, (southeast corner of said town, beginning two miles north of Canawagus and bounding on the said river,) to be in common and undivided; held, that the words beginning and bounding referred to the one hundred and fifty acres, not to the town or corner of the town. *Jackson v. Van Antwerp*, 8 Cow. 273.

4. Upon such doubtful words, a practical location either way, and an acquiescence by the parties for a time, so long as from 1790 to 1826, would bind. *Ibid*.

IDIOTS AND LUNATICS.

1. Where an act is sought to be avoided on the ground of mental disability, the proof lies

with him who alleges it. *Jackson, ex dem. Cadwell, v. King*, 4 Cow. 207.

2. Till the contrary appears, sanity is to be presumed. *Ibid.*

3. But after a general derangement is shown, it then is incumbent on the one who insists that the act was valid, to show sanity at the very time when it was performed. *Ibid.*

4. What shall constitute that derangement or imbecility of mind which renders a party incapable of contracting. *Ibid.*

5. Idiots and lunatics, or persons *non compos*, are of this description; and the disability is confined to these. *Ibid.*

6. One *non compos* is one who has wholly lost his understanding; and of such persons only, till since the revolution, did even the Court of Chancery entertain jurisdiction. *Ibid.*

7. It does not follow that because, according to the modern doctrine of the Court of Chancery, one would be the proper subject of a commission in nature of a writ *de lunatico inquirendo*, that his acts are void or voidable in a Court of law. *Ibid.*

8. The question as to the validity of a deed executed prior to such a commission would not be at all affected by it. *Ibid.*

9. For, to affect a deed at the common law, an entire loss of the understanding must be shown. The common law has drawn no line to show what degree of intellect is necessary to uphold it. *Ibid.*

10. Such distinction shows to be impracticable. *Ibid.*

11. But mere weakness of understanding is an item in the proof of fraud. *Ibid.*

12. Against this a Court of equity will relieve when it can be collected from the circumstances. *Ibid.*

13. So will a Court of law, where fraud is clearly established. *Ibid.*

14. But Courts of equity and law have not always concurrent jurisdiction in cases of fraud. *Ibid.*

15. The distinction goes upon the kind and degrees of evidence. *Ibid.*

16. *E. g.* at law, fraud must be proved, not presumed. *Ibid.*

17. Whereas, in equity, it may be presumed, from the relative situation of the parties, inadequacy of price, want of correct information, &c. *Ibid.*

18. The lunacy of a person who has executed a power of attorney does not operate to revoke it; at least, until the fact of his lunacy has been properly established by an inquisition. *Wallis v. The Manhattan Bank*, 2 Hall, 495.

19. The plaintiff, having deposited in the bank of the defendants certain sums of money, executed a general power of attorney in favour of his brother, and afterwards became lunatic. The attorney attempted to draw the money, thus deposited, out of the bank, by virtue of his power; but the defendants refused to honour his checks, in consequence of the lunacy of the principal, who was then in an asylum for madmen; but there had been no inquisition, nor proceedings in Chancery, for the appointment of a committee of his estate; *held*, that the power

was not revoked by the lunacy of the plaintiff, and that the defendants were bound to pay interest on the deposits, from the commencement of the suit to the time of the judgment. *Ibid.*

LOAN OFFICER.

1. Delaware county was erected by an act of 10th March, 1797, from Ulster and Otsego. The act providing that deficiencies on mortgages to the new loan officers of Ulster, of lands situated in that part of Delaware taken from Ulster, should be paid by tax on the inhabitants of that part, &c.; *held*, that to determine the deficiency, the loan officers of Ulster were not bound either to advertise or sell in Delaware; but might do both in Ulster. *People v. Supervisors of Delaware*, 5 Cow. 436.

2. Though there be a default of payment on a mortgage to the loan officers, under the act of April 11, 1806, (sess. 41, ch. 216, 5 W. W. 392.) yet the mortgagor retains an equity of redemption till sale, as in the case of an ordinary mortgage, upon which a judgment recovered against him will become a lien; and it may be sold in execution, though the mortgagor has assigned it to another, who is the person making default. *Jackson v. Rhodes*, 8 Cow. 47.

3. After a sale, the purchaser may give notice to the commissioners of loans that he is an assignee; and redeem and receive a release as assignee pursuant to the act. *Ibid.*

4. At law, a deed from loan officers, in pursuance of a sale under a loan office mortgage, will be *held* conclusive, on showing a default in payment by the mortgagor, although the mortgaged premises were not duly advertised for sale. The remedy of the party entitled to the equity of redemption, if any, is in equity. *Brown v. Wilber*, 8 Wend. 657.

LOTTERY.

1. The defendant sold a ticket to the intestate in a lottery unauthorized by the laws of this state, which drew a prize of \$50,000. The defendant caused the prize to be discounted for the intestate, who, upon the close of the transaction, permitted him to retain \$10,000 by way of loan, for which the defendant gave his own promissory notes to the intestate. An action for money had and received being brought to recover the amount thus retained, the defendant set up the illegality of the transaction, under the lottery act, as a defence; *held*, that the loan of the money formed a good consideration for the *assumpsit*, and that the illegality of the original acts of the intestate and the defendant, in the purchase and sale of the ticket, could not be introduced as a defence to the action. *Hamilton v. Confield*, 2 Hall, 596.

MANDAMUS.

- I. *Where and to whom a mandamus lies.*
 II. *Rule to show cause; mandamus, and proceedings thereon.*

I. *Where and to whom a mandamus lies.*

1. *Mandamus* lies to correct erroneous practice of a Court of Common Pleas, except in mere matters of discretion. *Blunt v. Greenwood*, 1 Cow. 15.

2. *Mandamus* will not lie to compel a Court of Common Pleas to vacate a rule arresting judgment. *Ex parte Bostwick*, 1 Cow. 143.

3. The course is, for the party against whom the rule was made to apply for judgment against himself, and then bring error. *Ibid.*

4. If the Court below refuse to give judgment against him, this Court will then interfere by *mandamus*. *Ibid.*

5. A *mandamus* is proper where a party has a legal right, and there is no other appropriate legal remedy, and when in justice there ought to be one. But where a discretion is vested in any inferior jurisdiction, and that discretion has been exercised, *mandamus* will not be granted, for this Court cannot control, and ought not to coerce that discretion. *Ex parte Nelson*, 1 Cow. 417.

6. Allowing costs upon a *nolle prosequi* is a matter of discretion; and the Common Pleas having exercised that discretion by refusing costs, this Court have no power to interfere by *mandamus*. *Ibid.*

7. Even if giving judgment omitting costs is error, the proper remedy is by writ of error, not *mandamus*. *Ibid.*

8. The power to grant a *mandamus* is discretionary; and will be refused where the end of it is private right merely; and where the granting of it will be attended with manifest hardships and difficulties. *Van Rensselaer v. Sheriff of Albany*, 1 Cow. 509.

9. *Mandamus* does not lie where a party has a remedy by action. *Boyce v. Russell*, 2 Cow. 444.

10. Though a verdict in the Common Pleas be against the weight of evidence, and that Court, on motion, refuse a new trial, there being a counsellor at law on the bench, yet this Court will not interfere by *mandamus*. *Ex parte Baily*, 2 Cow. 479.

11. Because the granting a new trial rests in discretion. *Ibid.*

12. Though this Court might interfere by *mandamus* in an extreme case of this nature, as where there is no room for doubt, yet such remedy should be exercised very sparingly. *Ibid.*

13. Under the usual clause in an act dividing towns, requiring the supervisors, &c. to meet and apportion the poor and moneys of the respective towns, if they omit to do this, or do it partially, by omitting to pass upon a particular pauper, *mandamus* lies to compel them to correct the apportionment. *Supervisor, &c. of Sandlake v. Supervisor, &c. of Berlin*, 3 Cow. 485.

14. This Court will not grant a *mandamus* to compel an inferior Court to punish a man for a contempt, unless the civil rights of an individual are implicated in the proceeding. *Ex parte Chamberlain*, 4 Cow. 49.

15. When this is not the case, every Court must be the judge whether a contempt has been committed against it. *Ibid.*

16. The Supreme Court will not interfere by *mandamus* to control the mere chamber business of a judge of the Common Pleas. *Ex parte Brown*, 5 Cow. 31.

17. Setting aside a judgment by default in a Court of Common Pleas is matter of discretion with that Court; and this Court will not interfere on such a subject by *mandamus*. *Ex parte Bacon*, 6 Cow. 392.

18. The Supreme Court will not interfere by *mandamus* to compel a Court of Common Pleas to open a rule granted by default, on the ground that the attorney forgot to appear. *Ex parte Benson*, 7 Cow. 363.

19. It is a mere matter of discretion with the Common Pleas whether they will open the rule or not. *Ibid.*

20. A *mandamus* does not lie to coerce the discretion of an inferior tribunal. *Ibid.*

21. The Supreme Court will not interfere by *mandamus* to control the Common Pleas on a question of amending a formal defect which depends upon their rules of practice. *Ex parte Oster*, 7 Cow. 523.

22. *E. g.* allowing a party to enter rules for interlocutory judgment and assessment of damages *nunc pro tunc*. *Ibid.*

23. On application for a *mandamus*, where both parties are heard, and there is no dispute about the facts, and the law is with the application, a peremptory *mandamus* will be granted in the first instance. *Ex parte Rogers*, 7 Cow. 526.

24. Where a statute or charter positively requires that a certain number of persons shall be present at the consummation of any act, they must all be so present; and the act is not good though it be begun while all are present, if one of them depart, though wrongfully, before consummation. This rule exemplified by the cases. *Ibid.*

25. Otherwise, it would seem, where such presence is not thus positively required. *Ibid.*

26. All the integral parts of a corporation necessary to do an act must continue present till the act is consummated. *Ibid.*

27. What is meant by the integral parts of a corporation, with several examples. *Ibid.*

28. The Supreme Court will not attempt by *mandamus* to control or coerce the discretion of a subordinate tribunal; the Court will, however, review their decisions, when properly brought up; and if they erred in the application of legal principles to the cases before them, the proper remedy will be applied. *The People v. Columbia Common Pleas*, 1 Wend. 297.

29. The trustees of Brooklyn have a discretion, and may refuse to go on with proceedings commenced relative to the opening of streets in that village, until such proceedings have progressed so far as to give mutual rights to the parties. After rights have become vested by virtue of such proceedings, they cannot refuse with impunity to proceed, though it does not follow that a *mandamus* is the proper remedy for such refusal. To entitle a party to a *mandamus*, a complete, not an

inchoate right must be shown; and this writ will not be allowed, unless there is no other specific remedy. Where the trustees of Brooklyn refused to file a report of commissioners of estimate and assessment, and obtain a confirmation of the same, and have the damages which have been awarded assessed, this Court refused to issue a *mandamus*, but left the parties to their remedy by action. *The People v. The President and Trustees of Brooklyn*, 1 Wend. 318.

30. A writ of error does not lie upon the refusal of the Supreme Court to grant a peremptory *mandamus*, when application is made by motion; it lies for the relator, only when judgment is pronounced after issue joined upon plea or demurrer, interposed upon the coming in of the return to the alternative *mandamus*. *The People v. The President, &c. of Brooklyn*, 13 Wend. 130.

31. A judgment refusing a peremptory *mandamus* will not be reversed, unless from the record it appears that the alternative *mandamus* was upon its face *prima facie* sufficient to entitle the relator to the relief sought. *Ibid.*

32. Where such writ of error on such judgment is quashed upon the argument of the cause, no more costs will be awarded to the defendant in error than he would have been entitled to had the writ of error been dismissed previous to the joinder in error. *Ibid.*

33. Five years after the final disposition of an appeal cause in the Common Pleas, the Supreme Court will not interfere by *mandamus*, to direct the quashing of the appeal. *The People v. Delaware Common Pleas*, 2 Wend. 256.

34. A *mandamus* will not be granted, where the party has acquiesced for a year in the proceedings sought to be set aside. *The People v. Seneca Common Pleas*, 2 Wend. 264.

35. A *mandamus* lies to a circuit judge to seal a bill of exceptions; but the practice is, on complaint that a bill is erroneously settled, in the first instance to refer it back to the judge, to give him an opportunity to review it. *Delavan v. Boardman et al.* 5 Wend. 132.

36. A Court of Oyer and Terminer, after quashing an indictment, may, at a subsequent term, give leave to the public prosecutor to make up a record as if judgment had been rendered for the defendant on demurrer, for the purpose of enabling him to sue out a writ of error; and should such leave be refused, this Court will award a *mandamus*. *The People v. Stone*, 9 Wend. 182.

37. Instead of an alternative *mandamus* to a Court of Common Pleas to vacate a rule ordered by it, this Court in the first instance grants an order to show cause. *Anonymous*, 9 Wend. 472.

38. A *mandamus* will not be granted commanding a justice to proceed in a suit before him in which he had given judgment of nonsuit, which subsequently was reversed in the Common Pleas. *Anonymous*, 9 Wend. 503.

39. Where a subordinate Court sets aside a verdict as against evidence, or refuses to set it aside on that ground, this Court will not interfere by *mandamus*, except in extreme cases where there is no dispute about facts, and the Court below consequently has no discretion to

exercise. *The People v. Superior Court of New York*, 10 Wend. 285.

40. A *mandamus* will not be awarded where a subordinate tribunal has an absolute discretion, without other control than its own judgment, as where criminal Courts are authorized in their discretion to fix the term of imprisonment of convicts within certain periods, or to impose fines within certain amounts, or where supervisors have power to audit accounts and fix the amount; but where the law has given to parties rights as growing out of a certain state of facts, their discretion ceases, and if the tribunal charged with the matter commits an error, its acts will be reviewed. *Ibid.*

41. Where a Court of Common Pleas set aside a report of referees on the merits, and err in so doing, a *mandamus* lies to correct the error. *The People v. Niagara Common Pleas*, 13 Wend. 246.

42. A *mandamus* lies where there is no other remedy at law, and it is no objection to the granting of it that the party asking the aid of such process may resort to a Court of equity, or that his adversary may be punished criminally for omitting to do the act to compel the performance of which the *mandamus* is asked for. *People v. Mayor of New York*, 10 Wend. 393.

II. Rule to show cause; *mandamus*, and proceedings thereon.

43. Form given of a *mandamus* to Common Pleas to vacate a rule. *Blunt v. Greenwood*, 1 Cow. 15; 22, note (c).

44. To commissioners of highways to lay out and open a road. *The People v. Commissioners of Salem*, 1 Cow. 23.

45. On setting aside a *ca. sa.* for irregularity, the Court of Common Pleas required the party against whom it issued to stipulate that he would not bring false imprisonment; and on motion to this Court for a *mandamus*, requiring them to vacate the condition; *held*, that this was matter of discretion in the Court below, with which this Court would not interfere. *In the matter of Gilbert*, 3 Cow. 59.

46. Under the seventh section of the fourth article of the constitution, the judges of the Common Pleas have a discretion whether they will hear a charge preferred against a justice of the peace; and the Supreme Court will not interfere with its exercise. *Ex parte Johnson*, 3 Cow. 371.

47. Form of an alternative *mandamus* to a Court of Common Pleas commanding them to seal a bill of exceptions. *The People v. Judges of Westchester*, 4 Cow. 73.

48. It did not set forth the bill; yet *held* sufficient. *Ibid.*

49. It was served in vacation, by showing each judge separately the original *mandamus*, and delivering him a copy; *held*, a good service. *Ibid.*

50. A motion to quash an alternative *mandamus* may be made before the writ is returned. *Ibid.*

51. Alternative *mandamus* to the judges of the Common Pleas is in nature of a rule to show cause, may be served in vacation by showing the original and delivering a copy, the

judges should return without waiting to receive the writ, and the relator should cause this to be filed. *The People v. Judges of Westchester*, 4 Cow. 403.

52. Where, on motion for a *mandamus*, upon notice, the case is clear against the relator, the Court will deny it with costs. *Ex parte Root*, 4 Cow. 549.

53. On motion for a *mandamus*, heading the affidavit, "Supreme Court: in the matter of J. L. against the judges, &c." is not such an entitling as to prevent its being read. *Ex parte La Farge*, 6 Cow. 61.

54. Peremptory *mandamus* granted on motion, the return to an alternative *mandamus* being insufficient. *The People v. Seymour*, 6 Cow. 579.

55. On a return to a *mandamus*, the relator may demur or traverse, but he cannot do both. A rule both to join in demurrer and reply is irregular. *Fail et al. ads. The People*, 1 Wend. 38.

56. Where the defendants in an action apply to the Supreme Court for a *mandamus* to the judges of the Court below, and the plaintiffs oppose the issuing of a peremptory *mandamus*, and request a return to be made to the alternative *mandamus*, they are not liable to the costs of suing out the writ, although the relators obtain a judgment by default, on a demurrer directed by the Court on the return of the writ, the plaintiffs not having appeared or been made parties to the demurrer. *The People v. Jefferson Common Pleas*, 2 Wend. 301.

57. Where an application is made for a peremptory *mandamus* on the return of an alternative writ, the papers on which the original motion was made must be presented, and the points stated in writing in support of the application. *The People v. Delaware Common Pleas*, 2 Wend. 255.

58. To a return to a *mandamus* a relator is not allowed to demur specially; if dissatisfied with the return, he may obtain a further or supplementary return. *The People v. Onondaga Common Pleas*, 9 Wend. 499.

59. If an alternative *mandamus* is defective either in form or substance, the defendant may move to quash it. *Commercial Bank of Albany v. Canal Commissioners*, 10 Wend. 25.

60. In a return to an alternative *mandamus*, the defendant must either deny the facts stated in the writ, or show other facts sufficient to defeat the relator's claim. *Ibid.*

61. A return to an alternative *mandamus* setting forth or referring to matters of evidence from which certain facts may be inferred, instead of positively and distinctly alleging the facts relied upon in answer to the *mandamus*, is bad, and may be demurred to. *Ibid.*

62. Although such pleading demurred to is bad either in form or substance, yet if some previous pleading is defective in substance, judgment must be given against the party who has committed the first fault. *Ibid.*

63. At any time after a return to an alternative *mandamus*, before a peremptory *mandamus* is awarded, the defendant may object a want of sufficient title in the relator to the relief sought, or show any other defect in substance; though, it seems, that after a return advantage cannot be taken of defects in form. *Ibid.*

64. In an alternative *mandamus*, the relator sets forth his title, or the facts on which he claims a right to the relief sought for, and the defendant is required to do the particular act, or show cause why he has not done it. *Ibid.*

65. Upon the coming in of a return to an alternative *mandamus*, the relator may be ruled to plead or demur to the return within twenty days. *The People v. Cayuga Common Pleas*, 10 Wend. 632.

66. Notwithstanding such rule, the relator may within the twenty days apply at a special term by *parol*, on due notice, for a peremptory *mandamus*. *Ibid.*

67. Where a rule to show cause why a *mandamus* should not be issued has been obtained, and cause is shown, but not satisfactory, a peremptory *mandamus* will be granted in the first instance; but for the purpose of suing out a writ of error, the defendant may make up the record *pro forma*. *People v. Throop*, 12 Wend. 183.

68. If the opposite party appears to show cause why a *mandamus* should not be issued, the relator holds the affirmative. *Ibid.*

69. An alternative *mandamus* may be made returnable at a special term; it is not process, within the meaning of the statute regulating the tests and return of process. *The People v. New York Common Pleas*, 13 Wend. 649.

MARRIAGE PROMISE.

1. In an action for a breach of a marriage promise, a witness may be asked his opinion, whether, living with the plaintiff, and from an observance of her deportment, &c., he is of opinion that the plaintiff was sincerely attached to the defendant. *M'Kee v. Nelson*, 4 Cow. 355.

2. The father of the defendant may be asked if he did not remonstrate with the defendant against the marriage; but shall not be allowed to specify immoral conduct, as the ground of such remonstrance, unless he personally knows the ground to be true. *Ibid.*

3. Unchastity or immorality in the plaintiff may be given in evidence by the defendant. *Ibid.*

4. A jury may infer mutual promises of marriage from the defendant's visits to the plaintiff as a suitor, and his declarations that he had promised to marry the plaintiff. *Southard v. Rexford*, 6 Cow. 254.

5. After a defendant has once broken a promise of marriage, his offer to renew it is no defence to an action for the breach. *Ibid.*

6. In an action for breach of promise of marriage, if the defendant give notice, with his plea, that he will prove that the plaintiff has been guilty of fornication, but fail entirely to show it on the trial, the jury may consider this in aggravation of damages. *Ibid.*

7. The damages in this action are in the sound discretion of the jury, under the circumstances of each particular case. *Ibid.*

8. The promise to marry by an infant is a

good consideration for a corresponding promise. *Williard v. Stone*, 7 Cow. 22.

9. The contracts of infants are not void, but voidable at their election merely. *Ibid.*

10. In an action by a female for breach of promise of marriage, the defendant cannot show by general reputation that after promise another had supplanted him in the affections of the plaintiff. *Ibid.*

11. But he may show, that even after he had broken off all intimacy with the plaintiff, she was guilty of indecent and lascivious familiarities with another man. *Ibid.*

12. Where a promise to marry generally was proved without any time fixed; but the defendant broke off all intimacy with the plaintiff, and on request did not explain why; *held*, that it might be left to the jury to infer a refusal to marry. *Ibid.*

MASTER AND SERVANT.

1. In general, the plaintiff has his election to bring case or trespass for debauching his female servant. *Moran v. Dawes*, 4 Cow. 412.

2. Case is, in all cases, a proper remedy. *Ibid.*

3. To establish the relation of master and servant, in this action, the slightest acts of service are sufficient. *Ibid.*

4. Where one enters into a contract and performs part, and then, without cause, and without the agreement or fault of the other party, of his own mere volition, abandons the performance, he cannot recover for what he has done. *Lantry v. Parks*, 8 Cow. 63.

5. Accordingly, where L. hired to P. for a year; and after working ten months and a half went away, saying he would work no more for P.; but two days after returned, and offered to fulfil his contract, which P. would not permit; *held*, that L. could not recover any thing for the time he had worked. *Ibid.*

6. Where a servant on contract for a certain cause goes away, declaring he will work no more, the master is not bound to receive him again; nor can the servant recover a *pro rata* compensation. *Ibid.*

7. Where a servant hires himself for a fortnight, and quits at the end of ten days, in consequence of rough language from his master, he is not entitled to compensation for the ten days' labour. *Marsh v. Ruleson*, 1 Wend. 514.

MERGER.

1. Where a person who has an annuity charged upon certain real estate, inherits one-half of such estate as the heir at law of the devisee, of the grantor of the annuity, one-half of the annuity becomes merged by the descent thus cast upon him. *Jenkins v. Van Schaick*, 3 Paige, 24

MICHIGAN TERRITORY.

1. The government of the territory of Michigan have the power, under the law organizing the territory, to incorporate a banking company. *Bank of Michigan v. Williams*, 5 Wend. 478.

MILITARY LANDS.

1. A defendant in ejectment, though he settled under colour of a *bona fide* purchase on a military lot, may be turned out of possession, without pay for his improvements, within the statute, (1 R. L. 303, s. 2, 4, 3 W. and S. 399; sess. 26, ch. 78, s. 2.) unless he show that he settled there before the 8th day of April, 1813, when the last act concerning lands in the military tract passed. *Jackson v. Chapman*, 3 Cow. 390.

2. Where two successive conveyances of military lots were made by the patentee before the statute of January 8th, 1794, (1 R. L. 309.) neither of which were deposited in the clerk's office of Albany, pursuant to that act; *held*, that the deed last executed took preference. *Jackson v. Harrington*, 6 Cow. 135.

3. *Held*, also, that a conveyance by the patentee for a valuable consideration, subsequent to the second, should take preference of that; but it appearing that it was executed pending an ejectment by those claiming under the second conveyance, to a grantee who had notice of that conveyance, and actual knowledge of the first; *held*, that it lay with the defendant to show otherwise than by his last conveyance that a valuable consideration was, in fact, paid. *Ibid.*

4. Whether a subsequent conveyance for a valuable consideration, with notice of a prior deed, comes within the protection of the statute, (1 R. L. 309.) or it must be *bona fide* in the full sense of the terms? *Quære. Ibid.*

5. To render the conveyance of a military lot, executed before January 8th, 1794, valid as against a subsequent purchaser, not only the immediate deed must have been deposited pursuant to the act of 1794, (1 R. L. 309, 311.) but also the power of attorney under which it was executed. *Jackson v. Bowen*, 6 Cow. 141.

6. The statutes (sess. 17, ch. 1, and ch. 44, 1 R. L. 309, 311.) requiring certain deeds, &c. of land in the military tract to be deposited in the Albany clerk's office by May 1st, 1795, or that they should be void as against subsequent purchasers, &c., does not extend to the grantor or his heirs. A deed not deposited is good as against him and his heirs. *Jackson v. Phillips*, 9 Cow. 94.

7. A deed relating to these lands was found in the clerk's office of Cayuga, in December, 1826, dated June 4th, 1790, but not recorded there. It was acknowledged June 26th, 1790, and endorsed as recorded in the secretary's office, April 18, 1795, and endorsed also, generally, "Registered April 29th, 1795." *Scilicet*, that it shall be taken *prima facie* to have been

deposited in the clerk's office at Albany, before the first of May, 1795. *Ibid.*

8. The form of a certificate of the proof to be endorsed on a deed in order to make it evidence, and entitle it to be recorded under the act of 1788. (Sess. 11, ch. 44, 2 Greenleaf, 99.) It need not state that the officer knew the witness, or that the witness knew the grantor. *Ibid.*

9. A deed of military land having been duly acknowledged and recorded in April, 1795, (not according to the act of 1813,) so as to make it evidence according to the existing laws of 1795, may be read in evidence now, though not acknowledged or recorded pursuant to the act of 1820, (sess. 43, ch. 245, s. 1.) and though that act literally prohibits all deeds dated before 1797 from being evidence, unless acknowledged or proved according to the statute of 1813. (Sess. 36, ch. 97, s. 1.) *Ibid.*

10. Specimen of an entry in the balloting book of land drawn to a revolutionary soldier. *Jackson v. Cody*, 9 Cow. 140.

11. This is the authority for a patent. Per *Sutherland, J.*, delivering the opinion of the Court. *Ibid.*

12. A registry of deeds of military bounty lands by the clerk of Albany, appears by the case to be merely setting down the names of the grantors in a book, in order, as directed by the act of January, 1794, not copying or recording the whole deed, as under the general registry acts. *Ibid.*

13. Where a patent of land was granted to a soldier, who died intestate, without children, and leaving a father and brothers, before our statute of descents, in consequence of which, the land descended to his elder brother, as at common law, who conveyed the land on the 20th of November, 1795, subsequent to the statute of descents, to a *bona fide* purchaser; held, that the grantee of the brother should be preferred to the subsequent grantee of the father, who would have been preferred by the statute of descents; this being a case within the exception of the eighth section of the statute of 1803, (sess. 26, ch. 88.) and seventh of the act of 1813. (1-R. L. 305.) The words, held by *bona fide* purchasers or devisees, used in those acts, do not contemplate an actual possession and improvement of the land; but any one holding the legal title. *Jackson v. Mumford*, 9 Cow. 254.

14. The act of the 6th of April, 1790, (sess. 13, ch. 59.) relative to the military bounty lands, (sec. 5, 2 Greenleaf, 333, 334.) did not validate a patent to a soldier who was not alive on the 27th day of March, 1783; so that nothing could pass by such a grant. (19 John. 198, S. P.) *Jackson v. Lyon*, 9 Cow. 664.

15. By the act of the 3d of April, 1807, (sess. 30, ch. 114, 5 W. L. N. Y. 124.) which vested the lands patented to John M'Cloghry, a deceased soldier, in his heirs, though aliens, in like manner as it would have descended to them if they had been citizens of the state at the time of his death, (1781,) according to the law of descents of this state, it was intended

that the heirs should take according to the law of descents at the time of passing the act. (19 John. 198, S. P.) *Ibid.*

16. The title of J. M.'s heirs, therefore, as as it respects any limitation, is to be deemed to have accrued from the time of passing the act. (19 John. 198, S. P.) *Ibid.*

17. But the act of April 5th, 1803, (sess. 26, ch. 88, 3 W. L. N. Y. 399, s. 1.) vested military bounty lands theretofore granted in the officer or soldier, as at the time of his death, whenever that happens; thus constituting him a stock of descent, and passing the land to his heirs *ex parte paterna*, and for default of them, then *ex parte materna*; and the Legislature could not, by the act of 1807, divest the title of the latter heirs. *Ibid.*

18. The state has no power to divest the title vested in one set of heirs, and pass it to another; *e. g.* from the heirs *ex parte materna* to those who, but for their alienism, would have been heirs *ex parte paterna*. *Ibid.*

19. In ejectment, the plaintiff claimed title under the alien heirs of a deceased soldier, such heirs being declared capable of taking, by a statute of 1807; but which statute was void, because the title had in 1781, on the death of the soldier, vested in his heir *ex parte materna*. The defendant, who claimed title under a deed from one of the alien heirs, showed the outstanding title, but did not connect himself with it, nor did he show that the heir *ex parte materna* had ever entered or claimed the land, from 1803, when his title accrued, to 1822. Held, no defence; and that the plaintiff should recover the rights of those alien heirs who had not conveyed; on the ground that the outstanding title was not shown to be a subsisting one; and a conveyance from the heir *ex parte materna* might be presumed. *Ibid.*

20. A sale by the surveyor-general of the survey of fifty acres in a lot in the military tract, under a six weeks' notice, commenced previous to the expiration of the time limited for the payment of the expense, is valid. *Jackson v. Ottz*, 2 Wend. 537.

21. The provision respecting payment for improvements in the act respecting the military tract is retrospective; that is, payment can be claimed only where a settlement was actually made on the lands previous to the passage of the act in 1813. *Jackson v. Caywood*, 7 Wend. 246.

22. So, also, the limitation as to bringing suits previous to the 1st January, 1823, only applies where the land was actually settled previous to 1813. *Ibid.*

23. A deed of the survey of fifty acres in a military lot from the surveyor-general to a purchaser is not within the purview of the acts of 1794, relative to military bounty lands, requiring deeds and conveyances concerning such lands to be filed and deposited. *Jackson v. Chamberlain*, 8 Wend. 620.

24. Nor is it necessary that a deed from such purchaser to his vendee should have been filed or deposited to give it validity; nor that it should be recorded, where such deed was executed before the recording acts. *Ibid.*

MILITIA.

1. A written memorandum by a captain of a company of horse artillery, of an application to him by a member of his company to enrol his horse for service, is a sufficient enrolment under the militia law to exempt such horse from seizure under an execution. *Shields v. Crany et al.* 3 Wend. 274.

2. A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, is directory merely, unless the nature of the act is to be performed, or the phraseology of the statute is such, that the designation of time must be considered as a limitation of the power of the officer; and it was accordingly held, that a brigade order constituting a Court Martial issued in July, when, by the militia law under which the proceeding was held, it was made the duty of the commandant of the brigade to issue such order on or before the first day of June in every year, was valid. *The People v. Allen*, 6 Wend. 486.

3. Individuals liable to militia duty, who appear at places of rendezvous in unusual and fantastical dresses, and thus excite laughter, disorder, and confusion, are liable to be returned and punished as delinquents. *Rathbun v. Sawyer*, 15 Wend. 451.

4. It is discretionary with a Court Martial whether counsel shall or shall not be allowed to a party accused as a delinquent. *Ibid.*

5. It seems, it is not necessary that Courts Martial should hold their sittings in public. *Ibid.*

MORTGAGE.

- I. *What will be deemed a mortgage; its execution, and how avoided.*
- II. *Nature of a mortgage, and its construction.*
- III. *Estate and interest of the mortgagor and mortgagee.*
- IV. *Registry of mortgages, and priority of encumbrances.*
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I. *What will be deemed a mortgage; its execution, and how avoided.*

1. Where a party, whose personal property has been seized under an execution against him, and a sale of it forced, with great rigour and oppression, and at enormous sacrifice, by the deputy sheriff, acting in concert with the creditor, who is the chief bidder at the sale, is induced, in order to avoid the sacrifice of the whole property, to yield to the demands of the creditor, and to give him a bond and mortgage for a large sum of money, so as to cover not only the amount of the execution, but also debts due from a son of the debtor, who is insolvent, the sale will be declared oppressive and illegal

by a Court of equity, and the bond and mortgage, as having been oppressively and illegally obtained, will be directed to stand as security for the amount only which is due on the execution, with interest and costs; and, on payment of that amount, to be delivered up and cancelled. *M'Donald v. Neilson*, 2 Cow. 139.

2. But where, in such case, the creditor has other demands against the debtor, though they could be enforced in a Court of equity only, the bond and mortgage shall also stand as security for them. *Ibid.*

3. And if it appear, moreover, that the bond and mortgage were executed upon full and adequate consideration, and are, on the whole, reasonable, the Court will not interfere; especially where the debtor has delayed all objection to the security so long that the creditor cannot be reinstated in his original rights. *Ibid.*

4. A legal act will always be presumed to have been done for a legal purpose, unless the contrary is made to appear by positive proof or the strongest circumstantial evidence. Per *Sutherland, J.* *Ibid.*

5. But when it does appear to have been done for an illegal purpose, a Court of equity will restrict its operation to the object which might legally have been accomplished by it. *Ibid.*

6. A deed, absolute on the face of it, but intended by the parties as a security merely for a debt, though registered as a deed, is valid and effectual between the parties as a mortgage; but it is liable to be defeated by a subsequent mortgage duly registered. *James v. Morcy*, 2 Cow. 246.

7. A conveyance of property absolute in terms, if intended by the parties to be a security for a debt, is a mortgage. *Clark v. Henry*, 2 Cow. 324.

8. And this, whether the intention is manifested by a written defeasance, executed simultaneously with the conveyance, or by the parol declarations or the acts of the parties. *Ibid.*

9. H. was indebted to C. on promissory notes of \$225, and executed an assignment to C., absolute in its terms, of a mortgage which H. held against one D. for \$1065.03, and C. and H. at the same time destroyed the notes; and C. executed to H. a writing, by which he promised to sell the mortgage to H. if he would pay C. \$225 by a certain day; and H. failed in the payment; and C. declared several times before the day of payment, that he held the assignment as security for his debt; held, that the assignment was a mortgage, and not a conditional sale, and that H. might redeem on paying the debt due to C. with interest. *Ibid.*

10. There is no exception to the rule, that a conveyance which is once a mortgage is always a mortgage. *Ibid.*

11. No agreement in a mortgage, to change it into an absolute conveyance, upon any event, will be allowed to prevail by a Court of Chancery. *Ibid.*

12. A commissioner to take the acknowledgment of deeds has no power to take the acknowledgment of a mortgage out of the state. *Jackson, ex dem. Walsh, v. Childen*, 4 Cow. 266.

13. Though, *semble*, he may take the acknow-

ledgment in any county within the state, though out of the county for which he is appointed. *Ibid.*

14. The reference in a mortgage to a collateral security was a bond bearing even date for \$750, executed by the mortgagor to the mortgagees. The bond intended was dated a few days prior to the date of the mortgage; was to the mortgagees and two others; and was a bond of indemnity, &c. against a promissory note for \$750, executed by the mortgagees and the two others, to the mortgagor, or order, dated November 18th, 1817, which the makers were obliged afterwards to pay; held, that the variance was immaterial, and that the reference was sufficiently certain; or if not, that it might be made so by parol evidence, showing that this was the bond intended. *Jackson v. Bowen*, 7 Cow. 13.

15. Whether a total misdescription of the bond would have vitiated the mortgage? *Quære. Ibid.*

16. The note intended by the mortgage was, on demand, payable to the mortgagor or bearer, and dated the 17th of November, 1817; whereas the bond recited it as a note for \$750, generally, payable to the obligor or order, and dated the 18th of November, 1817. Held, that the variance was immaterial; and that the obligees might show by parol what note was intended by the bond. *Ibid.*

17. A conveyance of property absolute in terms, if intended by the parties to be a security for a debt, is a mortgage; and such intentions may be manifested, either by a written defeasance, executed simultaneously with the deed, or by the acts or parol declarations of the parties. *Lane v. Shears*, 1 Wend. 433.

18. A conveyance of land, accompanied by another instrument showing the conveyance to have been intended as a security in the nature of a mortgage, though absolute in its terms, will be considered as a mortgage; and, not being registered or recorded, will be adjudged inoperative and void as against a subsequent bona fide purchaser for a valuable consideration without notice. *Brown v. Dean et al.* 3 Wend. 308.

19. A release of the equity of redemption obtained by a mortgagee is a satisfaction of the mortgage, and also of the bond accompanying it as collateral security, if the property when the release is obtained is equal in value to the debt for which it was mortgaged. If it be of less value than the debt, it is payment *pro tanto*. *Spencer v. Harford's Executors*, 4 Wend. 381.

20. A foreclosure of mortgaged premises without sale does not operate as an extinguishment of the debt, unless the mortgaged premises are of sufficient value to pay the debt. *Ibid.*

21. An instrument giving security upon a chattel for payment of a debt at a future day, and providing that the debtor shall have possession of the chattel until that day, and on nonpayment of the debt authorizing the creditor to take possession thereof, is a mortgage, and not a pledge, although the words used are, "I hereby pledge and give a lien on," &c., instead of the ordinary terms of conveyance. *Langdon v. Buel*, 9 Wend. 80.

22. A deed conveying lands in fee, with a condition annexed, that if the grantor do and

shall pay certain legacies charged upon other lands sold and conveyed by the grantor to the grantee, then the deed to be void, is a mortgage, and no recovery can be had upon it by action of ejectment. The remedy of the party for the non-performance is in equity. *Stewart v. Hutchins*, 13 Wend. 485.

II. Nature of a mortgage, and its construction.

23. A power of attorney to execute a mortgage authorizes the attorney to insert in the mortgage a power of sale on default of payment. *Wilson v. Troup*, 2 Cow. 195.

24. This does not alter the nature of the instrument, or give any greater security than is implied in the word mortgage. *Ibid.*

25. The power to sell applies solely to the remedy, and impairs no right of the mortgagor. *Ibid.*

26. A power to give a mortgage must be taken to mean the instrument in common use as a mortgage, where the power is to be executed. *Ibid.*

27. Mortgages in this state generally include a power of sale, or summary foreclosure. *Ibid.*

28. And a power by a citizen of Pennsylvania to execute a mortgage in this state implies an authority to insert a power of sale, &c. *Ibid.*

29. A mortgage is a mere incident to the debt; and an assignment of the interest in the land without the debt is a nullity. *Ibid.*

30. A mortgage is good without a power of sale. *Ibid.*

31. The nature of a power of sale in a mortgage considered. *Ibid.*

32. It is a power coupled with an interest. *Ibid.*

33. It seems, it is a power appendant, and not in gross. *Ibid.*

34. A mortgagee cannot hold the mortgage as security for any claim which he has against the mortgagor, by bond or simple contract, &c. beyond the sum specifically secured by the mortgage. *James v. Morey*, 2 Cow. 246.

35. Especially where an objection is interposed by a bona fide judgment creditor. *Ibid.*

36. Yet a mortgage to secure future advances is valid. *Ibid.*

37. And, it seems, that as between mortgagor and mortgagee, a mortgage given to secure one debt may become security for a debt subsequently contracted by the mortgagor to the mortgagee, where the former consents. *Ibid.*

38. A mortgage created for the purpose of being assigned upon a loan of money, and assigned accordingly upon a loan at a discount of more than seven per cent., is not usurious, unless the assignee know at the time of the assignment of the purpose for which the mortgage was made. *Jackson, ex dem. Walsh, v. Colden*, 4 Cow. 266.

39. A mortgage of land to secure a simple contract debt, though it contain a stipulation against personal liability in the mortgage, does not operate as payment of the debt, nor discharge the mortgagor from personal liability for it. *Ainslee v. Wilson*, 7 Cow. 662.

40. A mortgage or mortgage in fee made by one having only a life estate is valid for his

life, though void for the excess. *Sinclair v. Jackson*, 8 Cow. 543.

III. *Estate and interest of the mortgagor and mortgagee.*

41. A mortgagor is deemed seised to all persons except the mortgagee, &c. *Wilson v. Troup*, 2 Cow. 195.

42. Both at law and in equity, a mortgage is considered a mere security for money. *Ibid.*

43. The interest of the mortgagee is a chattel merely. *Ibid.*

44. And will pass by delivery without writing. *Ibid.*

45. Where, on a judgment entered by confession on a bond and warrant of attorney, a specification of the consideration was not filed, pursuant to the statute of 1818, (now repealed,) whether the judgment is fraudulent and void as against a subsequent creditor by mortgage? *Quere. James v. Morey*, 2 Cow. 246.

46. And per *Savage*, C. J., a mortgagee is not a purchaser within that act. *Woodworth*, J. contra. *Ibid.*

47. The meaning and extent of the term purchase considered at law and in equity. Per *Woodworth*, J. *Ibid.*

48. The assignment of a bond or debt secured by mortgage passes the interest in the mortgage. *Jackson v. Blodget*, 5 Cow. 302.

49. The debt is the principal, and the mortgage but an accessory, which cannot exist as an independent debt. *Ibid.*

50. If, therefore, after the assignment of a bond secured by mortgage, though the mortgage be not delivered, and notice of such assignment to obligor, he pay the debt to the mortgagee, and take a discharge, this is in his own wrong, and void as to the assignee. *Ibid.*

51. After a foreclosure and sale upon a mortgage for a less sum than will satisfy the amount of the mortgage debt, the mortgagee may prosecute at law on his bond for the balance. *Globe Insurance Company v. Lansing*, 5 Cow. 380.

52. Where a party, who had the legal estate in certain premises by a fraudulent conveyance, which had been avoided in Chancery, subsequently became the assignee of a mortgage of the same premises; *it was held*, that the estate conveyed by the mortgage was not merged in the prior legal estate. *Roberts ads. Jackson*, 1 Wend. 478.

53. A lessee of a mortgagor, under a lease executed subsequent to the mortgage, is not entitled as against the mortgagee to crops growing on the mortgaged premises at the time of the foreclosure and sale of the same; and the mortgagee, becoming the purchaser, may maintain trespass against the lessee for taking and carrying away the crops. *Lane v. King*, 8 Wend. 584.

54. Default in payment of the money secured by a mortgage of personal property renders the title of the mortgagee absolute, and authorizes him to reduce the property to actual possession. *Patchin v. Pierce*, 12 Wend. 61.

55. Tender of the money after forfeiture does not operate to reinvest the title in the mortgagor, though a tender and acceptance have that

effect; but an acceptance of part of the money is not a waiver of the forfeiture. *Ibid.*

56. A mortgagee of personal property, on the failure of the mortgagor to perform the condition of the mortgage, acquires an absolute title to the property. *Langden v. Buel*, 9 Wend. 80.

57. If a mortgagee of personal property assigns the debt to secure the payment of which the mortgage is given, whether the same be done before or after forfeiture, the interest of the mortgagee passes to the assignee; and if the property be taken by a stranger, trespass must be brought in the name of the assignee, and not in the name of the assignor. *Ibid.*

IV. *Registry of mortgages, and priority of encumbrances.*

58. The mortgage first registered takes preference; and, *it seems*, that the Courts will notice the fractions of a day with a view to the question of preference. *Lemon v. Foot*, 1 Cow. 592.

59. A tax laid upon real estate in the city of New York, for the purpose of opening or improving a street, &c., takes preference of a prior mortgage. *Dale v. M'Evers*, 2 Cow. 118.

60. It is not necessary to the validity of a mortgage, or a purchase under a power of sale therein, even as against subsequent purchasers, &c., that the power to execute it should be registered according to the statute. (1 R. L. 373, s. 2.) *Wilson v. Troup*, 2 Cow. 195.

61. This is not necessary as against the mortgagor. *Ibid.*

62. Of two unregistered mortgages, the oldest takes preference. Per *Savage*, Ch. J. *Jama v. Morey*, 2 Cow. 246.

63. The second cannot take preference, unless registered, and not even then, if the second mortgagee have notice of the first mortgage. *Ibid.*

64. A mortgage, by way of an absolute deed, must be registered as a mortgage, in order to be effectual against subsequent *bona fide* purchasers or mortgagees. *Ibid.*

65. The registering it as an absolute deed is not sufficient for this purpose. *Ibid.*

66. Whether one having a recorded mortgage, standing silently by, and seeing another bid off the mortgaged premises on a judgment younger than the mortgage, forfeits his claim under the mortgage in equity? *Quere.* Per *Sutherland*, J. But, per *Savage*, Ch. J., he does not; for the registry is notice to all the world. *Ibid.*

67. The statute (sess. 45, ch. 245, s. 1.) declaring, that a mortgage shall be considered as recorded from the time when received by the clerk, does not apply to mortgages delivered for registry before the act went into effect. *Jackson v. Valkenburgh*, 8 Cow. 260.

68. Where a mortgage is given, the mortgagee, being expressly informed of the existence of a previous mortgage, and understanding that he is to take this mortgage subject to the previous one, is affected by this notice, though the previous mortgage be not registered. *Ibid.*

69. But his *bona fide* assignee without notice is not affected by the notice to the mortgagee. *Ibid.*

70. Notice to the agent or attorney who is

employed to obtain the assignment, would be notice to the assignee. *Ibid.*

71. But the notice, whether to the principal or attorney, must be full and clear. *Ibid.*

72. A notice, to supply the place of registry, must be more than barely sufficient to put the party on inquiry. *Ibid.*

73. Where the attorney had heard generally of a mortgage previous to one which he was directed to procure an assignment of; but on searching found no registry of it, though he saw a previous absolute assignment of the mortgagor's interest among the deed papers of the clerk's office, which had been recorded (probably by the mistake of the clerk) in the book of deeds, there being in fact a simultaneous defeasance which gave it the character of a mortgage; *held*, that this was not a sufficient notice to supply the place of a proper registry, and that the assigned mortgage should take preference. *Ibid.*

74. One took a mortgage, with notice of a previous unregistered mortgage. He assigned to one who had no such notice, for valuable consideration. *Held*, that the assignee took discharged of the previous mortgage. *Ibid.*

75. Where a conveyance acknowledging the receipt of the purchase money is given of land on which there is an unregistered mortgage, it is *prima facie* evidence as against the mortgagee, and in favour of the purchaser, and all claiming under him, that the consideration was actually paid. *Jackson v. M'Chesney*, 7 Cow. 360.

76. Otherwise, where a bill in equity is filed to avoid a conveyance as fraudulent. Then the defendant must plead actual payment before he had notice of the plaintiff's rights, and show it in proof. *Per Sutherland J.*, delivering the opinion of the Court. *Ibid.*

77. In ejectment by a mortgagee against one claiming from the mortgagor by a quit-claim deed, the mortgagor is not a competent witness for the plaintiff. *Ibid.*

78. Where one purchases, *bona fide*, land subject to an unregistered mortgage, the land is discharged from the lien; and though the mortgage be afterwards registered, or notice otherwise given to subsequent purchasers, they are not affected by such registry or notice. *Ibid.*

79. Van D., having purchased lands of Van R. for which he had not paid, sold part of the land to W., from whom he took two mortgages of equal date, for parts of the consideration, intending that one of the mortgages should be assigned to Van R. to secure the original consideration of the land, and that it should have priority. This was pursuant to an understanding and an agreement between Van R. and Van D. when the former conveyed. The mortgages were registered concurrently; but the one intended for Van R. was first assigned to him, and afterwards the other was assigned to S. in good faith, for full value; *held*, that the mortgage assigned to Van R. took preference. *Stafford v. Van Rensselaer*, 9 Cow. 316.

80. S. took the other mortgage, subject to all the equity which Van R. had against the mortgage. *Ibid.*

81. The statute of registry has no application to such a case as between the two assignees. *Ibid.*

82. Van D. took the mortgage assigned to Van R. as trustee of Van R. *Ibid.*

83. Van D. was a competent witness for Van R. in a suit between him and S. *Ibid.*

V. Satisfaction of a mortgage.

84. A release of the debt discharges the mortgage. *Jackson v. Slackhouse*, 1 Cow. 122.

85. A writing signed by the obligor in a mortgage bond, stating the object for which the endorsement is made on the bond, cannot be contradicted by parol evidence, as between the mortgagee on the one hand, and the mortgagor, or one claiming under him, on the other. *Ibid.*

86. In ejectment by the mortgagee, the defendant may prove by parol that the mortgage debt is paid, which is a good defence to the action. *Ibid.*

87. At law, where a greater estate and a less meet and coincide in the same person, in one and the same right, without any intermediate estate, the less estate is immediately annihilated; or in the law phrase, is said to be merged. *James v. Morey*, 2 Cow. 246.

88. This rule at law is inflexible. *Ibid.*

89. And where equitable and legal estates unite in the same person, the equitable is merged in the legal estate. *Ibid.*

90. But in equity the rule is not inflexible. *Ibid.*

91. It depends on the expressed or implied intention of the person in whom the estates unite, whether the equitable estate shall merge, or still be kept in existence. *Ibid.*

92. Or upon the circumstance that he is not capable of making an election, being an infant or lunatic, &c. *Ibid.*

93. In the latter case, the equitable estate shall still be kept on foot. *Ibid.*

94. And so, where it is for the interest of the person in whom these estates unite, the law will imply an intention to keep the equitable estate on foot. *Ibid.*

95. Thus, where a mortgagee purchases or takes a release of the equity of redemption, the whole estate is vested in him, and the mortgage is extinguished. *Ibid.*

96. And with it the mortgage debt. *Ibid.*

97. Unless intention, incapacity to elect, or interest, &c. in the mortgagee intervene, to prevent the merger. *Ibid.*

98. And where a mortgagee purchases, or takes a release of the equity of redemption, in a part of the mortgaged premises, the mortgage is extinguished *pro tanto*. *Ibid.*

99. And may be apportioned between the part as to which it is extinguished and the part in relation to which it exists. *Ibid.*

100. Various acts, declarations, and circumstances considered, which evince an intention to keep the legal and equitable estates distinct, or to unite them. *Ibid.*

101. Meaning of the estate in lands, &c. *Per Sutherland, J. Ibid.*

102. Can be no merger unless estates meet. *Ibid.*

103. When an equitable estate is once merged by a union with the legal, it is gone for ever, and cannot be revived. *Per Cramer, Senator. Ibid.*

104. Where the equity of redemption is merged by being united with the legal estate in the hands of a mortgagee, &c., an assignment by the words grant, &c. may enure as a conveyance in fee, if not restrained by the *habendum*. Per *Woodworth, J. Ibid.*

105. A release or conveyance of the equity of redemption by the mortgagor to the mortgagee extinguishes the mortgage. *Jackson v. Devitt, 6 Cow. 310.*

106. Medcef Eden, being in possession of a house and lot, claiming it as his own, in 1783 bought in an outstanding mortgage of the premises, executed in 1767, to secure the payment of a sum of money within one year after its date, and took an assignment of it. In 1798 he made his will, devising the mortgaged premises to one of his sons, named Joseph, and other property to another son named Medcef, directing that if either of his sons should die without lawful issue, his share or part should go to the survivor, and appointing his two sons executors of his will. In 1804, the sons, as executors of their father's will, executed an assignment of the mortgage to Joseph Winter, in which, after the usual words transferring the mortgage, was a clause to this effect: "And we do hereby, for ourselves and our heirs, release and convey unto the said J. W., his heirs and assigns, all our right, title, and interest, of, in, and to the said lot of ground and premises before mentioned, and every part and parcel thereof." J. W. entered in 1804, and he and those claiming under him continued in possession until 1828. Joseph Eden died in 1813. Medcef Eden died in 1819. In 1828 an ejectment was commenced by the devisee of the latter, and judgment obtained in 1827, when the tenant was put out of possession; who, in 1828, turned round and brought his action of ejectment against the lessor of the plaintiff in the former suit, and recovered in the Superior Court of the city of New York. On writ of error, *it was held*, that the plaintiff in the last suit was not entitled to recover; that the mortgage, at the time of the assignment to Winter, was not a valid and subsisting encumbrance; that Medcef Eden the younger, at the time of the assignment, having a mere naked possibility of interest in the premises, and not a right *in esse*, such possibility was not the subject of release; and that the release being without warranty, Medcef Eden the younger, and those claiming under him, are not estopped from setting up the title which devolved upon Medcef Eden the younger on the happening of the death of Joseph Eden, or from alleging that the mortgage, by reason of lapse of time, in presumption of law, was paid, and that the only purpose of the assignment was to pass the mortgage as a muniment of title during the continuance of the life estate of Joseph Eden. *Pelletreau v. Jackson, 11 Wend. 110.*

107. Possession or occupation of land under a claim of title unexplained is evidence of a fee; and if it be continued for twenty years, is conclusive evidence, and bars the right of entry even against the real owner who may show a paper title. *Ibid.*

VI. Foreclosure and ejectment.

108. One who holds of a mortgagor under a parol contract to purchase, is not entitled to a notice to quit. *Jackson v. Stackhouse, 1 Cow. 122.*

109. A mortgagee may pay off a senior encumbrance; and on bill filed to foreclose, and to be reimbursed the sum which he has paid, he is entitled to a decree for indemnity out of the proceeds of the sale of the mortgaged premises. *Dale v. M'Evere, 2 Cow. 118.*

110. Where W. held a mortgage against E. on lots in the city of New York, subject to a tax due to the corporation, and the lots were sold at auction for the tax, and the execution of the mortgagee bid them in for a term of one year, at the amount of the tax, and then filed their bill praying to be reimbursed by a sale of the mortgaged premises under a decree of foreclosure; *held*, that they were purchasers in their own right, and must rely upon the use of the premises, during the term, for their reimbursement. *Ibid.*

111. A statute foreclosure of a mortgage is equivalent to a foreclosure in equity. *Wills v. Troup, 2 Cow. 195.*

112. Form of order of reference to a master, to ascertain and report balance due on mortgage, &c. Order of sale of mortgaged premises. How to dispose of proceeds; to deliver title deeds, &c.; to deliver possession to the purchaser. *James v. Morey, 2 Cow. 246.*

113. A delay of more than four years to bring ejectment, after a notice to quit by a mortgagee to the mortgagor, is not a waiver of the notice. *Jackson v. Stafford, 2 Cow. 547.*

114. The notice to quit by a mortgagee to a mortgagor need not direct the mortgagor to quit on a day in the year corresponding with the date of the mortgage. *Ibid.*

115. The mortgagor, in order to warrant ejectment against him, is not entitled to notice to quit after foreclosure. At any rate, the advertisement of sale operates as a sufficient notice to quit. *Jackson, ex dem. Walsh, v. Cullen, 4 Cow. 266.*

116. Encumbrancers brought in by a mortgagee on a bill to foreclose, and answering and disclaiming as to him, are entitled to the costs of appearing and answering, out of the mortgage fund; though they contest the right to the surplus as between themselves. *Mackie v. Cairns, 5 Cow. 547.*

117. Authorities showing that they are generally entitled to these costs out of that fund, cited by *Sutherland, J. Ibid.*

118. Decree by the Court for the Correction of Errors, making various provisions as to costs, between such encumbrancers, relating to and awarded by divers interlocutory and final orders and decrees of the Circuit Court, Court of Chancery, and Court for the Correction of Errors, in a cause which was commenced in the Circuit Court, and passed through the two latter Courts by appeal; the cause having received different determinations on the merits in each Court. *Ibid.* See also *Livingston v. Van Rensselaer, 6 Wend. 63.*

119. It seems, that a fixing up of the advertisement of a sale, under a power contained in the mortgage, on the Court-house door, for the purpose of foreclosure, at law is *prima facie* evidence within the statute, (1 R. L. 374, s. 6.) without showing it to have been continued. *Jackson v. Bowen*, 7 Cow. 13.

120. A conveyance by a mortgagee, as upon a statute foreclosure, under the power of sale in his mortgage, even if the proceedings to foreclose be irregular, yet carries all his interest as mortgagee to the purchaser as well in the debt as in the land mortgaged. *Ibid.*

121. Such a deed, at least, operates as a good assignment of the mortgage; and the purchaser may claim as assignee. *Ibid.*

122. A decree of foreclosure and sale of premises mortgaged in fee is a complete bar of the equity of redemption, though the mortgagee became a purchaser. *Lansing v. Golet*, 9 Cow. 346.

123. So is a decree of sale, without any express decree of foreclosure. *Ibid.*

124. Where the premises on sale bring only a part of the mortgage debt, the mortgagor may collect the deficiency by judgment and execution on the collateral bond; and this shall not open the foreclosure, or restore the equity of redemption. *Ibid.*

125. The principle and history of the practice in this state, of selling mortgaged premises instead of strict foreclosure; and a view of the English and American authorities on that practice, with the statutes of New York relating to the same practice, per *Jones*, Chancellor, *arguendo* to the Court of Errors, in support of his decree in Chancery. *Ibid.*

126. Money paid by the holder of a mortgage, to redeem the mortgaged premises from a sale for taxes, is a charge upon the land, and may be demanded on foreclosure of the mortgage. *Burr v. Feeder*, 3 Wend. 412.

127. A statute foreclosure of a mortgage, thirty-one years after the moneys secured thereby fell due, rebuts the presumption of payment arising from lapse of time. The fact, that the premises were occupied by a mere naked possessor, neither holding nor claiming under the mortgagor, may also be relied on to rebut the presumption of payment. *Jackson v. Slater*, 5 Wend. 295.

128. A mortgage to secure the payment of a debt in specific articles, where the mortgagee on default is authorized to sell the mortgaged premises at public vendue, and to retain from the proceeds of the sale a specified sum, may be foreclosed under the statute. *Jackson v. Turner*, 7 Wend. 458.

129. Where a mortgagee assigns to a creditor a portion of the debt secured by the mortgage, and authorizes him to collect such portion, and appropriate it to his own use, and the mortgagee and assignee unite in foreclosing the mortgage, and the proceeds of the sale, being less than the portion of the debt assigned, are received by the assignee, the mortgagee is not entitled to demand any proportion of such proceeds, although in the assignment there be a proviso that it shall not be so construed as to prevent the mortgagee from receiving or dis-

posing of the residue of the mortgage moneys. *Mechanics' Bank v. Bank of Niagara*, 9 Wend. 410.

130. All acts in the transaction of business done on Sunday are as valid as if done on any other day of the week, unless prohibited by common law or statute. The proceedings in a statute foreclosure of a mortgage are not void, because the day of sale specified in the advertisement happens on a Sunday. It is competent, however, to the mortgagee, after the institution of the proceedings, and before the day of sale, to postpone it to a subsequent day, without affecting the validity of the proceedings. *Sayles v. Smith*, 12 Wend. 57.

131. Where judgment creditors are prevented from attending and bidding at a master's sale on a mortgage foreclosure, in consequence of an impression received from the master that the sale will not take place on the day appointed, and the creditors offer to make an advance, at the resale, upon the bid at which the property was struck off, to an amount sufficient to cover their demands, the sale will be set aside, although there is no collusion between the master and the purchaser. *Collier v. Whipple*, 13 Wend. 224.

VII. Power to sell in a mortgage, and sale under it.

132. The provision that the power of sale shall be recorded before a conveyance under it shall be executed, (sess. 36, ch. 32, s. 6, 1 R. L. 374.) is for the benefit of the purchaser; and was intended to protect him against subsequent purchasers, &c. *Wilson v. Troup*, 2 Cow. 195.

133. But it does not lie with the mortgagor to object that a sale and conveyance have been made under the power, without its having been recorded. *Ibid.*

134. It was conceded by the Court, that the registry of a power, the proof or acknowledgment of which was taken out of this state, though before a commissioner resident here, is a nullity. *Ibid.*

135. A mortgagee, though he have conveyed the whole mortgaged premises, with warranty in fee, can yet foreclose; for this conveyance of the land will not pass his interest in the mortgage. *Ibid.*

136. So if he have thus conveyed only a part of the mortgaged premises, he may yet foreclose for the whole, under a power of sale in the mortgage; and may himself become the purchaser. *Ibid.*

137. Whether a mortgagee, having assigned part of his interest in the mortgage, may foreclose under a power of sale in his own name, or must give notice in the name of himself and his assignees? *Quere. Ibid.*

138. Though the mortgagee convey in fee a part of the mortgaged premises, this does not prejudice the right of the mortgagor to redeem. *Ibid.*

139. If a mortgagee convey a part of the mortgaged premises with warranty, and afterwards himself purchase the whole, under the power of sale, the purchase will enure to the benefit of his grantee. *Ibid.*

140. An advertisement of mortgaged premises for sale, under the act "authorizing a loan of moneys to the citizens of this state," passed April 11, 1808, (sess. 31, ch. 216, 5 W. & S. 392.) is sufficiently particular in its description of the premises, if it contain the name of the mortgagor, the date and number of the mortgage, the number of the lot in which the premises lie, the town in which it was situate when the mortgage was given, and the quantity of acres mortgaged, without describing the premises by metes and bounds. *Jackson v. Harris*, 3 Cow. 241.

141. A proper form of an advertisement for sale of several lots by commissioners, under the seventeenth section of that act. *Ibid.*

142. The seventeenth section, directing the commissioners to put up advertisements of sale at three of the most public places in the county, is sufficiently complied with by fixing them in three of the most public places, though they are all remote from the premises in question. *Ibid.*

143. Whether the commissioners have a right to sell on credit? *Quære. Ibid.*

144. But the objection that the commissioners gave a credit for the surplus money, beyond the principal and interest due, can only be made by the mortgagor. *Ibid.*

145. It seems, that it is no objection to the validity of the sale, that the commissioners do not proceed and sell on the first default, but wait till several years' interest accumulates. *Ibid.*

146. A foreclosure under the act concerning mortgages, (1 R. L. 312.) by an advertisement and sale, is complete without a deed of conveyance, where the mortgaged premises are purchased by the mortgagee or his assignee. *Jackson*, ex dem. *Walsh*, v. *Colden*, 4 Cow. 266.

147. It does not lie with the mortgagor or assignor of the mortgage to object that the power of sale was not regularly acknowledged and recorded. *Ibid.*

VIII. Assignment of a mortgage.

148. If the donee of a power appendant and coupled with an interest (as a mortgagee) convey his whole estate, this would pass, but not extinguish the power. *Wilson v. Troup*, 2 Cow. 195.

149. This is the common case of the assignment of a mortgage, which carries not only the legal estate, but all the remedies or powers attached to it. *Ibid.*

150. But a conveyance of a part of the estate will not carry with it a corresponding portion of the power. *Ibid.*

151. Because the power is indivisible. *Ibid.*

152. It can operate but once, and then is exhausted. *Ibid.*

153. The recording an assignment of a mortgage is not necessary within any of the general registry acts. *James v. Morey*, 2 Cow. 246.

154. It is, therefore, no notice to a mortgagor, so as to render payments by him to the mortgagee in his own wrong. *Ibid.*

155. Nor is it notice to a subsequent assignee of the mortgagee. *Ibid.*

156. Nor to a subsequent purchaser or mortgagee of the premises. *Ibid.*

157. The assignee of a mortgage takes it subject to all the equities existing between the mortgagor and mortgagee at the time of the assignment, but not subject to the latent equities of third persons, unless the assignee have notice of such equities. *Ibid.*

158. Payments made after an assignment, but before notice of the assignment is given to the mortgagor, must be allowed to him. *Ibid.*

159. But it is not necessary to the protection of the assignee that he should give notice of his assignment to a subsequent assignee or purchaser. *Ibid.*

160. One assigns as mortgagee; whatever interest he afterwards acquires in the mortgaged premises enures to confirm the assignment. *Per Sutherland, J. Ibid.*

161. The assignee of a mortgage in possession will be protected against an action of ejectment by the mortgagor, and all persons coming in under him; and this, though his assignment was obtained on a unanimous consideration. *Jackson v. Bowen*, 7 Cow. 13.

162. The lessees of the usurious assignee of a mortgage in possession, without notice of the usury, are to be considered *bona fide* purchasers, and will, as such, be protected against the allegation of usury. *Ibid.*

163. W., holding a mortgage against C. and S. to secure about \$6000, became indebted to them in \$3000 on an open account, after which R. recovered a judgment against C. and S. W. subsequently assigned his mortgage to the Bank of N. without endorsing or crediting the \$3000. R. tendered to the bank the amount supposed to be due on the mortgage, and more; and filed a bill for redemption and assignment to him, for an account, and to have the \$3000 allowed on the mortgage; *held*, that the \$3000 should be allowed as a set-off. *Niagara Bank v. Roosevelt*, 9 Cow. 409.

164. Till judgment, the parties to the mortgage might have applied the set-off to the mortgage or not, at their election; but by the judgment, the right of set-off became absolute to the judgment creditor. *Ibid.*

165. The assignee of a mortgage takes it subject to all equities existing against it in the hands of the mortgagor; and, among others, the right of set-off. *Ibid.*

166. A creditor whose judgment is a lien on an equity of redemption, on coming to redeem, has a right to the assignment of the mortgage. *Ibid.*

167. A treasurer of a corporate body, whose duty it is to receive and pay debts, has no right, on receiving the amount of a debt due to the corporation, to assign the security therefor, without direction from the managers of the fiscal concerns of the corporation. *Jackson v. Campbell*, 5 Wend. 572.

168. Though such treasurer execute an assignment of a mortgage under the seal of the corporation, of which he is the keeper, if it be without the direction or knowledge of the managers, it is void, unless there be a subsequent ratification. *Ibid.*

169. Where a mortgage is assigned with the concurrence of the mortgagor, the assignee is

entitled to interest upon the interest paid by him, as well as upon the principal of the mortgage. *Ibid.*

170. The assignee of a mortgage does not, by the deed of assignment, acquire a legal title to the mortgaged premises, nor does he thereby become entitled to the rents, where the mortgaged premises are held by lease under the mortgagor. *Ibid.*

IV. Mortgage of goods and chattels.

171. Where goods are mortgaged, if payment be not made at the day, the interest of the mortgagee becomes absolute. *Ackley v. Finch*, 7 Cow. 290.

172. Where a mortgage was executed by a brewer of his stock on hand and the utensils of his trade, and it appeared that he was embarrassed with debt at the date of the mortgage; that the transaction was kept secret from those in his employment, and that he not only continued in the possession of the property, but used and disposed of it as absolute owner; *it was held*, that a verdict of a jury finding against the *bona fides* of the transaction was right, and the Court affirmed a judgment entered on such verdict, although the charge to the jury on the trial of the cause was objectionable. *M'Lachlan v. Wright*, 3 Wend. 348.

173. Where personal property has been mortgaged, the possession may in some instances remain with the mortgagor; especially where such a course is rendered proper and expedient from the nature of the property and the objects of the parties in making the mortgage. *Lewis v. Stevenson*, 2 Hall, 63.

174. But if the mortgagor, while in possession, sell or pledge the property to a *bona fide* purchaser, or pledgee, who is ignorant of the mortgage, and has no cause for suspicion or inquiry, and deliver the possession, the sale or pledge will be good, and the rights of such a purchaser or pledgee are paramount to those of the mortgagee. *Ibid.*

175. The defendant, a pawnbroker, advanced certain sums of money to a son of the mortgagor, for the use of the family of the latter, and incautiously received plate, linen, &c., in pledge, which had been conveyed to the plaintiff by way of mortgage, and neglected to make any inquiry as to the authority of the pawnbroker, although there were circumstances to excite suspicion; *held*, that the mortgagee had a right to reclaim the property out of the hands of the pawnbroker. *Ibid.*

176. Where personal property is put into the hands of trustees by a borrower of money, as security for a loan made to him by a third person, an appropriation, by the trustees, of a part of the proceeds of the property, to an object not expressly mentioned in the deed of trust, made with the assent of the borrower and the lender, cannot be questioned by the parties to the loan. *Ibid.*

NEW TRIAL.

I. *When a new trial will be granted on the merits, either for a misdirection or error of the judge, or where the verdict was*

contrary to law or the evidence, or not founded on sufficient evidence.

II. *When a new trial will be granted, on the ground of newly discovered evidence.*

III. *Excessiveness of damages, and other causes for granting a new trial.*

IV. *Motion for a new trial, granting a new trial, and when costs will be required on refusing or granting it.*

V. *New trial in criminal cases.*

I. *When a new trial will be granted on the merits, either for a misdirection or error of the judge, or where the verdict was contrary to law or the evidence, or not founded on sufficient evidence.*

1. If an objection, which can be obviated by further proof, be not taken, or not persisted in at the trial, it will not be received as the ground of a motion for a new trial. *Jackson v. Davis*, 5 Cow. 123.

2. The admissibility of evidence, if not objected to at the trial, cannot be questioned on a motion for a new trial. *Jackson v. Jackson*, 5 Cow. 173.

3. The course at the circuit is for the jury to find the facts in issue; but where a party puts matter in issue which is not material, though the jury find against him, contrary to evidence, this is no ground for a new trial. *Beckman v. Satterlee*, 5 Cow. 519.

4. Where the testimony before a jury is contradictory, and the character and credit of witnesses are in question, a new trial will not be granted, on the ground that the verdict is against the weight of evidence. *Winchell v. Latham*, 6 Cow. 682.

5. Where the evidence of the trial is contradictory, and leaves the question in doubt, and has been fairly submitted to the jury, the Court will not disturb their verdict, on a motion for a new trial, upon the ground that they found against the weight of evidence. *Ackley v. Kellogg*, 8 Cow. 223.

6. Where a witness was objected to as interested, and in the course of proving his interest, the judge allowed evidence which was objected to by the party offering the witness, but admitted him with the remark that he should leave his credibility to the jury; yet, *held*, that this was no cause for a new trial, even supposing the evidence objected to on such preliminary examination was improper. *Ibid.*

7. Where a witness is improperly admitted on exception, a new trial may be awarded; but on a special verdict, judgment must go. *Per Jones, Chancellor, and Spencer, Senator. Powell v. Waters*, 8 Cow. 669.

8. Testimony not objected to must be considered as received by consent. *Jackson v. Cody*, 9 Cow. 140.

9. In an action by the endorsees of a promissory note against the maker, where the proof of the handwriting of the endorser was slight, and the judge charged the jury that the plaintiffs were entitled to a verdict, without leaving it to them, under proper instructions, to say whether the endorsement was or was not the handwriting of the party, a new trial was grant-

ed. *Utica Insurance Company v. Badger*, 3 Wend. 102.

10. A new trial will be granted for the misdirection of the judge, although the evidence may have warranted the verdict found, where the chances are equal that the verdict resulted from the misdirection. *Wardell et al. v. Hughes et al.* 3 Wend. 418.

11. The omission to state the fact, that the witnesses subscribed their names in the presence of the testator, does not conclude the jury from finding that the will was so subscribed, if warranted by the circumstances to find in favour of its execution. *Jackson v. Christman*, 4 Wend. 277.

12. The substantial ground of objection to the introduction of evidence must be explicitly stated at the trial, or it will not be heard in bank, if the party could have obviated the objection, if properly made. *Ibid.*

13. A new trial will not be granted where, upon the question of the fraudulent alteration of a deed, there is conflicting testimony, and the evidence nearly balanced. *Lewis et al. v. Payn*, 4 Wend. 423.

14. A new trial may be asked for on a case made, on the ground of the misdirection of the judge, although no exception was taken to the charge of the judge on the trial. *Archer v. Hubbell*, 4 Wend. 514.

15. An objection of a variance between the contract, as laid and proved, must be taken at the trial, unless it be such as could not be obviated. *Lawrence v. Barker*, 5 Wend. 301.

16. Evidence resting in records will be received in bank to supply defective proof at the trial. *Armstrong v. Percy*, 5 Wend. 535.

17. An observation of a judge in a charge to a jury, that "a discrepancy between the testimony of a witness and his former statement seemed naturally enough accounted for," cannot be considered a misdirection, nor will a new trial be granted therefor. *Jackson v. Packard*, 6 Wend. 415.

18. A new trial will not be granted because the judge nonsuited the plaintiff, if the evidence be such that if the cause had been submitted to the jury, and they had found for the plaintiff, the Court would have set aside the verdict. *Demyer v. Souzer*, 6 Wend. 436.

19. Where evidence is competent, if contradicted, it is sufficient to warrant a verdict; and where the judge on such evidence directs a verdict, instead of submitting the question of the sufficiency of evidence to the jury, a new trial will not be granted. *Nichols v. Goldsmith*, 7 Wend. 160.

20. After two concurring verdicts in a case where there are many witnesses and much testimony on both sides upon a mere question of fact, and there is no misdirection of the jury, a new trial will not be granted, although the Court may be of opinion that the verdict is against the weight of evidence. *Fowler v. Elina Fire Insurance Company*, 7 Wend. 270.

21. Where the evidence on which a plaintiff rests is not sufficient to entitle him to a recovery, and a nonsuit is denied, a verdict will not be set aside for such cause, if subsequently in the progress of the trial the defendant supplies

the necessary proof. *Jackson v. Leggett*, 7 Wend. 377. *S. P. Lansing v. Van Alstine*, 2 Wend. 561.

22. In an action by a female for breach of promise of marriage, where it was shown that she had been guilty of grossly indecent conduct, but whether before or after the promise did not appear; and the jury, under the instruction of the circuit judge, that there was no middle course to adopt, that they must either give exemplary damages or nothing, found a verdict for \$180 damages; a new trial was ordered; the Court holding, that the evidence would have warranted a verdict for the defendant, and at all events, that the conduct of the plaintiff should have been taken into consideration in mitigation of damages. *Palmer v. Andrews*, 7 Wend. 142.

23. In an action of trespass against the master of a boat navigating the Erie canal, for running her against another boat lying in the canal, waiting her turn to pass the locks, the judge charged the jury that the defendant was liable if he had been guilty of negligence or intention to inflict the injury; but that if there was no negligence or design of injury, and if, in attempting to pass, the defendant managed his boat in a prudent and skillful manner, and the injury was sustained by means of the acts of the plaintiff himself, or by mere accident, the defendant was not liable; and the jury found for the defendant; a new trial was granted for the omission of the judge to instruct the jury to inquire whether, under the circumstances of the case, the defendant was not bound to know that his boat could not pass without hazard, and if he was, whether he ought not to have proceeded with caution. *Dygiert v. Bradley*, 8 Wend. 469.

24. In an action for a libel where the jury find a verdict for the defendant, the Court will not grant a new trial, although the verdict be against the weight of evidence, where the proof is such as would have warranted a verdict for the plaintiff for only nominal damages. *Russell v. Butler*, 10 Wend. 119.

25. It seems, however, that in the case of an aggravated libel, where there are no mitigating circumstances, a verdict for the defendant would be set aside, as evidence of prejudice, partiality, or corruption in the jury. *Ibid.*

26. Where the charge of a judge has a tendency to make an erroneous impression upon a jury, and to mislead them in their views of the case, a new trial will be granted. *Benken v. Curry*, 11 Wend. 83.

27. A new trial will be granted in a writ of right, as well as in any other action, where the verdict is against law or evidence. *Bradstreet v. Clarke*, 12 Wend. 602.

28. Where a proceeding in the nature of an action of ejectment is had, upon the requirement of a defendant, to compel the determination of claims to real property, and the plaintiff has a verdict, upon which he enters judgment, the defendant is not entitled to demand, as of course, that the judgment be vacated, and that a new trial be granted, on payment of the costs and damages; the judgment in such a case is conclusive as to the title established in the ac-

tion; but for errors in law or fact happening at the circuit, a new trial may be granted in such a case. *Milin et al. v. Rose*, 12 Wend. 258.

29. A new trial will not be granted where there is no error in point of law in the charge of the judge, although his comments upon the evidence strongly indicate an opinion adverse to the party against whom the verdict is rendered. *Jackson v. Timmerman*, 12 Wend. 299.

30. Where a judge charged a jury that where a great number of witnesses impeach the character of a witness, the testimony of such witness is destroyed; but if an equal number of witnesses of the same respectability, and possessing like means of knowledge with the first, sustain the witness attacked, his character stands as if no impeachment had been attempted; that, however, it was the province of the jury to say whether the witness was or was not impeached; this Court refused to reverse a judgment, *holding* that the question of the *credibility* of a witness had been substantially submitted to the jury. *Bakeman v. Rose*, 14 Wend. 105.

31. An exception will not lie to the charge of a judge, on the ground of the comments made by him upon the testimony. *The People v. White*, 14 Wend. 111.

32. A new trial will not be granted where the plaintiff has been nonsuited, although there was some evidence to establish the case, if the Court, on a motion for a new trial, are satisfied that the evidence, as well that adduced as that offered and rejected, was not sufficient to warrant a verdict in favour of the plaintiff. *Wilson v. Williams*, 14 Wend. 146.

33. A new trial will not be granted in a penal action, where there is a verdict for the defendant, merely because the verdict is against evidence; the Court will not interfere, unless some irregularity or tampering with the jury is shown. *Overseers of the Poor of Rochester v. Lunt*, 15 Wend. 565.

34. Nor will the judgment of a justice be reversed under such circumstances, where the effect of the reversal will be a new trial. *Ibid.*

35. In proving an account of sales made by the plaintiffs for the defendant, certain letters from the former to the latter were read to the jury, with the permission of the presiding judge, not as evidence of the facts therein contained, but as notice of facts which might be binding upon the defendant, if his assent to them could be proved. *Held*, that these letters came within the rule which excludes a party from testifying in his own favour, and were improperly admitted. *Held*, also, that although the verdict in all probability would have been the same without the letters as with them, still a new trial must be granted, because the effect of the improper evidence upon the jury could not be known by the Court. *Anthoine v. Coit*, 2 Hall, 40.

36. The jury must pass upon all the facts proper for their consideration; and if they have not done so, the Court will grant a new trial, without considering on which side the weight of evidence lies. *Gouverneur et al. v. Elliott and Wife*, 2 Hall, 211.

II. When a new trial will be granted on the ground of newly discovered evidence.

36. A new trial will be granted in ejectment for land in the military tract, on the ground of newly discovered evidence; though the evidence be cumulative merely, and intended to impeach a witness sworn at the first trial. Ejectments for military lots are, in this respect, an exception to the general rule. *Jackson v. Hooker*, 5 Cow. 207.

37. A new trial will not be granted on the ground of newly discovered evidence, when that evidence is merely cumulative. *Whitbeck v. Whitbeck*, 9 Cow. 266.

38. It cannot be objected to the granting of a new trial on the ground of newly discovered evidence that it is cumulative, if the evidence alleged to have been newly discovered is of a different kind and character from that adduced on the trial; as where the evidence on the trial is wholly circumstantial, and the evidence newly discovered is positive and direct. *Guyot et ux. v. Bufts et al.*, 4 Wend. 579.

39. In a suit against executors on a stale demand, a new trial will be granted, though the newly discovered testimony consists of admissions made by the party against whom it is intended to be used; and in such a case the Court will not go into a rigid scrutiny of trifling discrepancies between the newly discovered testimony and that which has been given on the part of the defendants. *Ibid.*

40. The granting or refusing of a new trial, on the ground of newly discovered evidence, is not a matter of discretion, where it clearly appears that the party applying for the new trial was guilty of gross negligence in not procuring on the trial such evidence, and it is exclusively cumulative. *The People v. Superior Court of New York*, 5 Wend. 114.

41. If a Court of subordinate jurisdiction grant a new trial in a case where such objections exist, a *mandamus* will be awarded, directing the jury granting a new trial to be vacated. *Ibid.*

42. Where a subordinate Court grants a new trial on the ground of newly discovered evidence, and it appears from the return to an alternative *mandamus*, that the party in whose favour the new trial was granted was chargeable with *laches*, and that evidence alleged to be newly discovered was cumulative, this Court will grant a peremptory *mandamus* to vacate the rule granting a new trial. *The People v. Superior Court of New York*, 10 Wend. 235.

43. A party is chargeable with *laches* who, previously to the trial, knew that the witness whose testimony he seeks to introduce as newly discovered, must probably, from his situation and employment at the time of the transaction, and the subject of controversy, be conversant with the facts in relation to the transaction, and especially where previous to the trial the party knew, as the witness himself testifies, what the witness could testify to, although at the time of the trial, and while preparing therefor, the party had forgotten what the witness could testify to. *Ibid.*

44. The discretion to be exercised by an inferior Court in granting new trials for newly discovered testimony is not an arbitrary, but a legal discretion, and therefore subject to review. *Ibid.*

45. In order that a new trial may be granted on the ground of newly discovered testimony, it must appear that the testimony was discovered since the former trial, or could not have been

obtained with reasonable diligence on the former trial; that it is material to the issue; that it goes to the merits of the case, and not to impeach the character of a former witness; and that it is not cumulative. *Ibid.*

46. By cumulative evidence is meant additional evidence to support the same point, and which is of the same character with evidence already produced, as where the turning point of a cause was, whether a bill of exchange was or was not left at a bank for collection before noon of a certain day, and both parties produced testimony as to the time when the bill was left; it was held, that the evidence of a witness not produced on the trial, corroborating and supporting testimony which was adduced that the bill was left after noon, was cumulative. *Ibid.*

47. Upon an application for a new trial on the ground of newly discovered evidence, where such evidence rests in the knowledge of a witness, the Court will require the party moving to produce an affidavit of the witness, setting forth the facts upon which he relies, or to show that it could not be obtained. *Denn, ex dem. Hugh, v. Morrell et al.* 1 Hall, 382.

48. Newly discovered evidence, which is cumulative merely, is never the ground of a new trial, especially where a part of it was in the knowledge of one of the witnesses examined at the trial, but not disclosed by him. *Wheelwright v. Beers*, 2 Hall, 391.

III. Excessiveness of damages, and other causes for granting a new trial.

49. A Court will, in their discretion, sometimes deny a new trial, though the verdict be plainly against law, as if the nature of the controversy be trifling, &c. *Ex parte Bailly*, 2 Cow. 479.

50. A new trial will not be granted merely because the attorney for the plaintiff promises the agent of the defendant, to whom the defence is confided, to write to his client, (the plaintiff,) submitting the agent's proposition for settlement; but afterwards notices the cause for trial, and tries it in the agent's absence, without communicating to him the result of his proposition, and especially on the general affidavit of merits. *Jackson v. Van Antwerp*, 8 Cow. 273.

51. A new trial will not be granted in an action of slander on the ground of excessive damages, unless the amount is so flagrantly outrageous and extravagant as manifestly to show that the jury acted corruptly, or under the influence of passion, partiality, or prejudice. *Douglas v. Touzey*, 2 Wend. 352.

52. Want of proof of notice to quit cannot be urged as a ground for a new trial, if the objection was not taken at the trial. *Jackson v. Russell*, 4 Wend. 543.

53. Where *parol evidence* of the contents of a deed is given, on proof of loss of the deed, and the character of the witness who proved the loss is impeached subsequently, such impeachment cannot be insisted upon in support of a motion for a new trial. *Jackson v. Rowland*, 6 Wend. 666.

54. A new trial will be granted on the ground

of surprise, where the attorney of one of the parties had in his possession a deed important to the rights of the other party, and, before the trial, delivered it to a third person, without apprising his adversary, who subpoenaed the attorney, and also gave notice to him to produce the deed, and on the trial first learned that it was not in his possession. *Jackson v. Warford*, 7 Wend. 62.

55. On appeal from the decision of the circuit judge refusing a new trial, it is not necessary both to give a bond to pay the costs of the appeal, and obtain an order to stay proceedings, to entitle a party to the benefit of the appeal; either is sufficient. *Miller v. Franklin*, 13 Wend. 656.

56. Where a defendant had procured the testimony of a witness under a commission, and the plaintiff produced the witness on the trial and examined him, and the defendant alleged that the testimony of the witness on the trial was materially variant from his deposition, and asked for a new trial on the ground of surprise, and that he could fully establish his defence by other witnesses, the motion was denied, the Court being of opinion that there was no variance in the testimony, and the defendant omitted to produce the affidavits of the persons by whom he alleged his defence could be established. *Phenix v. Baldwin*, 14 Wend. 62.

57. Although it is conceded that Courts have the power of granting a new trial for excessiveness of damages in cases of *crim. con.*; still, it seems, such power has never been exercised; and, accordingly, the Court refused to set aside a verdict for \$3000 damages, although it appeared that the plaintiff had reason to know of the improper conduct of his wife, suspected her, and yet took no measures to prevent intercourse between her and the defendant. *Smith v. Master*, 15 Wend. 270.

58. It, however, appearing that the defendant had discovered evidence not known to him at the time of the trial, that the plaintiff had lived in a state of adultery with another woman after his wife eloped from him, and previous to the trial, the Court ordered a new trial, on the ground of such newly discovered evidence, on the payment of costs. *Ibid.*

59. A new trial will not be granted for the excessiveness of the damages, where a jury give \$150, although property was sold only to the amount of \$35, in a case of distress for rent, where the affidavit was not conformable to the statute. *Marquissee v. Wharton*, 15 Wend. 368.

IV. Motion for a new trial, granting a new trial, and when costs will be required on refusing or granting it.

60. A motion for a new trial on a feigned issue, to try a question of adultery, should be made to the Court of Chancery. *Doe v. Roe*, 1 Cow. 216.

61. Application for a new trial, on account of newly discovered evidence, considered. *Porter v. Tulcott*, 1 Cow. 359.

62. Motion for a new trial, for irregularity and newly discovered evidence, is an annunciated motion. *Anonymous*, 2 Cow. 586.

63. On a motion for a new trial on account of newly discovered evidence, or to set aside

the report of referees upon the merits, and other enumerated motions founded upon affidavits, counter affidavits may be read without being previously served on the party moving. *Strong v. Platner*, 5 Cow. 21.

64. If there be a defect of proof on one side at the trial, which may be supplied, the opposite party must object such defect. If he omit to do so, he cannot avail himself of the defect in a motion for a new trial. *Jackson v. Cody*, 9 Cow. 140.

65. On a motion for a new trial, affidavits of jurors cannot be received to show their impressions as to the effect of their finding, or that they intended something different from what they found by their verdict. *The People v. Columbia Common Pleas*, 1 Wend. 297.

66. Whether affidavits, offered on a motion for a new trial, ought to be received or rejected, is a question, not of discretion, but of law. *Ibid.*

67. It is scarcely possible to conceive a case where the Court would interfere with the decision of a circuit judge, in the granting or refusing the delay of a new trial, until a party can obtain the attendance of witnesses casually or unexpectedly absent. *Leggett v. Boyd*, 3 Wend. 376.

68. On a motion for a new trial on a case made, a party may object to the charge of the judge, although no exception was taken at the trial, especially where he has excepted to the introduction in evidence of the matter constituting the substance of the charge. *The People v. Holmes et al.* 5 Wend. 191.

69. On a motion for a new trial, on the ground of newly discovered evidence, a case of what transpired on the trial must be presented. *Anonymous*, 7 Wend. 331.

70. Where a verdict is against evidence, and also contrary to the charge of the presiding judge, on granting a new trial the costs abide the event of the suit. *Knapp v. Curitt*, 9 Wend. 60.

71. On the granting or denial of a new trial by a circuit judge, a rule must be entered, to give such effect to such decision, at the next term after the decision. *Muir v. Demarle*, 9 Wend. 449.

72. An appeal from such decision may be made at any time within eight days after the entry of such rule. *Ibid.*

73. Record evidence of a fact imperfectly proved at the trial of a cause, may be exhibited at bar in opposition to a motion for a new trial. *Ritchie v. Putnam*, 13 Wend. 524.

74. Where, to a plea to the statute of limitations of *actio non accrevit infra*, &c., the plaintiffs replied that the cause of action did accrue within six years before the commencement of the suit, and on the trial of the cause proved the suing out of a *capias* before the accruing of the statute, but failed to produce the writ of *testatum capias* (or an authenticated copy thereof) whereon the defendants were arrested, a verdict passed for the defendants; such verdict was approved by the Court; but on a motion for a new trial, and on production of a certified copy of the *testatum capias*, the verdict was set aside on payment of the costs of the trial, and of all subsequent proceedings, on the ground that without such relief the plaintiffs would lose

their debt. *Orange County Bank v. Haight*, 14 Wend. 83.

75. Under a general objection at the circuit, a party is not at liberty, on an application for a new trial, to urge grounds in support of his motion which were not distinctly presented at the circuit. *Ibid.*

76. Where a new trial is granted, not from any mistake or misdirection on the part of the judge, but in consequence of an error or incorrect finding by the jury, the party moving to set aside the verdict is bound to pay the costs. *Birkbeck v. Burrows*, 2 Hall, 51.

V. New trial in criminal cases.

76*. A new trial will not be granted even in a criminal case, because the district attorney by mistake withholds in his hands papers important to the defendant, unless the latter uses due diligence to obtain them. Where the district attorney told him by mistake they were in the hands of C., who, on being applied to, answered that they were with the district attorney; but the defendant did not explain the mistake, and apply to the district attorney again; *held*, a want of due diligence. *The People v. Vermilyea*, 7 Cow. 369.

77. Where, in a criminal case, the trial closed so late on Saturday night, that had the jury been charged, they must either have been dismissed or kept over the Sabbath, a new trial was refused though demanded, because the judge had declined (notwithstanding a request) to charge the jury, there being no dispute as to the law of the case, and the verdict being fully supported by the evidence. *The People v. Gray et al.* 5 Wend. 289.

78. A noncompliance by the clerk to put the names of all the persons returned as jurors into a box, from which juries for the trial of issues are to be drawn according to the statute, is not a sufficient ground for setting aside a verdict, either in a criminal or civil case, where the Court are satisfied that the party complaining has not or could not have sustained any injury from the omission; and it was accordingly held, where, on the trial of a capital case, after twenty-eight jurors had been called, eleven of whom were approved and sworn, and seventeen peremptorily challenged, it was discovered that the ballot containing the name of a juror, who had answered on the calling of the general panel, was not in the box containing the names of the jurors returned for the Court, and which on search was found and put into the box, and drawn out of it by direction of the Court, and the juror sworn to serve on the jury, that the irregularity or neglect of the officer was not such as to entitle the prisoner to a new trial, it appearing to the Court that the omission to put the ballot into the box proceeded from neglect, and not from design. *The People v. Ransom*, 7 Wend. 417.

79. For offences greater than misdemeanour, a new trial cannot be granted, whether the accused be acquitted or convicted. *The People v. Comstock*, 8 Wend. 549.

80. Whether it is competent for a Court to grant a new trial in a case of felony, at the instance of the defendant, where there has been a palpable misdirection of the Court upon mere matters of fact, or a verdict clearly against the weight of evidence, without such misdirection, where no erroneous decision in point of law is made? *Quere. The People v. Haynes*, 14 Wend. 546.

NEW YORK CITY.

1. Where an assessment for enlarging a street in the city of New York has been made

and deposited, and notice published, an affidavit against its confirmation, though not laid before the commissioners, will be received if it appear that the time for objecting had expired before the party opposing was in fact apprized of the proceeding, and the matter will be referred back to the commissioners. *In the matter of Dover Street*, 1 Cow. 74.

2. Where the commissioners of estimate and assessment, in the city of New York, assess the damages of unknown owners, which are levied and paid into the clerk's office of this Court, according to the 184th section of the act to reduce the several laws relating particularly to the city of New York into one act, (3 R. L. 418, 19.) in order to entitle the persons claiming to be owners to move to have the moneys paid over to them, they must publish notice of their application, describing the property for which they claim the money, for six weeks, in one of the daily papers published in the city of New York, and also give a like notice to the corporation of the city. *In the matter of Dewint, and Reg. Gen.*, 1 Cow. 595.

3. On ordering a rule to pay out moneys, which have been paid into this Court, as belonging to unknown owners in the city of New York, under the powers of the corporation to enlarge and improve streets, this Court will, if the claim be doubtful, require security to refund on its turning out to be unfounded. *In the matter of Dewint*, 2 Cow. 498.

4. The incorporation of the Manhattan Company was granted upon the following condition: "Provided that said company shall, within ten years from the passing of this act, furnish and continue a supply of pure and wholesome water, sufficient for the use of all such citizens, dwelling in said city (of New York) as shall agree to take it on the terms to be demanded by the said company; in default whereof the said corporation shall be dissolved." *It was held*, that the company being declared a body politic and corporate *in presenti*, and having ten years to perform the acts required of them, the proviso was a defeasance, and not a condition precedent, and that therefore they were not bound in their plea to set forth the condition and allege performance, even for the purpose of showing a present right, although at the time of the plea, the period limited by the proviso had long since expired; as in judgment of law a corporation once shown to exist is presumed to continue until the contrary be shown. *People v. Manhattan Company*, 9 Wend. 352.

5. *It was further held*, that the attorney-general, in alleging a breach of the condition, was bound to name such citizens as were willing to agree, &c., and that the naming of one individual would have been sufficient; also that he should have averred a request on the part of those citizens who wished a supply of water, or an offer to pay for it, or that the defendants had notice of such willingness or desire. *Ibid.*

6. *And further*, that alleging the breach in the general terms, that the defendants "have not furnished or continued a supply of water sufficient (or a supply or any other quantity of pure and wholesome water) for the use of all citizens, dwelling in the said city of New

York, as were willing and desirous to agree for and take the same as aforesaid," was not the allegation of a material fact on which issue could be taken; that it tendered an issue upon an emotion or affection of the mind, which is not traversable or susceptible of trial. *Ibid.*

7. *It was further held*, that this being in the nature of a criminal case, the attorney-general had a right to set up several distinct causes of forfeiture in his replication, the statute as to replying double not being applicable to criminal cases. *Ibid.*

8. If a master of a ship, or other vessel, arriving from a foreign country, or any other of the United States, who shall enter his vessel at the custom house of the city of New York, suffer an alien passenger to land there, without giving, if required, pursuant to the statute, (sess. 36; ch. 86, s. 252, 2 R. L. 441.) such bond as is required by that section, or without such permission in writing as is required by that section, unless it be refused on defraud, he incurs the penalty of \$500 mentioned in that section. *New York v. Staples*, 6 Cow. 169.

9. The course to be pursued under the 251st and 252d sections of that act, as to an alien passenger, is on report by the master, for the mayor or recorder to require a bond, when it must be given. If not required, or if required and given, the master must then demand a permission in writing from the mayor or recorder to land his passengers; when, if it be granted or refused, he may land. But a permission, or demand and refusal, is essential to the right. A bond only or neglect to demand one is not enough. *Ibid.*

10. The statute is not in this respect void, as being contrary to the constitution of the United States. *Ibid.*

11. After confirmation of the report of the commissioners of estimate and assessment, under the statute, (1 R. L. 413, s. 178.) there being no irregularity or surprise, the Court will not open the matter, so that the merits may be considered, as to the wrongful assessment of an individual, even with the consent of the corporation. *In the matter of, &c. Third Street*, 6 Cow. 571.

12. The Supreme Court act under the statute as commissioners, not as a Court, and a report once regularly confirmed is irrevocable, unless all the parties in interest consent. *Ibid.*

13. The affidavit of rent due, in the city of New York, required by the statute (sess. 38, ch. 153.) to be made and filed before distress, is *prima facie* sufficient, though the *jurat* be subscribed simply with the name of the officer before whom it is taken, without the addition of his title or office. *Hunter v. Leconte*, 6 Cow. 736.

14. The statute (sess. 42, ch. 18, s. 35, 5 Laws N. Y. 24, a.) authorizing the harbour masters to regulate and station vessels in the East and North rivers, in the city of New York, and imposing a penalty for disobeying their orders, or the orders of either, extends to wharves in the hands of private owners; and is not unconstitutional, as interfering with private property or impairing the obligation of contracts. *Vanderbilt v. Adams*, 7 Cow. 349.

15. It is valid as a police regulation. *Ibid.*

16. The general principle of police laws considered. Per *Woodworth, J.*, in delivering the opinion of the Court. *Ibid.*

17. Under the statute, (2 R. L. 413, s. 178.) the Supreme Court may, on refusing to confirm an estimate and assessment of three commissioners in the city of New York, refer the matter to the three former commissioners, three new ones, or retain part of the former commissioners, joining them with new ones. *In the matter of, &c. Henry Street, &c.* 7 Cow. 400.

18. A statute, (2 R. L. 445, s. 267.) declared to be a public act, authorized the corporation of the city of New York to make various by-laws when they should deem them necessary and proper, "and for regulating, or, if they find it necessary, preventing the interment of the dead" within the city. The corporation passed a by-law prohibiting the interment of the dead within certain parts of the city, under a penalty; notwithstanding which, certain persons interred dead bodies in the part of the city to which the by-law related. The interment was by persons having a right under grants of, or titles to land holden in trust for the sole purpose of interment, some of which had been used for that purpose for more than a century, and to some of which certain fees for interment were incident, and belonged to the persons interring. A further right was also claimed by individual vault owners, in whose behalf some of the interments were made. *Chates v. The Mayor, &c. of New York*, 7 Cow. 585.

19. *Held*, that the by-law was valid and operative as to all these interments. *Ibid.*

20. The act under which it passed is not unconstitutional, either as impairing the obligation of contracts, or taking private property for public use without compensation, but stands on the ground of being an authority to make public regulations in respect to nuisances. *Ibid.*

21. *Held*, that the by-law need not recite or adjudge on its face that it was necessary; but such necessity was implied by the act of passing it. *Ibid.*

22. *Held*, also, that a declaration for the penalty of the by-law need not aver that such by-law was necessary. *Ibid.*

23. Necessity, as intended by the statute, is nearly synonymous with expediency, or what is necessary for the public good. *Ibid.*

24. *Held*, that the length of time, one hundred years, during which part of the premises in question had been used for interring the dead, was not conclusive against the power of the Legislature or the corporation to pass the laws. *Ibid.*

25. *Held*, also, that though premises be granted for a certain purpose, and long used for that purpose, this will not prevent the use afterwards being treated as a public nuisance. *Ibid.*

26. Though a corporation grant laws for the purpose of interment, and even covenant that they shall be quietly enjoyed for that purpose, they are not thereby estopped afterwards to pass a by-law forbidding such interment under a penalty. *Ibid.*

27. Such a by-law repeals the covenant. *Ibid.*

28. *Semble*, the powers of the corporation of the city of New York depend on statute, which

has superseded their original charter, especially as to those things in relation to which the statute makes provisions, either agreeing with or differing from the charter. *Ibid.*

29. Form of declaring for the penalty of a corporate by-law, what such declaration should contain. *Per cur.*, at the close of their opinion. *Ibid.*

30. A map must accompany a petition claiming a portion of the moneys awarded to owners unknown, for ground taken in the laying out of streets in the city of New York. *In re Administrator of A. Bogart*, 1 Wend. 41.

31. On reversal of a justice's judgment, rendered in the city of New York, the plaintiff in error is entitled to costs. The \$50 act does not apply to the city of New York. *Latimer ads. Barton*, 1 Wend. 278.

32. W. B., being the owner of a plot of ground in the city of New York, sold the same in lots, which he had caused to be surveyed upon the streets and avenues (running through his ground) which had been designated by the commissioners of streets and roads in the city of New York, and these he actually laid open, before selling any of the lots in question, except two. In the conveyances, the lots are described as bounded by the streets. *Held*, that the fee in the streets remained in the vendor, but subject to a right of way in the purchasers. *In the matter of Seventeenth Street*, 1 Wend. 262.

33. Where a building lot is sold bounded upon a street in the city of New York, designated as such on the map of the city, or on a map made by the owners of lands, in reference to which sales are made, although the street remains at the time unopened under the authority of the corporation, a covenant will be implied that the purchaser shall have an easement or right of way in the street to the full extent of its dimensions, and when the street is subsequently opened, on the application of the corporation, the purchaser is not liable to pay the owner the full value of the land thus appropriated, but only of the fee subject to the easement. *In the matter of Lewis Street*, 2 Wend. 472.

34. A report of commissioners of estimate and assessment in the city of New York, relative to the opening of streets, will not be confirmed, if, in the opinion of this Court, the measure is premature, and will cost more than the proprietors of the adjacent land will be benefited by the operation. *In the matter of Fourth Avenue*, 3 Wend. 453.

35. Where a part of leasehold property in the city of New York, subject to a mortgage, is taken for a street by the corporation, and a sum of money is allowed by way of loss or damage to the mortgagor by the commissioners of estimate, the mortgagee is entitled *prima facie* to so much of the sum assessed as damages as may be considered the substitute of that part of the premises appropriated to public use. *Astor v. Hoyt et al.* 5 Wend. 603.

36. Where a street in the city of New York was widened from forty to sixty feet, and accordingly used by the public for nineteen years, although no legal measures had been taken to divest the title of the owner; it was held, that the nonclaim of the owner for such length of

time, connected with his acts, such as the payment of an assessment for paving the street to the full width, and the recognition of the appropriation of the twenty feet, were sufficient to establish the right of the public to the use of the street to the full width of *sixty feet*. *Denning v. Roome*, 6 Wend. 651.

37. Where the owner of *lands in a city* sells *building lots*, bounding them by streets of a specified width as laid down on a map, but not actually opened, the purchasers acquire a legal right as against their grantor to have the streets kept open to the width delineated on the map. *Livingston v. Mayor of New York*, 8 Wend. 85.

38. Where building lots were thus conveyed in the city of New York, and the streets were subsequently opened by the corporation, under the act relative to the opening of streets in that city; *it was held*, that the grantor was not entitled, by way of compensation for the land thus appropriated as streets, to more than the value of his *legal title*, subject to the *easement* belonging to the purchasers. *Ibid.*

39. The benefit accruing to a person whose land is taken for a street, by the increased value of his adjacent property, may be set off against the loss or damage sustained by taking his property for a street, and if equal to the loss or damage, is a just compensation for the property so taken. *Ibid.*

40. *Trial by jury*, as secured by the constitution of New York state, applies only to trials of issues of fact in civil and criminal proceedings in Courts of justice, and has no relation to assessments of damages of owners of property taken for streets or other public use; the mode of ascertaining such damages belonging to the Legislature, who may direct the assessment by a jury or by commissioners. *Ibid.*

41. The provisions in the constitution of the United States, that no person shall be deprived of his property without due process of law, that private property shall not be taken for public use without compensation, and that in suits at law, where the amount in controversy exceeds \$20, trial by jury shall be preserved, are restrictive only upon the general government and its officers. *Ibid.*

42. Where, on the widening of a street in the city of New York, an allowance of a sum of money by way of damage is made to the owners of the fee of a lot taken for the street, and also an allowance is made to a lessee of the same lot, and the report of the commissioners is confirmed, it is not competent for the lessee, in an action against his landlords, to show by parol that in the amount awarded to them, was included a sum intended for the benefit of the lessee, to enable him to put the premises in tenantable repair, rendered necessary by the widening of the street. *Turner v. Williams et al.* 10 Wend. 139.

43. Where a statute authorizes the corporation of a city to sell lands for taxes, and to execute a lease of the same to the purchaser, if the owner neglects to redeem within a specified time, this Court will not grant a *mandamus* requiring the execution of such lease, although the time for redemption has expired, where the corporation has failed to publish a notice re-

quired to be published after the sale, and before the expiration of the time of redemption, calling upon the owner to come in and redeem. *The People v. The Mayor, &c. of New York*, 10 Wend. 393.

44. Where such notice is directed to be published at least six months before the expiration of the time of redemption, calendar, and not lunar months will be intended to have been meant, when in the same act, and in reference to the same subject-matter, calendar time, as years, months, and weeks, are spoken of. *Ibid.*

45. The register of the city and county of New York, when elected, takes the office for three years, whether the vacancy which he is elected to fill be occasioned by the death, removal, or expiration of the term of office of his predecessor; and a re-election of the incumbent to the same office, during the term of three years, does not justify him in holding the office longer than three years in the whole; such re-election during the term for which he was entitled to hold under his first election being void. *The People, ex rel. Bunn, v. Coutant*, 11 Wend. 132.

46. Where a housebuilder contracted to build a house and find the materials, for which he was to receive his pay as the work advanced, and after putting up and enclosing the house, worked up in the house plank preparatory to erecting columns for a piazza to the building, and moved the same as a mere matter of convenience to an adjoining house, where they were levied upon by virtue of an execution against the builder; *it was held*, in an action of replevin by the employer for the taking of such materials, that the plaintiff, although he had made advances as the work progressed, was not entitled to maintain an action, the materials being personal property, and not passing to the plaintiff until delivery, or until affixed to the freehold. *Johnson v. Hunt*, 11 Wend. 135.

47. The corporation of New York have not power to take more of the lands of individuals than is actually required for a street, and that portion of the act relating to the city of New York which authorizes the commissioners of estimate and assessment to include in their assessments the whole of a lot, where part only is required for the use of a street, by means whereof the fee becomes vested in the corporation upon confirmation of the report of the commissioners, is unconstitutional and void, when such lands are taken without the consent of the owner. *In the matter of Albany Street, New York*, 11 Wend. 149.

48. Where a street is laid through a cemetery, the same value must be assessed upon the part left fronting upon the street by way of benefit as upon the part taken for the street by way of damage; the latter cannot be valued in reference to its worth as building lots, and the former as a cemetery not convertible to such use; the whole must be valued in reference to the qualified rights of enjoyment of the property by the church to which the cemetery belongs. *Ibid.*

49. Where the Court are satisfied that property adjacent to a street proposed to be opened assessed for benefit, cannot be benefited to the extent of the amount assessed upon it, the

report will be sent back for review until property can be found sufficiently benefited to defray the expenses of the improvement, or until the proceedings shall be discontinued. *Ibid.*

50. The question of the necessity or propriety of opening a street in the city of New York cannot be agitated upon a motion to confirm the report of commissioners of estimate and assessment. Whether the determination of the corporation of New York in respect to streets is directly the subject of review? *Quære. Ibid.*

51. Proceedings under the laws relative to the city of New York, in respect to laying out, opening, and extending streets, may be discontinued by order of the Supreme Court, subsequent to the report of the commissioners of estimate and assessment, and previous to confirmation. *In the matter of Canal Street*, 11 Wend. 154.

52. Where the proprietor of real estate in the city of New York sells and conveys lots in conformity to the city map, on which the property of such proprietor is designated as laid out into blocks, streets, avenues, and squares, such recognition of the plan, laying out his ground into streets, &c. is a dedication of the streets to be taken for public use whenever the corporation shall think proper to open them, although such streets, &c. be not actually opened at the time of such sale and conveyance; and by such sale the proprietor is concluded from subsequently conveying away more of that portion of the estate delineated on the city map as streets, &c. than the mere naked fee; subject to the easement of a perpetual right of way in the public. *Wyman v. Mayor of New York*, 11 Wend. 486.

53. Such right of way is not limited to the owner or owners of lots immediately bounding on the street in question, but extends to every purchaser from the original proprietor of lots in the same tract.

54. A release, therefore, of the right of way by the owners of lots immediately bounding on the streets in question, will not destroy the rights of purchasers of other lots in the same tract, or restore those of the original proprietors. *Ibid.*

55. Where a vendor sells city property as bounded by streets or avenues of particular dimensions, or grants such property in reference to a map or town plot, on which streets, &c. are laid down in the vicinity of the lots sold, the law presumes that the vendor has obtained an enhanced value therefor, and impliedly grants to the purchaser the right or privilege of having such streets, &c.; and such presumption cannot be contradicted by parol proof. *Ibid.*

56. The purchasers of lots bounded upon streets not yet opened are not subject to an assessment for opening such streets to pay their vendor for the value of the land taken for such streets; all he is entitled to receive is a nominal compensation for the naked fee, subject to the easement of a perpetual right of way in the public. *Ibid.*

57. So, where the original proprietor, after recognising the city map, sells and conveys that portion of his estate delineated on the map as a street, the purchaser, on the opening of

such a street, is entitled only to a like compensation. *Ibid.*

58. The register of the city and county of New York, when elected, takes the office for three years, whether the vacancy which he is elected to fill be occasioned by death, removal, or expiration of the term of office of his predecessor; and a re-election of the incumbent to the same office, during the running of the three years, does not justify him in holding the office longer than three years in the whole; such a re-election during the term for which he was entitled to hold under his first election being void. *Costant v. The People*, 11 Wend. 511.

59. It is no objection to the confirmation of a report of commissioners, under the act, "relative to improvements, &c. in the city of New York," &c., that one of the commissioners is a member of the board of Common Council of the city, and that a portion of the property assessed belongs to the corporation. *In the matter of Twenty-sixth Street*, 12 Wend. 203.

60. The Marine Court in the city of New York has no power to set aside a judgment, and grant a new trial; if error occur, it must be corrected by *certiorari*. *The People v. Marine Court of New York*, 12 Wend. 220.

61. The ordinance of the corporation of the city of New York, requiring anthracite or hard coal to be weighed by weighers appointed by the corporation, is a valid by-law, not unreasonable or in restraint of trade; and a penalty imposed for a violation of it may be enforced by action. *Stokes v. The Corporation of the City of New York*, 14 Wend. 87.

62. A declaration generally referring to the by-law under which the penalty was claimed is good in substance; and not having been objected to in point of form in the Justice's Court where the suit was commenced, the objection will not be listened to on a writ of error. *Ibid.*

63. The sale or mortgage of personal property, unless accompanied by delivery, and followed by an actual and continued change of possession, is *prima facie* fraudulent, and conclusively so, unless the sale or assignment is satisfactorily shown to have been made in good faith, and without any intent to defraud, &c. *Murray v. Burtis*, 15 Wend. 212.

64. If no explanation is attempted, the question is one of law, and it is the duty of the Court to pronounce the sale or assignment void; if explanation is given, the question must be submitted to the jury. The only case of presumptive legal fraud is that declared by the statute. *Ibid.*

65. Private property cannot be taken for public use without notice of the proceeding to the owner; but it is competent to the Legislature to direct the mode of giving such notice, and if the requirements of the statute in such case be complied with, it is sufficient. *Owners of ground, &c. v. Mayor, &c. of Albany*, 15 Wend. 374.

66. Taking the grounds of individuals in a city to convert into a public square is taking private property for public use, as much so as if such grounds were converted into a street; and the fact of the damages being assessed upon

the owners of adjoining property, instead of being levied as a general tax upon the city, is no evidence that the property is not taken for public use. *Ibid.*

67. An incorporated company who own a lot in the vicinity of a public improvement are not liable to be assessed for benefit, if by the terms of the grant by which the lot is held, it can be appropriated only to a specific use, which by possibility cannot be rendered more advantageous by the opening of a street or square in its neighbourhood; but the company may be assessed for benefit to adjoining grounds not thus restricted. *Ibid.*

68. This Court cannot quash proceedings had in a subordinate Court, on the ground that the damages apportioned to owners benefited are unreasonably high or extravagant. *Ibid.*

NIAGARA BANK.

1. Under the act incorporating the Bank of Niagara, (sess. 39, ch. 167.) the bank did not forfeit its charter by insolvency and closing their banking operations, if, before they were prosecuted by the people, they resumed the payment of their debts. *People v. Niagara Bank*, 6 Cow. 196.

2. Otherwise, if the prosecution had been commenced before they resumed payment. *Ibid.*

3. The statute (sess. 48, ch. 325, sec. 6.) passed April 21, 1825, limited such insolvency to one year. If it exceed that term, the bank forfeits its charter. But this act does not extend to cases of forfeiture happening before it passed. *Ibid.*

NOTE FOR SPECIFIC ARTICLES.

1. A note payable in specific articles, without mentioning day or place, is, in law, payable on demand, and a special demand is necessary. *Loddell v. Hopkins*, 5 Cow. 516.

2. A note thus payable in farm produce should be demanded at the farm of the debtor. *Ibid.*

3. A note thus payable in merchandise or manufactures should be demanded at the store of the merchant or the shop of the manufacturer. *Ibid.*

4. Where R. on the 22d of August agreed to deliver a certain quantity of hops to T. between the 1st of October and the 1st of December, to be paid for on delivery at a certain place, with liberty in T. to increase the quantity on giving reasonable notice; in an action by T. for not delivering the increased quantity; held, that he was bound to give the notice before the 1st of October, and prove that he was ready to pay for the increased quantity. *Tipping v. Root*, 5 Cow. 404.

5. Where there is an undertaking of A. to pay if B. fails in paying after three months from the time of the delivery of certain articles, no-

tice to A. of the delivery of the articles, and of the failure of B. in making payment, is not necessary. *Kemble v. Wallis*, 10 Wend. 376.

NUISANCE.

1. An action for erecting a fence across a public highway will not lie for special damage to an individual, by reason that the highway was more contiguous, and, therefore, more beneficial; and the deprivation of its use, therefore, more injurious to him than to others. *Pierce v. Dart*, 7 Cow. 609.

2. He must sustain some specific damage to warrant an action. *Ibid.*

3. But trifling damage is sufficient, as if he be detained on his way. *Ibid.*

4. The remedy by action is not barred by the act of abating the nuisance. *Ibid.*

5. On *certiorari* from a Justice's Court, the judgment will not be reversed for excess of damages when the action below was for a tort, *e.g.* case of special damage arising from a public nuisance. *Ibid.*

6. Keeping a billiard room, without allowing any noise to disturb the neighbourhood, and without allowing any bets on the game, is not a public nuisance, unless it be in a tavern, where it is made a nuisance by statute. *People v. Sergeant*, 8 Cow. 139.

7. It is not a nuisance at common law. *Ibid.*

8. Playing the rub to determine which party shall pay for the use of the table is not gaming. *Ibid.*

9. The continuance of a nuisance created by the overflowing of lands by means of a mill dam for twenty years and upwards, although it confers a right to the use of the land flowed, is no defence to a proceeding on the part of the public to abate it, or to an action by an individual for specific and peculiar injury sustained by him in consequence of it, there being no such thing as a prescriptive or any other right to maintain a public nuisance. *Mills v. Hall* et al. 9 Wend. 316.

10. It is not lawful for an individual, without grant to construct and moor a floating storehouse or vessel for the receiving and delivering out of goods and merchandise in any public river, or in any port or harbour, or in the basins or docks thereof; such permanent appropriation and exclusive occupation of a portion of a public river, &c., is an obstruction to its free and common use, and is indictable as a public nuisance. *Hart v. Mayor, &c. of Albany*, 9 Wend. 571.

11. A Court of equity will not grant an injunction to restrain a mere trespass where the injury is not irreparable and destructive to the plaintiff's estate, but is susceptible of pecuniary compensation and for which the party may obtain adequate satisfaction in the ordinary course of law. *Ibid.*

12. A corporation, whose duty it is to prevent obstructions in a river, will be considered a party aggrieved, and may, by its own act, without indictment, abate or remove such nuisance. *Ibid.*

13. Whether an individual, without being specially aggrieved, has a right to abate or remove such nuisance? *Quære. Ibid.*

14. In summary proceedings for the abatement or removal of nuisances, the party whose interests are affected thereby is not entitled to a jury. *Ibid.*

15. An individual, it seems, has not the right upon his own mere motion (or remedy by the act of the party) to abate as a nuisance a few loads of ashes laid in the highway near his dwelling. *Rogers v. Rogers*, 14 Wend. 131.

16. Public nuisances may be abated by the mere act of individuals. *Welmere v. Tracy*, 14 Wend. 13.

17. The statute authorizing commissioners of highways to order the removal of fences by the erection of which highways have been encroached upon, does not abrogate the common law remedy of abatement of nuisances by the mere act of individuals, or abolish the proceedings by indictment; the remedy given by the statute is cumulative. *Ibid.*

18. The object of the statute seems to have been to provide a remedy in doubtful or questionable cases. *Ibid.*

19. A dwelling-house cut up into small apartments, inhabited by a crowd of poor people in a filthy condition, and calculated to breed disease, is a public nuisance, and may be abated by individuals residing in the neighbourhood by tearing it down, especially during the prevalence of a disease like the Asiatic cholera. *Meeker v. Van Rensselaer*, 15 Wend. 397.

20. Parol evidence of the acts of a board of health of a city in directing the abatement of nuisances is inadmissible; it should consist of written minutes of the proceedings, or written orders of the board. *Ibid.*

OFFICE AND OFFICER.

1. A minor is incapable of holding a civil office within the state of New York; but the officer whose duty it is to administer the oath of office cannot, on that ground, refuse to administer such oath. *The People v. Dean*, 3 Wend. 438.

2. An action will not lie for the recovery of a bet on the number of votes which a candidate for a public office has received, made after an election, and previous to the result being known. *Brust v. Keeler*, 5 Wend. 250.

3. An officer sued in an action of trover is entitled to the benefit of the provisions of the act for the more easy pleading in certain suits, and the fact of his having received an indemnity does not deprive him of his rights under it. *Hull v. Southworth*, 5 Wend. 365.

4. Where he levies upon goods in the possession of the defendant in an execution, and such goods are in fact the property of another, this act will be considered as done *virtute officio*. *Ibid.*

5. Where the venue in such case is not laid within the county where the act complained of was done, after the evidence is given on the trial of the cause, the plaintiff cannot submit to

a nonsuit, and the defendant is entitled to a verdict. *Ibid.*

6. Where a person receives a deputation to a public office which entitles him by statute to a certain *per centage* upon the fees and emoluments of the office of his principal, and on receiving his appointment enters into an agreement to perform the duties of his office at a fixed salary, such agreement, being in violation of the act against buying and selling offices, is void, although it be not certain that the stipulated sum would be less than the per centage allowed by law. *Tuppen v. Brown*, 9 Wend. 175.

7. Where such corrupt agreement has been entered into, although the duties of the office have been faithfully performed by the deputy, no action lies by him against his principal for the recovery of his portion of the fees and emoluments received by the principal. *Ibid.*

8. On the argument of a demurrer, the defendant is not entitled to ask for judgment in his favour, although it appears that he is sued in trespass for acts done by him as a public officer, and that the venue is not laid in the county where it appears the acts were done; the party must rely on his statute remedy. *Love v. Humphrey*, 9 Wend. 204.

9. An officer, having process requiring the arrest of a party, is bound to use all reasonable endeavours to execute it, and should at least go to the residence of the party; if he relies upon vague information of the absence of the party, derived from casual inquiries, he does so at the peril of being answerable for a false return. *Hinman v. Border*, 10 Wend. 367.

10. A constable or other ministerial officer, the fees for whose official services are prescribed by law, cannot maintain an action on a promise of extra compensation for extra services, although services beyond what could legally be required are rendered by the officer. *Halch v. Mann*, 15 Wend. 44.

PARENT AND CHILD.

1. When an infant works for another with the consent of his father, on a promise to pay the infant, he (the infant) may maintain an action on the contract in his own name. *Burlingame v. Burlingame*, 7 Cow. 92.

2. A husband is not bound to maintain his wife's children, especially her illegitimate children, born before marriage. *Overmars, &c. of Minden v. Cox*, 7 Cow. 235.

3. Where, on a *certiorari* to this Court from the General Sessions, removing their decision, on an appeal from an order of filiation, it did not appear from the return that the alleged putative father was proved to be in fact such; and the return did not state that the question was made. *Held*, that it was to be intended that this fact was proved. *Ibid.*

4. The statute compelling parents and children to maintain each other extends only to natural relations. *Ibid.*

5. Where a bastard child is likely to be born, and chargeable to a town, the justices may make an order upon the overseers of the poor

to provide for the lying in expenses of the mother before the birth. And after the birth, they may make an order upon the putative father to pay those expenses in gross. *Ibid.*

6. Such an order may be made, though nothing has been paid by the overseers under the first order. The question of payment properly arises when the town seeks to enforce the order. *Ibid.*

7. A parent is entitled to the earnings of his child, being a minor, where there is no agreement, either express or implied, that payment may be made to the child; and an action for the work, labour, and services of such child in such case must be brought in the name of the parent. *Shute v. Dorr*, 5 Wend. 204.

8. A parol agreement by a parent that his child, aged sixteen, shall serve a third person, until the child arrives at the age of twenty-one, when he was to be paid \$100 by his master, is within the statute of frauds; but if any services are rendered under such contract, there may be a recovery for the same upon a *quantum meruit*. *Ibid.*

PARTITION.

- I. *How it may be made, and the effect of it.*
- II. *Proceedings in partition.*

I. *How it may be made, and the effect of it.*

1. Though a deed containing operative words, both of a partition and an original deed, may be good as a partition deed merely, the interests of the parties appearing, in fact, or on the face of the deed, to be a common interest, and the deed being confined to that; yet, if this be not so, it will pass the interest of the several grantors, as an original deed, provided they have any such interest as may be covered by the words describing the subject-matter. *Jackson v. Tibbits*, 9 Cow. 241.

2. A deed must receive its construction, as to what it shall convey, from its language and subject-matter. *Ibid.*

3. A partition between parties holding a conditional fee, or an estate for life only, does not enlarge the estate, but merely serves the tenancy or possession during its continuance. If from the lapse of time since the partition, releases might be presumed, the presumption would be that the releases were made in accordance with, and not in enlargement of the estates of the parties. *Jackson v. Christman*, 4 Wend. 277.

4. Where partition was made by commissioners, in a partition suit between tenants in common, of property on which there were mills; one mill being situated below the other on a stream running through the premises, and the commissioners allotted to one of the parties a certain portion of the premises on which the lower mill was situated, together with all the mills, machinery, buildings, outhouses, water rights, and privileges belonging to the same, and allotted to the other party the residue of premises; and at the time of the partition,

and long before, the water raised by the dam of the lower mill flowed a portion of the premises on which the upper mill was situated; it was held, that by the partition the party to whom the lower mill was allotted, acquired not only the premises particularly described as allotted to him, but also the right to flow the lands of the other party, in the same manner and to the same extent as they were flowed previous to the partition. *Hills v. Day*, 14 Wend. 204.

5. A parol partition between tenants in common, followed up by actual possession, is valid and binding. *Corbin v. Jackson*, 14 Wend. 619.

6. Where a tenant in common commences a suit for the partition of lands held in common, stating in the bill his own right and title to an undivided portion, and that the owners of the residue are unknown to him, and proceedings are had in conformity to the provisions of the statute calling upon the unknown owners to appear and answer, and the bill is taken against them as confessed, and partition is made and confirmed, assigning to the plaintiff a certain portion of the lands to be held by him in severalty, the owners of the residue are barred by such partition from maintaining an action for the suit, if such plaintiff, in truth, had such right and title as set forth in his bill. *Sharp v. Pratt*, 15 Wend. 610.

7. But if on such partition the share of the unknown owners be allotted to an intruder in the partition suit, who, in fact, had no title to the land, although in the partition suit it be adjudged that he has title, the decree or judgment in partition is no bar to an action by the true owners for the recovery of the lands allotted to him. *Ibid.*

II. *Proceedings in partition.*

8. In partition, money paid into Court for use of owners unknown, paid out to claimants, without requiring security to refund, as provided by the statute, (sess. 36, ch. 100, s. 7, 1 R. L. 511.) it appearing that the sum claimed was small, and the claimants wealthy. *Green v. Beekman*, 2 Cow. 577.

9. A commissioner to make partition under the act, for partition of lands, (1 R. L. 507.) cannot maintain a suit for his fees or compensation till taxed by the Court. *Smyth v. Brodstreet*, 5 Cow. 213.

10. In an action by a commissioner, under the act, for his fees and disbursements, his co-commissioner is not a competent witness for the plaintiff. *Ibid.*

11. Whether the commissioners must join or sever in their action for fees or disbursements? *Quære*. And see the authorities as to the claim being joint, the necessity of joinder, and the consequences of nonjoinder, fully collected by A. Burr, *arguendo* for the defendant. *Ibid.*

12. In partition, under the act for the partition of lands, (1 R. L. 507.) the amount of compensation to the commissioners must be determined by the Court, (as per 1 R. L. 812, s. 9.) *Ibid.*

13. If a notice of presenting a petition in partition, and of moving to appoint commis-

sioners, mention a wrong place, this will be rejected as surplusage. *Willard v. Brown*, 5 Cow. 281.

14. No place need be mentioned in such notice. *Ibid.*

15. The object of a suit in partition, under the statute, (1 R. L. 507.) is to ascertain the several rights of the parties; but possession is not awarded. *Bromagham v. Clapp*, 5 Cow. 295.

16. Though the plaintiff's right of entry be destroyed by adverse possession when the suit in partition is commenced; yet, where the Court see that such possession was short of twenty-five years, and, therefore, no bar to a writ of right, they are bound to proceed under the statute, and ascertain the rights of the parties. *Ibid.*

17. To warrant proceedings in partition, it is not necessary that all the parties should be actually seised when the suit is commenced. *Ibid.*

18. The statute concerning the partition of lands does not apply to a case where all the parties are infants. Per *Woodworth, J. Galatian v. Cunningham*, 8 Cow. 361.

19. Proceedings to sell in partition, under the act of 1801, and the amendment, (sess. 34, ch. 25.) are *coram non iudice* and void, unless proof was given to the Court that the lands could not be partitioned without great prejudice to those interested. Per *Woodworth, J. Ibid.*

20. Circumstances from which fraud in procuring and conducting such a sale may be inferred stated, per *Woodworth, J.*, who pronounces it a ground for setting aside the sale; and so, *semble*, that the proceedings of a Court of competent jurisdiction may be avoided for fraud. *Ibid.*

21. The statute of March 16th, 1785, (1 Jones and Varick, 211.) providing for the partition of patented and other lands, is confined in its operations to joint or common owners of equal shares; and if a partition be made where the shares are unequal, it is void. *Jackson v. Tybbits*, 9 Cow. 241.

22. A partition under that act must designate the parties who are to take in severalty by name, or with as much certainty as a deed of conveyance; and where the commissioners awarded in severalty, thus to B.'s representatives, without naming them; *held*, that the partition was void for uncertainty of the persons who were to take. *Ibid.*

23. A Court of equity will not compel a purchaser to take a doubtful title, as on a bill for specific performance, or a sale on foreclosure of mortgage. But the rule does not apply to a sale decreed upon a bill for partition. *Sebring v. Mercereau*, 9 Cow. 344.

24. Judgment creditors and other encumbrancers are not proper parties to a bill for partition, even where a sale of the premises is decreed; and where they were made parties, in such case, by a supplemental bill; *held*, that the bill should be dismissed. *Ibid.*

25. In a proceeding by petition for partition, under the statute, (sess. 36, ch. 100, 1 R. L. 107.) alleging a seisin in common by the petitioners and the defendant, he pleaded sole seisin in himself, when the petition was presented,

and always afterwards; traversing the seisin in common alleged in the petition. Replication, that the petitioners were seised in manner and form as stated in the petition. *Held*, a material and proper issue in partition under the statute; and that it was incumbent on the petitioners, at the trial, to prove that they were seised in common, at the time of presenting the petition, within the meaning of the issue. *Clapp v. Bromagham*, 9 Cow. 530.

26. *It seems*, that, in a proceeding for partition, the plaintiff or petitioner must allege that he is seised, and show a present actual possession; and that a mere right of entry will not satisfy the averment; and that consequently, a subsisting adverse possession of the defendant, though short of twenty years, is a bar. *Ibid.*

27. *It seems*, that a disseisin or an adverse possession, though they may, in some respects, differ in meaning, will either of them, as between tenants in common, destroy their common possession, and thus bar a suit for partition between them; and either will, after twenty years, bar the entry of the tenant in common who is out of possession. *Ibid.*

28. But if adverse possession differ from disseisin in this, that the adverse possession of one tenant in common will not divest the seisin of the other tenants in common till it tolls their entry; yet after it continues twenty years, thus tolling their entry and leaving them a mere right, it then destroys the common seisin, and so bars a writ of partition, or a proceeding for partition under the statute. (Sess. 36, ch. 100, 1 R. L. 507.) The co-tenants out of possession are thus put to their writ of right, to recover their share and gain their seisin, before they can maintain partition. *Ibid.*

29. A judgment in partition does not change the possession; but in an ejectment or writ of right, it would be conclusive between the parties. *Ibid.*

30. On a bill for partition in Chancery, possession of twenty years, adverse to the plaintiff, being interposed, the cause must stand over for a trial of the title at law. Per *Jones*, Chancellor, delivering the opinion of the Court. *Ibid.*

31. When in a proceeding in partition under the statute, (sess. 36, ch. 100, 1 R. L. 507.) there is evidence of a possession twenty years before suit, adverse to the petitioners, the jury should be instructed that, if they find such adverse possession proved to their satisfaction, they should render their verdict for the defendant. *Ibid.*

32. In an action of partition against several defendants, the commissioners may assign to the plaintiff his individual share, and at the request and with the consent of the defendants, may set off their share of the premises together, without making partition among them; and in such a case, a joint judgment may be rendered against them for costs. *M'Whurter et al. v. Gibson*, 2 Wend. 443.

33. The allowance to commissioners in partition is three dollars *per diem*. *Anonymous*, 2 Wend. 621.

34. On a plea of non tenant, usual in partition, the plaintiff is entitled to a verdict, if the parties hold the premises together undivided,

although their interests may be different from what they are described in the petition. *Thompson v. Wheeler*, 15 Wend. 340.

35. If the interests are incorrectly described, it is competent to the Court to amend the record, and give judgment according to the rights of the parties; but the Supreme Court cannot do so on writ of error, where the jury in the Court below found a verdict against evidence. *Ibid*.

36. A judgment in partition under the statute, where part of the premises belong to owners unknown, is not valid, unless it appear upon the face of the record that the affidavit required by the statute, that the petitioner or plaintiff in partition is ignorant of the names, rights, or titles of such owners, was duly presented to the Court, and that the notice also required in such cases was duly published. *Denning v. Corwin et al.* 11 Wend. 647.

37. In partition an order for the sale of the premises may be made without a reference to the clerk to search for liens and encumbrances, unless such reference be asked for by one of the parties. *Gardner et ux. v. Luke et al.* 12 Wend. 269.

PARTNERSHIP.

- I. *What constitutes a partnership.*
- II. *Evidence of the existence of a partnership.*
- III. *Special or limited partnership.*
- IV. *How far the acts of one partner bind the other.*
- V. *Dissolution of partnership.*
- VI. *Actions by and against partners; between partners; between partners and third persons.*

I. *What constitutes a partnership.*

1. Where two persons are jointly concerned in the building of a mill, the promise of one to pay for advances made will not bind the other. The community of interest does not create them partners; to constitute them such, there must be an agreement ultimately to share in the profit and loss. *Porter v. McClure*, 15 Wend. 187.

2. The plaintiff employed the defendant to procure consignments for him, and to act as his agent in certain mercantile business, to be carried on in the name of the plaintiff. The defendant, as a compensation for his services, was to receive one-half of the profits of the business; but he had no authority to contract debts in the name of the plaintiff, nor was he to be liable to third persons for any responsibilities created for the concern. No profits were ever realized, but, on the contrary, losses ensued, and the plaintiff brought an action of *assumpsit* against the defendant for money had and received to his use, as appeared by the books, which the defendant had kept. *Held*, that the foregoing facts did not constitute such a partnership between the parties as would bar the action at law and the plaintiff having recovered a verdict against the defendant for the balance of his account, the Court refused to set it aside. *Ross v. Drinker*, 2 Hall, 415.

3. Where there has been a joint purchase by two persons, for a particular adventure, upon an agreement to share jointly in the ultimate profit and loss, and the goods were marked with the initials of both parties, actually sold, and the

proceeds applied to the payment of a joint debt, the parties are partners, though the relation is limited to the specific adventure. *Cumpton v. McNain*, 1 Wend. 457.

II. *Evidence of the existence of a partnership.*

4. Where two or more are charged as partners, articles of agreement between them are admissible in evidence, (although not conclusive,) for the purpose of showing what the true nature of the connexion between the parties was at the time it commenced; but their declarations made at a subsequent period would not be admissible. *Mitchell v. Roubstone and Stickney*, 3 Hall, 351.

5. A partnership may be proved by general reputation. *McPherson v. Rathbone et al.* 11 Wend. 96.

III. *Special or limited partnership.*

6. A. and B. enter into a contract with C., for a conveyance from him to them of a farm, and that they will pay a part in good negotiable promissory notes, to be endorsed by them; *held*, that this does not constitute them special partners, so that one can bind both by an endorsement in the name of both, without the knowledge and assent of the other. *Ballow v. Spencer*, 4 Cow. 163.

7. What is sufficient proof of a limited partnership. *Reynolds v. Cleveland*, 4 Cow. 263.

IV. *How far the acts of one partner bind another.*

8. Partners are all liable for articles furnished for the benefit of the firm, though the vendor does not know of the existence of the firm, and though he suppose himself dealing with, and give credit to an individual partner, by charging him alone in his books. *Ibid*.

9. And so, it seems, though the agreement be reduced to writing between the vendor and the individual partner, and signed by the latter with his name only. *Ibid*.

10. One partner cannot release a debt due to the firm, even during the partnership, in consideration of a debt due from him individually; and if such appear to be the fact on the face of the release, it is void. *Gram v. Cadwell*, 5 Cow. 489.

11. Where two were concerned together as partners, but the business was done in the name of one, and it was not generally known that they were partners; *held*, that the other was a dormant partner. *Kelley v. Hurlburt*, 5 Cow. 534.

12. And where the acting partner made a contract to pay for goods within the scope of their former partnership; this being after actual dissolution; though no public notice had been given of the dissolution, and it not appearing that the vendors ever had any dealings with the firm, and they never having heard of its existence; *held*, that the dormant partner was not liable. *Ibid*.

13. Where a partnership is publicly and notoriously known, all the partners are responsible for the contracts of each, within the scope of the partnership, until public notice of the dissolution is given; but it is otherwise of a dormant partner. Actual dissolution, without notice, will protect him. *Ibid*.

12. A partner who holds money in his individual right in trust for another cannot subject the firm to an action for the money, by applying it to the use of the firm, without the knowledge or privity of the other member or members of his firm. Otherwise, where it is applied with their knowledge or privity. *Jaques v. Marquand*, 6 Cow. 497.

13. Where a partner borrows money on his individual credit, and afterwards applies it to the payment of partnership debts, or lends it to the firm, this does not make the original lender a creditor of the firm. *Ibid*.

14. But where a party borrows money generally, without saying for whom, the fact of its being used in the business of the partnership is *prima facie* evidence to sustain an action against the firm. *Ibid*.

15. A promissory note was endorsed by one of the members of a firm in the partnership name, as security for a third person, and the person to whom it was passed knew the facts; it was held, that such endorsement did not bind the partners who did not sign or assent to it. *Lavery et al. v. Burr et al.* 1 Wend. 529.

16. Where one of two partners endorsed his appearance on a *capias* against himself and his partner after the return day, and then gave a *cognovit*, on which a judgment was entered against both partners, and an execution issued, on which the partnership property was taken, and the partners subsequently united in confessing a judgment to other creditors, on which an execution also issued, which was levied on the same property; it was held, that one partner could not confess a judgment to be obligatory on another without his consent, or without due process of law; that under the execution in the first cause, the sheriff had a right to sell the property of the defendant who confessed the judgment, and his share of the surplus of the partnership property, after the partnership accounts are taken; that from the manner in which the plaintiff in the first cause had obtained judgment, he had become a creditor of that partner alone, while the plaintiffs in the second action, being still creditors of the firm, were entitled to a preference out of the partnership effects. *Crane v. French*, 1 Wend. 311.

17. Where a general partnership exists, and money is borrowed by one of the firm in the name of the firm, all the partners are liable, although the money when obtained be appropriated by the partner borrowing it to his own use. *Church v. Sparrow et al.* 5 Wend. 223.

18. So also, they are liable where one of the firm borrows money, (not expressly on his individual credit,) and it be shown that it was borrowed for and appropriated to the use of the firm. *Rid*.

19. A promissory note given by one of two partners in the business of farming and cooperating, signed, "Frederick Cleveland and Rufus Cleveland," is good, and binding upon both. *McGregor v. Cleveland*, 5 Wend. 475.

20. A promissory note subscribed by one of the members of a firm, in the partnership name, as surety for another person, without the consent of the other partners, cannot be enforced against the firm by the bank who discounted it, where

the fact of such suretyship was known to the cashier of the bank. *Bank of Rochester v. Bowen*, 7 Wend. 158.

21. The consent of or ratification by the other partner is necessary to allow a recovery. *Ibid*.

22. A debt due to a firm cannot be discharged by the application of it by one of the partners to the payment of a debt owed to him individually by the debtor of the firm, unless done with the consent of the other partners. *Everingham v. Ensworth*, 7 Wend. 326.

23. A partner is not liable to the payment of a note endorsed by his copartner in the name of the firm, out of the course of the partnership concerns, although he be present, and hear the arrangement respecting the endorsement; his assent must be proved, and will not be presumed. *Ibid*.

24. Where a note is given by a partner in the name of a firm for money received by him individually, the other members of the firm are not liable unless the money is applied to the use of the firm with their knowledge and approbation. *Whitaker v. Brown*, 11 Wend. 75.

25. Where, upon the renewal of an accommodation note, the borrower presents to his endorser for signature a note, to which he has affixed the name of a firm, of which he has recently become a member, as makers, the endorser is chargeable with notice that the note is given for the individual debt of the borrower, and in case of the dishonour of the note, cannot enforce payment against the other members of the firm. *Ganewort v. Williams*, 14 Wend. 133.

26. Under what circumstances a partner will be subjected to the payment of a note given, without his assent, in the name of the firm, by his copartner in a matter not relating to the business of the firm, discussed and considered, and the cases upon the subject, in the Courts of England, and in this country, examined and commented upon. *Ibid*.

27. Where one partner of a mercantile firm gives a note in the name of the firm for his individual debt, the assent of the other partner may be implied from facts and circumstances; an express assent need not be shown. *Ibid*.

28. Where goods are bought, and a note in the name of a firm as endorsers is given in payment, the partners not privy to the transaction are not bound; the partner using the name of the firm not having authority in such case to bind his copartners. *Wilson v. Williams*, 14 Wend. 146.

29. The endorsement in such case is not within the course of the partnership business; the endorsers are mere sureties, and the party taking the paper is chargeable with notice that the endorsement was not made on account of a partnership transaction. *Ibid*.

30. The case is not varied by the facts, that the goods were parted with in the usual course of trade, and on the credit of the endorsement. *Ibid*.

31. The party holding the paper is not entitled to have a jury pass upon the question of fraud or no fraud in the transaction; it is not a question of fraud, but of contract, viz. has the partner not concurring in the transaction agreed to pay the note? *Ibid*.

32. Where it is sought to charge a partner of a firm with the payment of a note endorsed in the name of a firm, by a copartner, in a matter not relating to the partnership business, on the ground of subsequent assent, the evidence must be strong and satisfactory; slight and inconclusive circumstances will not be sufficient. *Ibid.*

33. Where the name of a firm is affixed to negotiable papers, by one of the members thereof, for the accommodation of a third person, and the note is discounted by a bank without knowledge of such fact, the other members of the firm are bound, although the note is given out of the course of the partnership business, and without their knowledge and consent. *Catskill Bank v. Stall*, 15 Wend. 364.

34. One partner may execute, in the name of the firm, an instrument under seal necessary to the usual course of their business, which will be binding upon the firm, provided an authority for that purpose be previously communicated to him by the copartner. *Gram v. Seaton and Bunker*, 1 Hall, 262.

35. But this authority need not be by an instrument under seal, nor in writing, nor specially communicated for that specific purpose, but may be general, and inferred from the partnership itself, and from the subsequent conduct of the copartner, implying an assent on his part to the act of the partner who executed the deed. *Ibid.* See *Gates v. Graham*, 12 Wend. 53.

36. The defendants, (who were partners,) by an instrument under seal, executed by one in the name of both, chartered the whole of a vessel (except the cabin) of the plaintiffs, for a voyage from New York to Angostura, and were, by the terms of the charter party, to be allowed one passenger. Two passengers, however, were sent out in the vessel by the defendants; and in an action of covenant brought upon the charter party, it was held, that the instrument was well executed, but that the putting of the two passengers on board was not such a breach of the covenant as would allow the plaintiff to recover the amount of the passage money for the extra passenger in this form of action. If entitled to recover at all, he should resort to an action of *assumpsit*, either against the passenger if he had not paid his passage, or the defendants if they had received the amount of the passage money. *Ibid.*

V. Dissolution of partnership.

37. An agreement between partners, on dissolution, that one shall have the settlement of their affairs, he continuing the business, and assuming all debts and accounts outstanding and due with which the firm had connexion, until they should be settled; and that all the moneys contributed by the outgoing partner, except what had been drawn out by him, should be paid back by the other within a limited time, creates a separate interest in the remaining partner; and the subsequent release of a debt by the outgoing partner to a creditor having notice of the agreement is void. *Gram v. Cadwell*, 5 Cow. 489.

38. On the death of one partner, all the debts other choses in action, with the books and

evidences of debt, as incidents, survive and belong exclusively to the surviving partner, who must collect debts, and is liable to suits for debts in his own name alone; subject, however, to account for the partnership property to the representatives of the deceased partner. *Murray v. Mumford*, 6 Cow. 441.

39. And so, though the partnership be dissolved by mutual consent during the lifetime of the deceased partner. *Ibid.*

40. And in either case the survivor may maintain detinue against the representative of the deceased partner for the books of account and other evidences of debt. *Ibid.*

41. The dissolution of a partnership by mutual consent does not, *ipso facto*, render the partners mere tenants in common of the books and other choses in action belonging to the firm. *Ibid.*

42. The partnership still continues for the purpose of collecting and paying debts, with all the incidents belonging to that relation. *Ibid.*

43. General notice in the Gazette of the dissolution of a partnership is sufficient as to all persons who have had no previous dealings with the firm. *Graves v. Merry*, 6 Cow. 701.

44. But as to those with whom the firm has dealt, such constructive notice is not enough. Actual notice must be shown; otherwise as to these, the act of one of the former firm, in the partnership name, will bind all the former partners. *Ibid.*

45. An authority to one partner to sign notes in the partnership name, for debts of the firm, may be implied from circumstances. *Ibid.*

46. From what circumstances such authority may be inferred. *Ibid.*

47. After a dissolution of partnership, the admission of one of the firm is not evidence against his former copartners, except to avoid the statute of limitations. *Hopkins v. Banks*, 7 Cow. 650.

48. The admission of one partner, either of an account or any fact, made after the dissolution of the partnership, is not admissible as evidence to affect any other member of the firm. *Baker v. Stackpoole*, 9 Cow. 420.

49. A. and B., partners in trade, made an assignment of their property for the benefit of their creditors, containing a condition that it should enure only to the benefit of those creditors who should execute an agreement to accept the individual responsibility of each partner for the one-half of their respective balances, and to release each partner respectively for the other half. *Le Page v. M'Crea*, 1 Wend. 164.

50. The plaintiff (a creditor of the firm) did execute such an agreement, which contained a covenant on the part of A. and B., individually, to take upon themselves each a moiety of the partnership debts, but they did not become parties to the agreement; held, that until the partners had given their individual security, as contemplated, there was no severance of the responsibilities of the firm. *Ibid.*

51. Where three partners previously to a dissolution submit to arbitrators all the partnership accounts, the submission does not embrace a

note given by two of the partners to the third during the partnership, but not for a partnership transaction. *Harris v. Wilson*, 1 Wend. 511.

52. Where a note or bill is payable to a firm, strict proof is required that the firm consists of the plaintiffs on the record. *M'Gregor v. Cleveland*, 5 Wend. 475.

53. Where a party bound himself by bond that A. and B. should execute certain articles of dissolution of a mercantile firm, and that the same should be delivered duly executed to the obligee by a certain day, in which articles it was recited that the said B. had some interest in the profits of the concern, in lieu and satisfaction for his services rendered; it was held, that a memorandum made by the witness in the attestation clause on the execution of the instrument by A. and B., that it was understood, declared, and protested by A. and B., that notwithstanding the recitals in the instrument, B. was not a partner, nor had any share in the profit or loss of the concern, but was merely entitled to compensation for services by a commission or per centage on the profits, without being a partner, did not vary the contract, and that the condition of the bond was complied with, notwithstanding such memorandum. *Wright v. Taylor*, 9 Wend. 538.

54. Even had the memorandum been contradictory to the body of the instrument, it would not have affected or varied its construction, on the ground that *parol declarations*, varying or contradicting a written instrument, are inadmissible in evidence. *Ibid.*

VI. Actions by and against partners; between partners, and between partners and third persons.

55. A dormant partner need not be named as plaintiff in *assumpsit* for goods sold, founded on a contract at the time of making which his interest was unknown to the defendant. *Clarkson v. Carter*, 3 Cow. 84.

56. On releasing or selling his interest to his copartner, he is a competent witness for the latter. *Ibid.*

57. A dormant partner who has never been known in the transaction to which the suit relates need not be made a party. *Hawley v. Cramer*, 4 Cow. 717.

58. The widow of a deceased partner is not a competent witness for the surviving partner in an action by him as such. *Allen v. Blanchard*, 9 Cow. 631.

59. Nor will a release from her to him of all her interest in the particular claim render her competent. Whether such a release would bar her claim to a share of the sum recovered, it not being to the personal representatives of her husband! *Quere.*

60. Where a suit is brought by a surviving partner as such, if he fails, the estate of the deceased partner is liable to contribute to the costs; and the assets of a deceased partner are liable for the debts of the firm if they cannot be collected of the survivor. *Ibid.*

61. On a joint and several promissory note, made by a firm and a third person, a suit may be maintained against the members of the firm without joining the other maker, the partners for this purpose being considered as but one

person, and the nonjoinder of the other maker cannot be pleaded in abatement. *Van Tine v. Crane et al.* 1 Wend. 524.

62. An action of *assumpsit* will not lie by one partner against another, to recover half the amount of a judgment against the firm, which has been paid by the former, unless there has been a settlement, a balance struck, and an express promise to pay; and this principle applies as well to a law partnership of practising attorneys as to other partnerships. *Westerlo v. Everton*, 1 Wend. 532.

63. An action *at law* may be maintained by one partner against the other for a balance due him, growing out of the partnership transaction, if there be but a single item to liquidate. *Musier v. Trumbour*, 5 Wend. 274.

64. Where two persons, partners in trade, were subjected to the payment of a debt of a third person, one as *surety* and the other as *heir* of a *co-surety*, which debt was paid from the partnership funds; it was held, that a separate action might be maintained by each against the principal for a moiety of the money paid. *Gould v. Gould*, 6 Wend. 263.

65. In the absence of all proof to the contrary, partners are presumed to be equally interested in the partnership funds. *Ibid.*

66. In an action against a firm on a note made by one of the partners in the partnership name, it is not incumbent on the plaintiff, in the first instance, to show that the note was given for a partnership transaction. *Vallett v. Parker*, 6 Wend. 615.

67. An action cannot be maintained against all the members of a firm by the acceptor of a bill of exchange, drawn by one of the firm in the partnership name, as *surety* for a third person, where the fact that it is so drawn is known to the acceptor. *Boyd v. Plumb*, 7 Wend. 309.

68. The word "*surety*" added to the name of a firm is sufficient to cast the burden of proof on the holder, to show that the bill was drawn with the assent of all the partners. *Ibid.*

69. Where a written contract is entered into by an individual for the doing of a job of work, in a suit by him to recover for the work done, it is competent to the defendant to show that the plaintiff had a partner in the job, and to prove payment to the partner in full. *Shepherd v. Ward*, 8 Wend. 542.

70. Where a partnership exists between two attorneys, and a suit is prosecuted by them in the name of one of the partners only as the attorney of record, an action may be maintained in their joint names against their client for the recovery of the costs of the suit. *Warner v. Griswold*, 8 Wend. 665.

70*. If several persons become partners, and agree among themselves that neither shall make any contract to charge the other, such agreement between the partners will not affect strangers having no notice of it. *Tradesman's Bank v. Astor et al.* 11 Wend. 87.

71. An action for money had and received, brought by a partner in a particular transaction against his copartner cannot be sustained, unless there has been a settlement of their joint affairs and a balance struck, although there may have been a complete termination of the partnership. *Attwater v. Fowler*, 1 Hall. 180.

72. Therefore, where A. and F. were jointly interested in the purchase of stock in the old bank of the United States, and upon a termination of their speculation, F. wrote to A. enclosed him a copy of his account, exhibiting a

balance against A., and informed him that he (A.) would be entitled to receive thereafter "whatever residue there might be on twenty-nine shares of said bank stock," but which residue, consisting of dividends on the shares, was afterwards received by F. himself; it was held, that he was not liable to account to A. for such dividends in an action for money had and received. *Ibid.*

73. The remedy in such cases, it seems, is to be sought in a Court of equity. *Ibid.*

74. In an action of *assumpsit* at law, by one partner against another, he must show more than a right to an account; he must show an actual account, or a division of the stock, or an adjustment and promise to pay. *Ibid.*

75. Although the general rule is, that demands growing out of partnership dealings cannot be set off against individual demands on one of the partners, yet a special agreement for that purpose may of course be made, which will be binding on the parties, and entitle the defendant to the set-off claimed. *Sewall v. Rodewald*, 1 Hall, 348.

76. A Court of law cannot take jurisdiction of accounts between partners. *Rogers v. Rogers*, 1 Hall, 391.

77. To an action upon a promissory note, the defendant pleaded that the note was given as the consideration of a release of a certain lot of land held by himself and his copartner jointly, upon the supposition that the balance of the partnership accounts was in favour of such copartner; whereas, in point of fact, the balance was in his own favour; and so that the consideration had failed. The plaintiffs replied that the balance of said accounts was not in favour of the defendant, and that the said lot of land was held by the said copartners, not jointly, but as tenants in common. Upon demurrer to this replication, it was held, that the plea was no bar to the action, as it sought to cause an investigation of accounts between partners before a Court of law. The plaintiffs, therefore, had judgment on the demurrer. *Ibid.*

78. A Court of equity has exclusive jurisdiction of accounts between parties, and a plea in bar of an action upon a promissory note, which sought to open partnership accounts, for the purpose of showing that there was a mistake in the note, and that its consideration had failed, was adjudged to be bad upon demurrer. *Ibid.* 394

PATENT.

I. *Patents and grants from the state; when they are valid, and the construction and effect of them.*

II. *Location of patents.*

III. *Construction of particular patents.*

I. *Patents and grants from the state; when they are valid, and the construction and effect of them.*

1. Natural objects control courses and distances in the description of land in a patent. *n v. Front*, 5 Cow. 346.

2. It is a rule of construction as to the description of premises in a deed, that what is most material and most certain shall control that which is less material and less certain. *Doe v. Thompson*, 5 Cow. 371.

3. Courses and distances yield to material, visible, and ascertained objects. *Ibid.*

4. A patent or grant of lands by the state takes effect only from the time when it is approved by the commissioners of the land office, and passes the secretary's office. *Jackson v. Douglass*, 5 Cow. 458.

5. The date is not conclusive of the time of its issuing. *Ibid.*

6. The governor, as such, has no power to sell or contract for the sale of the unappropriated lands of the state. He has no more power than any other commissioner of the land office. *Ibid.*

7. His signature to a patent, therefore, under a certain date, is no evidence of a contract at that time to sell the lands, nor that the patent issued at that time. *Ibid.*

8. What is meant by a patent passing the secretary's office. *Ibid.*

9. A patent of lands by the state shall be presumed to have issued regularly, and if it be not void on its face, cannot be avoided collaterally in a suit between individuals, unless it issued without authority, or against the prohibition of a statute. *Jackson v. Marsh*, 6 Cow. 281.

10. Thus, where a patent issued in 1823, for lands which were occupied and improved to the value of \$25, on the 17th of February, 1809; held, that it should be presumed that satisfactory proof was produced to the commissioners of the land office that the occupant had been satisfied for his improvements previous to the date of the patent, pursuant to the statute. (1 R. L. 296, 7, s. 17.) *Ibid.*

11. A patent was granted of subdivision No. 2; beginning at the southeast corner of the survey fifty acres, and then giving courses and distances, which would not include subdivision No. 2; but the whole, or greater part, of subdivision No. 4. Whereas, had it begun at the northeast corner of the survey fifty acres, the same courses and distances would have included subdivision No. 2. The subdivision had before the grant been surveyed, and a map made, and filed in the office of the surveyor-general; according to which, subdivision No. 2 began at the northeast corner of the survey fifty acres, whence the courses and distances mentioned in the patent were laid down, and would include subdivision No. 2. Held, that the word "southeast" should be rejected as surplusage, and that the location upon the map should control. *Ibid.*

12. If there are certain particulars sufficiently ascertained in the description of parcels in a patent or deed, which designate the thing intended to be granted, the addition of circumstances false or mistaken will not frustrate the grant. *Ibid.*

13. Where a conveyance made in 1762, of one of two tracts of land, contained a recital that the original patentees had in 1734 released and conveyed their interest in the two tracts to

the person under whom the grantor claimed, and no claim had been interposed to the lands up to the time of the trial adverse to such title; *it was held*, that the evidence was sufficient to authorize the presumption of a conveyance from the original patentees to the testator. *Jackson v. Russell*, 4 Wend. 543.

14. Where a tract of land in a patent from the state is described as beginning at the corner of another tract, and the termination of the third course given in the grant is described, in another patent issued several days afterwards, as a clump of rocks on the shore of the lake, if the corner mentioned as the place of beginning is sufficiently ascertained by proof, the location of the premises granted must be made by commencing at such corner, although in doing so, by pursuing the courses and distances, the clump of rocks will not be reached, the third course will be shortened one-half, and other changes will be effected so as to reduce the quantity of land nearly one-half. *Wendell v. The People*, 8 Wend. 183.

II. Location of patents.

15. Where a tract of land was surveyed by direction of the surveyor-general, and a map made, the lines of which did not agree with the survey, and the land was then patented to W., who gave deeds with the map annexed; but extensive locations were made, and possession taken in the patent according to the survey; *held*, that such possessions should not be disturbed; but that the survey, and practical location under it, should prevail over the map. *Jackson, ex dem. Johnson, v. Thillmadge*, 4 Cow. 450.

16. In the location of two hundred acres of land, "to be taken off, in a convenient compact form, from the southwest corner of the patent," &c., the south and west lines of the patent are to be the south and west boundaries of the two hundred acres, and they ought to be taken in a square, unless the situation of the land would render such location peculiarly inconvenient. *Jackson v. Vickory*, 1 Wend. 406.

III. Construction of particular patents.

17. Where C. purchased from E. the west half of lot 8, in lot B., in the twenty-second allotment of Kayaderoseras patent, for which he took a warranty deed, and C. having, as E. insisted, taken possession of more land than his deed covered, E. commenced an action of ejectment against C. to recover the land in dispute, and in his declaration inserted a count on a demise from his mother; and on the trial, E. proved the will of his father, the former owner of lot No. 8, by which it appeared that the lot was devised by him to his wife, and mother of E., during her widowhood; and the counsel for C. on trial called upon E. to produce his deed, or the evidence of his title to the premises conveyed by him to C., but E. declined doing so, and a recovery was had upon the count containing the demise from the mother of E., for the whole of the premises in the possession of C.; upon a bill filed by C., alleging that E. had obtained title to the whole lot subsequent

to his father's death, and praying a discovery of his title, that he might produce his title deeds, and that he and his mother might be restrained from taking possession of the premises conveyed by him to C.; and the conveyance of the mother to E. being admitted by the answer; the mother was perpetually enjoined from taking possession of any part of the premises recovered in the ejectment suit, or from commencing any suit for the *mesne* profits thereof; and costs were refused to E., although it turned out that the strip of land in dispute was not included in his deed to C. *Cudney v. Early*, 4 Paige, 209.

PATENT RIGHTS.

1. A patent for an improvement in a machine must describe the machine in use of which it is an improvement, so that it may be known in what the improvement consists; and a defect in the patent in that respect may be taken advantage of to defeat a recovery on a note given for a right to vend such improvement, on the ground of want of consideration. *Cross v. Hunley*, 13 Wend. 385.

PAYMENT.

1. A sale of goods by a deputy sheriff, and a receipt of the proceeds, operate as a payment to the sheriff, and discharge the defendant. *Hamlin v. Boughton*, 4 Cow. 65.

2. The Court, however, will not order satisfaction to be entered of record, until the money is paid to the plaintiff; but will stay all proceedings against the defendant, leaving the plaintiff to his remedy against the sheriff. *Ibid.*

3. A delivery of money due from a mortgagor to a mortgagee, with an intention to pay, operates as a payment without a receipt, or an endorsement on the mortgage, or on the collateral security. And if the money be afterwards delivered back by the mortgagee to the mortgagor, this shall be construed a loan on the personal credit of the mortgagor. And the lien by the mortgage, as to the sum paid, cannot be revived by the agreement of the mortgagor and mortgagee, as to third persons who hold *bona fide* encumbrances upon the mortgaged premises. *Martin v. Vedder*, 5 Cow. 671.

4. A delivery of money due from a mortgagor to a mortgagee is, of itself, *prima facie* evidence of payment to the extent of the sum so delivered, without the payment being endorsed, or a receipt given. *Ibid.*

5. When a debtor advances money to his creditor, which is intended by both parties to be applied on the debt due, it is but another name for payment. *Per Savage*, Ch. J. *Ibid.*

6. A delay of twenty years to demand the money, or bring a suit upon a contract under seal, will raise a presumption of payment; but this may be repelled, by showing that the covenantee died after the money fell due, leaving the contract in the hands of his attorney,

who did not deliver it to the administrators, or place it within their control, till a number of years after the covenantee's death, it not appearing that they had any knowledge of the contract at the time of making out the inventory of their intestate's estate. *Jackson v. Hotchkiss*, 6 Cow. 401.

7. A general payment by a debtor who owes his creditor on trio-accounts, may be applied by the latter to either. Per *Woodworth, J.*, delivering the opinion of the Court. *Niagara Bank v. Roosevelt*, 9 Cow. 409.

8. But if one of the debtor's liabilities be contingent, as if his creditor be his endorser or surety, not having paid the money, the latter cannot apply the money paid to this account. Per *Woodworth, J.*, delivering the opinion of the Court. *Ibid.*

9. A person indebted to the same creditor on different accounts or demands, and making payment, may apply the payment to which account or demand he pleases; and if he fails to make the application, the creditor may apply the payment to which account or demand he pleases. *Baker v. Stackpoole*, 9 Cow. 426.

10. Where neither party makes an appropriation, the law will appropriate the payment upon certain rules of presumption. The authorities to this point examined. *Ibid.*

11. Where A. has a demand against B. and C., and a more recent demand against B. alone, who makes an indefinite payment, *semble*, the law will appropriate the payment first to the extinguishment of the individual demand; and then the residue, if any, to the extinguishment of the joint demand; though if both demands were against B. alone, it might appropriate the payment first to the extinguishment of the oldest debt. *Ibid.*

12. But in such case, A. cannot wait after the payment till B. becomes farther indebted, and then appropriate the payment to the extinguishment of the newly created demand, leaving the previous demands unpaid. *Ibid.*

13. In no case can a creditor who receives payment generally retain and appropriate it to the extinguishment of a demand created after the payment, leaving a prior demand unpaid. *Ibid.*

14. If a debtor owe his creditor several debts upon distinct causes, and pays him a sum of money, he (the payee) has a right to say to which debt or debts the money shall be appropriated, provided he directs this at the time of the payment, but if he does not so direct, the creditor may apply it as he pleases; and, *semble*, where it is in the nature of the thing indifferent to the debtor to which debt the payment shall be applied, and the debtor does not direct, the creditor may make the application at any time after the payment. *Patterson v. Hull*, 9 Cow. 747.

15. Where the debts due by a debtor to his creditor are of different characters, and a general payment is made, and neither party applies the payment at the time, the law will then apply it, upon the presumed intention of the debtor, to that debt a relief from which will be most beneficial to him. *Ibid.*

16. Thus, if the debts be a mortgage and account, or judgment and account, the law will apply the payment to the mortgage or judgment

in preference to the account, because the former would bear most heavily on the debtor. *Ibid.*

17. Parallel between the civil and common law as to the application of payments. Note (b) to this case. *Ibid.*

18. The giving a note, as between the maker and payee, is not equivalent to the payment of money by the former to the latter, and will not authorize a recovery for money had and received on failure of the consideration. *Van Outland et al. ads. Reed et al.* 1 Wend. 424.

19. A note thus given will not be deemed equivalent to a payment, unless received as such by the party sought to be charged. *Ibid.*

20. Where there is no evidence from which the presumption of payment of a note can legitimately be drawn, the question ought not to be submitted to a jury. *Harris v. Wilson*, 1 Wend. 511.

21. Where the cashier of a bank, when a note held by the bank became due, accepted a check of a third person for part of the amount, and a new note for the balance, and delivered up the old note; it was held, on the check being dishonoured, that an action might be maintained on the original note against the maker, to recover the amount of the check; the mere delivering up of the old note not being evidence that the check and new note were received in payment. *Olcott v. Rathbone*, 5 Wend. 490.

22. Where, however, the suit was brought in the name of the cashier, and there was no evidence that the note had been transferred to him, or that the suit was instituted in his name by the direction of the bank; it was held, that there could be no recovery. *Ibid.*

23. A promissory note taken by express agreement in payment of a judgment, is an extinguishment of the precedent debt. *New York State Bank v. Fletcher*, 5 Wend. 85.

24. A surety, who pays the debt of his principal, is entitled to be substituted in the place of the creditor, as to all the means possessed by him to enforce payment against the principal debtor; but the surety of a surety, though compelled to pay the creditor, is not entitled to be substituted in the place of such creditor, for the purpose of enforcing the payment against the principal debtor, if such debtor has paid his immediate surety. *Ibid.*

25. Where the *partnership funds* of a firm have been misapplied, by a member of a firm, towards the payment of a judgment holden by a creditor of the firm against him for his individual debt, such creditor may, on the application of the other member of the firm, apply the payment to his demand against the firm, and enforce the judgment, although he gave a receipt, applying the payment on account of the judgment. *Campbell v. Mathews*, 6 Wend. 551.

26. Where a creditor receives an order or draft from his debtor upon a third person for a given sum, alleged by the debtor to be due within a few days, and the creditor takes the notes of such third person payable in six and nine months, he makes the debt his own, and in case of nonpayment of the notes, cannot call upon his debtor for the amount of the draft. *Southwick v. Sax*, 9 Wend. 122.

27. *Orders for goods* in the hand of the drawee

are *prima facie* evidence of goods sold to the drawer, delivered to the payee at his request: not so with orders for money; they are presumed to be drawn, nothing appearing to the contrary, upon funds in the hands of the drawer, and if paid, give no cause of action against the drawer, unless that presumption is rebutted by other evidence. Where one party, having a demand against another, pays such other a sum of money, and takes a receipt in full of all accounts, a jury are warranted in the presumption that the accounts on both sides were settled, if no explanation is given relative to the receipt. *Alford v. Baker*, 9 Wend. 323.

28. The presumption of payment, in analogy to the statute of limitations, was not applicable to demands due to the government previous to the late revision of the laws extending that statute to actions in the name of the people. *The People v. Supervisors of Columbia County*, 10 Wend. 363.

29. The effect of the statute upon demands existing at the time of its going into operation is the same as upon demands accruing on the day that the statute takes effect; that is, all demands then existing must be sued for within the time limited, or they will be barred. *Ibid.*

30. Where it is made the duty of supervisors of a county to raise a certain sum of money, as the ordinary county charges are levied and collected, the remedy is by *mandamus* against the supervisors, and not by action against the county. *Ibid.*

31. In order that a *mandamus* may be issued, the party asking for it must show a clear legal right, and no other appropriate specific remedy. *Ibid.*

32. In *assumpsit* against the maker of a note, it is competent for him to show proceedings, under the *absconding debtor act*, against the estate of the payee, the appointment of trustees, and the payment of the note to them; and such evidence is admissible under the general issue. *Clark v. Yale et al.* 12 Wend. 470.

33. Payment in the bills of an insolvent bank is not a satisfaction of a debt, although, at the time and place of payment, the bills are in full credit, and the parties to the transaction are wholly ignorant of such insolvency, if previously to such payment the bank has in fact become insolvent. *Ontario Bank v. Lightbody*, 13 Wend. 101.

34. Where a note of an insolvent bank was received in payment of a check drawn by a depositor upon another bank, such insolvency being unknown to both parties at the time of payment, the loss sustained by the receiver must be borne by the bank from which it was received, and an action of *assumpsit* will lie to recover the same. *Lightbody v. Ontario Bank*, 11 Wend. 9.

35. In order to charge a party receiving such a note with the loss, it must clearly appear that it was taken at his own risk. *Ibid.*

36. At common law, presumption of payment does not attach to a judgment, although there be no evidence of partial payments or of acknowledgment of indebtedness within twenty years. *Smith's Executor v. Miller*, 14 Wend. 188.

37. Now, by statute, the presumption of payment will attach to judgments, i. e. to all judg-

ments rendered previous to 3d of April, 1831; the presumption will attach after twenty years from the passage of the act, viz. 3d April, 1831, and to all judgments thereafter rendered, after twenty years from the docketing thereof. The statute on this subject is *prospective*, and not *retrospective*. *Ibid.*

38. In an action against sureties, on a bond conditioned that their principal, a collector of tolls, should pay over all moneys received by him; it was held, that the intention of the collector that certain payments made by him should be specifically applied might be inferred from circumstances, and that the jury were authorized to make appropriations accordingly, and apply payments in extinguishment of defalcations existing previous to the accruing of the liability of the sureties, although large portions of the payments thus appropriated arose from tolls collected after the accruing of the liability of the sureties, and the payments were credited at the accounting office on a general account; no direction or intimation being given by the collector, at the time of the payments, as to any specific appropriations, and none being in fact made by the accounting officer. *Stone v. Seymour and Bouck*, 15 Wend. 19.

39. Where, however, payments were made by the collector after a new bond with new sureties was given by him, and there were no directions to appropriate, or circumstances from which an intention on the part of the collector to appropriate such payment to any particular items of indebtedness could be inferred, and the moneys, when received by the accounting officer, were placed generally to the credit of the collector on the general account kept with him; it was held, that the sureties to the first bond were not entitled to credit for the payments made subsequent to the execution of the second bond, the new sureties being entitled to the benefit of such payments to countervail the claims existing against the collector, for moneys received by him as tolls after the accruing of their liability. *Ibid.*

40. A check upon a bank given in the ordinary course of business is not presumed to be received as an absolute payment, even if the drawer have funds in the bank, but as the means whereby the holder may procure the money. *Cromwell and Wing v. Lovett*, 1 Hall, 56.

41. The holder of a check in such a case becomes the agent of the drawer to collect the money; and if guilty of no negligence, whereby an actual injury is sustained by the drawer, he will not be answerable, if, from any peculiar circumstances attending the bank, the check is not paid. *Ibid.*

42. In a suit against the drawer for the consideration of such a check, the holder may treat it as a nullity, and resort to his original cause of action. *Ibid.*

43. The defendant, on the 3d of January, 1815, executed a bond for \$8500, in favour of the plaintiffs, to secure the payment of \$4404.52. The condition of the bond recited, that to pay and satisfy the last mentioned sum, one John C. Hamilton had, by indenture, granted unto the plaintiffs an undivided interest in cer-

tain lands, (which had been conveyed by Timothy Pickering to John B. Church and others, in trust,) which were unproductive, and could not be divided for several years thereafter. The condition further stipulated, that the defendant shall pay to the plaintiffs, year by year, the sum of \$308.21, the lawful interest on said sum of \$4004.52, until the said estate should be divided, and a clear and perfect title thereto made to the plaintiffs. In an action on the bond to recover the amount of the annual payments from the year 1818 to 1828, the defendant contended, 1. That the plaintiffs were bound to show diligence in procuring a partition of the land conveyed. 2. That they were barred by the statute of limitations from recovering any thing in arrear beyond six years, or that there was a presumption of payment from lapse of time. *Held*, however, that the statute of limitations did not apply to this case; that there was no presumption of payment; and that the plaintiffs were not bound to procure a partition of the estate. *Held*, also, that the annual payments were to be viewed in the light of interest on the principal sum, and that the plaintiffs were not entitled to interest upon the annual payments. *Henderson and Cairnes v. Hamilton*, 1 Hall, 314.

44. A debtor who pays money to his creditor, being liable to him upon more accounts than one, has a right to direct the application of the payment to whichever subject he may choose; and where the jury neglected or refused to follow this rule, the Court granted a new trial. *Hall and Montross v. Constant*, 2 Hall, 185.

45: Where there are several debts, some of which are *guaranteed*, and some are not, and a payment is made by the debtor, the creditor may apply it as he pleases, unless a special application is made by the debtor. *Clark and Clark v. Burdett*, 2 Hall, 197.

46. According to the general doctrine of *appropriation of payments*, where there are several accounts or transactions between the same parties, the *debtor* has the right to direct to which account the payment shall be applied; if he omits to give directions, the creditor may apply it to which account he pleases; and if no application be made by either party, the *law* will appropriate it according to the justice and equity of the case; and as a general rule, in the absence of all indications of the will or intention of the parties, the law will apply the payment to the extinguishment of the debts according to the *priority of time*; this rule, however, is subject to qualifications and exceptions. *Seymour v. Van Slyck*, 8 Wend. 403.

47. The *intentions* of the parties, either debtor or creditor, in relation to the appropriation, may be *inferred from circumstances*, when it has not been expressly declared; and accordingly, where a collector of tolls on the canal made a payment in July, corresponding *precisely in amount* with an account of tolls which he had returned as collected by him in the preceding month of May, there being at that time no other charge in the comptroller's office against him, except a trifling balance for previous months; and in *August*, made another payment, also precisely corresponding in amount with the account of

tolls rendered as collected in the month of June; *it was held*, that a jury were warranted from such circumstances to find that the collector *intended* the payment in *July* to apply to the tolls returned as collected in the month of *May*. *Ibid*.

48. Where, according to the ordinary course of business, the *monthly returns* of moneys collected as tolls were not made until from five to seven weeks after the expiration of the month in which the tolls accrued; *it was held*, that a payment made on the 21st April could not have been intended or understood, either by the collector or comptroller, as a payment of tolls of *that month*, and that the sureties of the collector in a suit against them were entitled to have such payment applied to the tolls of previous months. *Ibid*.

49. As between debtor and creditor, where the whole indebtedness is from the same individual, and where debts and credits are perpetually occurring in long running accounts, and no balances are adjusted, otherwise than for the mere purpose of making rests, payments will be applied to extinguish the debts according to the *priority of time*; but where *sureties* are bound for the paying over of moneys by their principal, and a *general account* is kept with the principal, in which all debts and credits are entered, and during the progress of the account there be a *change of sureties*, each set of sureties is entitled to the benefit of the moneys received during the period of their respective suretships, so far as the parties have not either expressly or by necessary implication, arising from the circumstances of the case, applied the payments. *Ibid*.

PERJURY.

1. Perjury may be committed in an affidavit made for the purpose of obtaining a *certiorari* to remove into this Court a judgment rendered by a justice of the peace, under the act of 1824, on a trial had before him; for although by that act the writ of *certiorari* is abolished, there are cases in which a *certiorari* is the proper remedy. *Pratt v. Price*, 11 Wend. 127.

PHYSIC AND PHYSICIANS.

1. Partners in the practice of physic are within the law merchant, which excludes the *jus accrescendi* between traders. *Allen v. Blanchard*, 9 Cow. 631.

2. An unlicensed practitioner in physic is not entitled to recover a demand claimed by him for medicine furnished, in which evidently is included compensation for his services as a physician. *Allcott v. Barber*, 1 Wend. 526.

3. An initiation fee may be demanded from physicians and surgeons, on becoming members of county medical societies. *The People v. The Medical Society of the County of New York*, 3 Wend. 426.

4. The law providing for the expulsion of

physicians from medical societies, and the abrogation of their licenses, in cases of gross ignorance, or misconduct in their profession, or when guilty of immoral conduct or habits, is a valid and constitutional law. *In the matter of Smith*, 10 Wend. 449.

9. The constitutional provision that no one shall be held to answer except on presentment or indictment, means that no one shall be held to answer *criminally* with a view to punishment under the criminal law, and has no reference to disciplinary proceedings, or which have exclusive regard to some special character or relation of the accused. *Ibid.*

10. The provision in the constitution of the United States relative to trial by jury applies only to the federal Courts; and the provision in the constitution of this state securing the right of such trial as heretofore used, applies only to cases of trial of issues of fact in civil and criminal proceedings in Courts of justice. *Ibid.*

11. The provision forbidding the creation of Courts proceeding differently from the course of the common law, refers to Courts exercising the usual jurisdiction of Courts of law, but proceeding by modes unknown to the common law. *Ibid.*

12. Where rights are conferred by an act of the Legislature, subject to determination in a certain manner, and the power to alter, modify, or repeal is reserved, the Legislature may prescribe a new and different mode in which the rights may be put an end to; and under such modification of the law, a forfeiture of rights may be declared, although the acts the cause of the forfeiture happened previous to such modification. *Ibid.*

13. A medical society is not precluded from preferring charges against a physician, by the fact of the same charges having been once before passed upon by them, and not sustained. *Ibid.*

14. The trial and acquittal of a physician in a Court of criminal jurisdiction, upon the same charges exhibited against him by a medical society, are no bar to an inquiry. *Ibid.*

15. A county medical society has not the power to expel or remove a member for the cause that he did not possess the requisite qualifications, and obtained his admission by false pretences. A resolution adopted and entered among their proceedings expelling a member for such a cause is a libel; and the member introducing it is liable to an action. *Favocell v. Charles*, 13 Wend. 473.

16. It seems, that the remedy in such a case is by *quo warranto*. *Ibid.*

17. Whether the power conferred upon the county judges to expel a member of a medical society, or to suspend him from practice for a limited period, when charges are exhibited against him for *immoral conduct or habits*, deprives the society of its common law power of a motion? *Quære. Ibid.*

18. Whether a private corporation has the power to remove a member of the corporation? *Quære. Ibid.*

19. The plaintiff brought an action for work and labour bestowed by him as a physician, surgeon, and apothecary, on the defendant's

wife, and for the medicines found and applied by him in the course of his attendance as such physician. It appeared, at the trial, that the plaintiff had no license authorizing him to practise, but was employed by the defendant to attend upon his wife, and in the course of such attendance, furnished a quantity of medicines, for the preparing of which he had obtained a *patent*; and he sought, in this action, to recover a compensation for his services as a physician, and also for his medicines. *Held*, that he was not entitled to recover any part of his claim, not even for the patent medicines furnished in the course of his attendance. *Smith v. Tracy*, 2 Hall, 465.

PLEADING.

I. Parties to the action.

II. Declaration: (a) *It must pursue the process*; (b) *Title of declaration*; (c) *Commencement of the declaration, and statement of the parties to the action*; (d) *Statement of the cause of the action*; (e) *Averments*; (f) *Variance between the declaration and proofs*.

III. Pleas in abatement: (a) *To the jurisdiction*; (b) *To the writ and other proceedings pending for the same cause*; (c) *Misnomer*; (d) *Joinder of improper, and omission of proper parties*; (e) *How and when to be pleaded; verification and judgment*.

IV. General requisite of pleas in bar: (a) *Each subsequent pleading must be an answer to the previous pleading of the opposite party*; (b) *It must not be double*; (c) *Nor a departure from the previous pleadings*.

V. Plea in bar: (a) *General issue*; (b) *Notice with general issue*; (c) *Formal requisites of a special plea*; (d) *Statement of the defence*.

VI. Plea puis darrein continuance.

VII. Particular pleas: (a) *Payment*; (b) *A former action, or recovery for the same cause*; (c) *Nul tiel corporation*; (d) *Plene administravit*.

VIII. Replication.

IX. Rejoinder.

X. Demurrer.

XI. Repleader.

XII. Judgment.

XIII. Pleadings in assumpsit: (a) *Declaration*; (b) *Plea*.

XIV. Pleadings in covenant.

XV. Pleadings in debt: (a) *Declaration*; (b) *Plea*; (c) *Replication*; (d) *Assignment of breaches on a bond conditioned to perform covenants, and proceedings and judgment thereon*.

XVI. Pleadings in replevin.

XVII. Pleadings in slander and actions for libel.

XVIII. Pleadings in trespass: (a) *Plea*; (b) *Replication*.

XIX. Pleadings in real actions.

XX. Pleadings in actions against unlicensed bankers.

I. Parties to the action.

1. All persons concerned in the demand, or who may be affected by the relief prayed, ought to be made parties to a bill in equity, if within the jurisdiction of the Court; but to a bill filed by one to set aside a deed of bargain and sale, absolute on its face, though the parties agreed by parol that it should be in trust for another, the latter need not be made a party, for the trust, not being declared by writing, is void. *Whelan v. Whelan*, 3 Cow. 537.

2. An aged man, whose children live with him and support him, working his farm, but without any contract giving them, or any of them, the exclusive possession, is still so possessed of his farm in the eye of the law, as to enable him, as possessor, to maintain an action for any injury to the farm. *Russell v. Scott*, 9 Cow. 279.

3. On an agreement to pay to the attorney of a defendant in a particular suit the taxable costs in the same, an action should be brought in the name of the defendant. *Stafford v. Stevens*, 2 Wend. 158.

4. The fact that a party entered into a contract with an association, and gave a receipt to such association in the name by which it is known, does not estop such party from denying that such association is a body corporate, or relieve the association from proving themselves a corporation when they sue as such. *Welland Land Company v. Hathaway*, 8 Wend. 480.

5. In an action by a firm, the name of a dormant partner need not and ought not to be used. *Clark et al. v. Miller et al.* 4 Wend. 628.

6. Where there are several executors, they must all be joined in the prosecution of a suit, even though some renounce. A suit in the name of A. B., acting executor, cannot be maintained. *Bodley v. Hulce*, 5 Wend. 313.

7. Where an agreement was entered into as between A. B., agent for C. D. of the first part, and E. F. of the second part, containing covenants to be performed by the party of the first part, and signed by A. B. in his proper name, without the addition of his character as agent or attorney; it was held, that A. B., and not C. D., was the contracting party, and that an action for the breach of the covenant lay against him. *Guyon v. Davis*, 7 Wend. 26.

8. Two incorporated companies may unite in an action of *assumpsit* to recover a sum of money deposited in a bank in their joint names. *New York and Sharon Canal Company v. Fulton Bank*, 7 Wend. 412.

9. Where a collector of the customs put certain property seized by him into the hands of a third person, and took a promise for its delivery on demand to the marshal of the district, or his deputy; it was held, that the marshal having no interest in the property, and the collector having an interest in it, being the contracting party and furnishing the consideration, the suit on the contract must be brought in the name of the collector. *Sailly v. Cleveland*, 10 Wend. 156.

10. It is only where an agent has a lien upon property sold by him, or has a commis-

sion *del credere*, that he has a right to sue in his own name on a contract of sale made for his principal, or to set off a demand arising from such contract due to his principal against his own private debt. *Butts v. Collins*, 13 Wend. 139.

11. G. S. and G., the lessees of a theatre, by their agent, advanced certain sums of money to the defendant Celeste, as a performer, under an agreement that she should be under the exclusive direction of one of the lessees, who was the manager of the theatre. In an action brought to recover back a part of the advances so made; it was held, that the action was properly brought in the name of all the lessees; and that the circumstance of the performer's being under the exclusive direction of one of the plaintiffs did not vary the form of bringing the action. *Gouverneur et al. v. Elliott and Wife*. 2 Hall, 211.

II. Declaration: (a) It must pursue the process.

12. The declaration must agree with the process in the names of the parties. *Willard v. Marsain*, 1 Cow. 37.

13. Where the process was at the suit of G. B. W., and the declaration was in the name of C. W., stating that the defendant was created at his suit, by the name of G. B. W., the declaration was set aside for irregularity. *Ibid.*

14. Where the defendant is sued by a wrong name, but appears by his right one, he may be declared against by the latter. *Ibid.*

15. Where several plaintiffs are sued by process bailable, the plaintiff cannot declare against one of them separately, though they have all endorsed their appearance. Otherwise as to process not bailable. *Bell v. Carrell*, 1 Cow. 193.

16. The question whether bailable or not, turns upon the nature of the action as expressed in the *ac etiam*; not whether the defendant is, in fact, holden to bail. *Ibid.*

17. *Et semble*, that where several defendants are named in the same bailable process, some in their own right, and others *en autre droit*, the objection arises more properly upon the pleadings, than by motion to set aside the writ. *Ibid.*

18. Where a plaintiff declares for a different cause of action than that expressed in the *ac etiam* clause of the *capias*, the proceedings will be set aside as irregular. *Durfee ads. Hamstreet*, 1 Wend. 305.

(b) Title of declaration.

19. Where a suit is commenced in vacation by filing and service of a declaration, for a cause of action accruing previously to the term preceding the commencement of the suit, it is not necessary or proper to entitle the declaration specially as of the day when the suit is commenced; it should be entitled generally as of the preceding term. *Ayres v. Haynes*, 12 Wend. 155.

20. A declaration in a suit commenced by *capias* must be entitled of the term to which the writ is returnable. *Craig v. Murdock et al.* 13 Wend. 293.

(c) *Commencement of the declaration, and statement of the parties to the action.*

21. Where a plaintiff declares by guardian, or a guardian declares as plaintiff, he must show how he is guardian, and that his supposed ward is an infant. *Stanley v. Chappel*, 8 Cow. 235.

22. Where the plaintiff declares in a special character, beginning his declaration by showing his character, he may, in all the subsequent parts of his declaration, refer to himself as the said plaintiff, without adding his special character. *Ibid.*

23. *E. g.* where a plaintiff sues and declares as guardian. *Ibid.*

(d) *Statement of the cause of action.*

24. The declaration stated that the bank of Utica had, pursuant to the act of the Legislature, passed the 10th day of April, 1815, established an office of discount and deposit in Canandaigua; *held*, a sufficient recital of the act in pleading, though it should be considered a private act, especially after verdict. *Bank of Utica v. Smades*, 3 Cow. 662.

25. In pleading any contract in writing, it is sufficient to set it forth according to its legal effect. *Grannis v. Clark*, 8 Cow. 36.

26. More of a contract than what is sufficient to show the cause of action should not be stated; but excess is no ground of special demurrer, though it may be stricken out as surplusage. *Ibid.*

27. An instrument having no date, or where the date is in blank, may be set forth as executed on a certain day, without stating expressly that it was without date. *Ibid.*

28. In declaring for a fraud in representing a machine, on sale of the patent right, as capable, if constructed and worked as described by the defendants, of performing a certain quantity of labour, and averring that, though so constructed, it would not perform the work; *held*, that it is unnecessary to set forth the manner of the construction. *Orwin v. Davison*, 9 Cow. 92.

29. The consideration of the sale need not be set forth particularly. It is enough to say a valuable consideration was paid, or that the plaintiff satisfied the defendant, without any thing more. *Ibid.*

30. It is a general rule in declaring that contracts must be set forth in the words in which they were made, or according to their legal effect; but where there are distinct parts of an agreement, in declaring for a breach of a particular part, it is not necessary to set forth other parts which do not qualify or vary the part on which the action is brought. *Scott v. Leiber et al.* 2 Wend. 479.

31. A general charge in a declaration, that the defendants, as directors of an insurance company, loaned the funds of the company upon inadequate security, knowing such security to be insufficient, without any specification of time, persons, or circumstances, is insufficient, and a demurrer for this cause will be sustained. *Franklin Insurance Company v. Jenkins*, 3 Wend. 131.

32. The declaration will also be adjudged bad, if the grievances complained of are alleged

to have been committed by the want of care and attention, and in part by the wilful mismanagement of the defendants. *Ibid.*

33. A contract in the alternative to transport fifteen or twenty tons of marble from one place to another, must be stated in the declaration according to the terms of it. If stated as an absolute contract for the transportation of twenty tons, and not fifteen or twenty tons, the variance will be fatal. *Stone v. Knowlton*, 3 Wend. 374.

34. If, in addition to the true consideration of a promise, another is alleged, it will be a cause of nonsuit. *Ibid.*

35. In declaring on a justice's judgment of a sister state, the statute giving jurisdiction to the justice must be pleaded. *Sheldon v. Hopkins*, 7 Wend. 435.

36. Where two considerations are alleged in one count in a declaration, one of which is void and inoperative, the count is not bad for duplicity, as the void consideration, though stated, need not be proved. *Wilks v. Green*, 10 Wend. 314.

37. In declaring on a justice's judgment rendered in this state, it is sufficient, besides stating the amount of the judgment, the time and place of its rendition, and the name of the magistrate, to allege that the judgment was rendered in a Justice's Court in a county of this state, in an action of which the justices of the peace have jurisdiction. *Stiles v. Stewart*, 12 Wend. 473.

38. In an action under the statute, making it penal to cut and carry away trees from the lands of the state, and creating a penalty of \$25 for each tree cut, it may be alleged, in one count of the declaration, that the defendant is indebted in a sum equal to twenty penalties; and the amount of any penalties, which it can be proved that the defendant has incurred, may be recovered; though they be less than twenty. *The People v. M'Fadden*, 13 Wend. 396.

39. In every action upon a special agreement, the declaration must set forth a sufficient consideration; and any material variance in the proof of the consideration will be fatal to the plaintiff's recovery. *Wheelwright v. Moore*, 1 Hall, 901.

40. The plaintiff declared upon a special agreement of the defendant, to guaranty the payment of certain promissory notes made by one S. in favour of the plaintiff, in consideration of the sale and delivery of goods by him to S. At the trial the plaintiff introduced the special agreement in evidence. This agreement recited the notes of S., which purported to be for value received, but contained no consideration for the defendant's promise, except such as might be inferred from the words "value received," used in the notes, and no other evidence of a consideration was offered. Upon demurrer to this evidence, it was *held*, that the proof did not meet the declaration; but as it was competent for the plaintiff to support the action by parol proof that the sale of the goods and delivery of the agreement were concurrent acts, the Court awarded a *verdict de novo* to give the plaintiff an opportunity of proving all the facts of his case. *Ibid.*

41. In declaring upon a deed executed for a

principal by his attorney, it is sufficient to count upon the deed according to its legal effect; and the authority by which the attorney so executes the deed need not be stated. It is the deed of the principal, and may be declared on as his. *Gram v. Seaton and Bunker*, 1 Hall, 298.

42. In an action against a witness for the penalty imposed upon him by the statute, (1 R. L. 524.) for not attending at a trial when duly subpoenaed, the declaration must state specially among other things, that the fees of the witness were paid or tendered to him, and it is not sufficient to allege that the witness was "legally subpoenaed," according to the practice of the Court. *M'Lane v. Lane*, 1 Hall, 319.

43. Although an action of debt upon an arbitration bond cannot be sustained, where the award is not made within the time specified in the condition, and the parties have, by a new agreement, extended the time for making the award; yet where the declaration sets forth the bond, the enlargement of the time by the new agreement, an award within the extended period, and a breach of its requirements on the part of the defendant, it contains a complete cause of action. *Myers v. Dixon*, 2 Hall, 456.

(e) *Averments.*

44. When an averment is material, adding videlicet does not make it immaterial, but the want of a videlicet will sometimes make an averment material which would not otherwise be so. *James v. Ostrander*, 1 Cow. 670.

45. The Court will not allow a formal objection to defeat an action, but will suffer the party to amend at any stage of the cause. *Ibid.*

46. It seems, amendments of clerical errors may be allowed by a judge who tries the cause at the circuit. *Ibid.*

47. The declaration alleged that the defendants had undertaken to charge the first endorser of notes payable on demand; and set forth this first endorsement of the notes to the plaintiffs as having been made on a day certain, the endorsement and delivery of the notes by the plaintiffs to the defendants about six months thereafter, and their undertaking at the latter time; held sufficient, especially after verdict, though the declaration did not aver that the demand of payment was made within a reasonable time. *Bank of Ulica v. Smedes*, 3 Cow. 662.

48. The power of a verdict to cure formal defects in pleadings should be liberally applied. *Ibid.*

49. Where an allegation in a declaration states an impossible date, it will be rejected, provided the allegation be still sufficiently certain. *Pangburn v. Bull*, 1 Wend. 345.

50. When the third day of grace falls on Sunday, a note may be protested on the second day, and it is unnecessary to aver in the declaration that the third day happened on Sunday. *Mechanics' and Farmers' Bank v. Gibson*, 7 Wend. 460.

51. Where a party entered into an agreement to give a contract for a certain lot of land at \$4 per acre, and no time was specified when the contract was to be delivered, nor when or in what manner the consideration was to be paid or secured, nor was the quantity of acres contained in the lot mentioned in the agree-

ment; it was held, that in an action for the non-delivery of the contract, the plaintiff must supply the deficiencies in the agreements by proper averments in his declaration. *Osborne v. Lawrence*, 9 Wend. 135.

52. Where a contract in its terms is defective, it should be declared on according to its legal effect. *Ibid.*

53. Where time for the performance of a promise is not specified in an agreement, it should be averred that it was to be done upon request, or within a reasonable time, and that such request had been made, or reasonable time elapsed, when performance was required. Reasonable time or not, is a question for the jury under the direction of the Court. *Ibid.*

54. In a declaration in an action on the case for a fraudulent representation, by means of which goods are sold on credit, and a loss ensues, it must be averred that the representation was made with the intent to deceive and defraud, or the declaration will be held defective, even after verdict. *Addington v. Allen*, 11 Wend. 374.

55. The first four counts of the declaration stated the damages resulting from the breach assigned to consist in a loss of the profits of the purchase; but there was a general averment of pecuniary damage at the conclusion of these, as well as the common counts. Upon demurrer to the first four counts, for the want of proper averments of tender and damage, it was held, that the allegation of special damage at the end of each count might be considered as surplusage, and that the general averment of damage at the conclusion of the declaration was applicable to each separate count. *White v. Demih*, 2 Hall, 405.

(f) *Variance between the declaration and proof.*

56. The plaintiffs declared, setting forth as exchange of vessels between them and the defendants, and that the defendants agreed to pay \$6500 as the difference or boot money, and the proof was that the agreement was to pay in notes at four, six, and eight months, the suit being brought after the notes fell due; it seems, that in such a case there is no variance. *Porter v. Talcott*, 1 Cow. 359.

57. The declaration set forth a judgment as of October term, 1813, *prout patet per recordum*. On *nul tiel* record, the judgment produced was of October term, 1814; held, a fatal variance. *Vail v. Smith*, 4 Cow. 71.

58. But, it appearing that the judgment was entered as of October term by mistake, the plaintiff was on the trial allowed to withdraw his record, in order that he might move to amend it. *Ibid.*

59. Sealed articles declared on with proof, allowed in evidence, though the defendant's name and seal were torn off; it appearing probable that this was done before the plaintiff had declared; and the mutilation not being with the plaintiff's consent. *Every v. Merwin*, 6 Cow. 360.

60. The copy of the declaration served was in consideration that the plaintiff, by articles of agreement, granted to the defendant the immediate, &c. possession of certain premises, together with one-half of the yearly rent then become due. The articles recited, that the plain-

tiff conveyed, relinquished, and gave up the premises; and then proceeded, "all of which premises the said defendant is to have the immediate, &c. possession of, together with the yearly rent, or that is to say, the half of the rent to become due, &c." The draft of the declaration and the oyer were right, as to the time of the rent becoming due; and the variance in the copy was a clerical mistake. The cause being referred, and the articles, though objected to, being received in evidence; *held*, that there was no variance in describing the possession as *granted*; and that as to the allegation of the time when the rent became due, it not appearing that any injustice had been in fact done by the referees, the plaintiff might amend, even after a motion by the defendant to set aside the report of the referees on the ground of this variance, on payment of costs; and that the report should then be confirmed. *Ibid*.

61. Whether such an amendment may be granted by a judge on the trial? *Quære. Ibid*.

62. Declaration on a covenant in articles of agreement, that the defendant, after the plaintiff had declared what he owed the defendant, and what the plaintiff owed one S., if S. would transfer the debt, would pay the remainder of a sum of 1500 dollars, in three equal annual payments from the date of the articles. The covenant was, to pay the remainder of the 1500 dollars after the deductions; to be paid in three equal annual payments, without saying from the date. *Held*, no variance; the covenant meaning that the time should run from the date; and being, therefore, set forth according to its legal effect. *Ibid*.

63. Clerical mistakes in the pleadings may be amended even after trial; where the party objecting to the mistake will not be injured. *Ibid*.

64. And the Court have strongly inclined that a single judge may allow the amendment at the trial. *Ibid*.

65. A judge at the circuit is bound to notice an objection for a substantial and material variance between the declaration and evidence, though not made till after the defendant's counsel has closed his summing up to the jury. *Mills v. McCoy*, 4 Cow. 406.

66. The declaration was on a promise to pay \$100 for improvements. Proof of a promise to pay if the promisor should obtain a contract for the land. *Held*, a fatal variance. *Lower v. Winters*, 7 Cow. 263.

67. In debt on a town collector's bond, the plaintiff, in assigning breaches, set out the tax warrant, and averred that the collector was thereby required to pay a large sum, to wit, \$5935 59, to the county treasurer; but the warrant produced required the payment of \$4530 15; *held*, no material variance. *Janson v. Osterlander*, 1 Cow. 670.

68. Where a promissory note is declared on as payable to the order of the plaintiffs, and the note produced on the trial is payable to them, but in their partnership name, it is no variance, although it is not alleged in the declaration that the note was thus made payable, or that the plaintiffs were partners, provided the fact be shown on the trial that the plaintiffs compose

the firm to whom the note is made payable. *Wardell et al. v. Pinney*, 1 Wend. 217.

69. Where, in a declaration against a sheriff for money collected on an execution, it is stated that the direction was to levy a certain sum without specifying interest, and by the execution it appears that he was directed to levy the amount with interest, the variance is not material. *Crane v. Dygert*, 4 Wend. 675.

70. The omission to set forth in a declaration the manner of payment prescribed on a contract, cannot be taken advantage of as a variance, if no question arises in the case upon that part of the contract. *Guyon v. Lewis*, 7 Wend. 26.

71. In an action of debt, where the declaration contains two counts, one on a special contract, in which a certain sum is demanded as damages, and another on a quantum meruit, demanding a like sum, and a verdict is rendered for a sum greater than is demanded in either count, the verdict will be set aside, and a new trial granted. *McIntire v. Clark*, 7 Wend. 330.

72. There is no variance in stating a note bearing date 4th month 1st, as having been made on the first day of April. *Field v. Field*, 9 Wend. 395.

73. An objection of variance between the declaration and proof will not be heard on the argument of a writ of error brought to reverse a judgment of the Common Pleas rendered on certiorari. *Whitney v. Sutton*, 10 Wend. 411.

III. Pleas in abatement: (a) To the jurisdiction.

74. Where a defendant appears in a Court of general jurisdiction in a neighbouring state, (one of the United States,) the judgment of that Court is conclusive against him, and shall have the same effect as a judgment in a Court of general jurisdiction in this state. *Wheeler v. Raymond*, 8 Cow. 311.

(b) To the writ and other proceedings pending for the same cause.

75. A variance between the writ and declaration is not pleadable in abatement. *Cronly v. Brown*, 12 Wend. 271.

76. Devisees, &c., cannot object by motion, that the heirs are not warned on a *scire facias*, but only by plea in abatement. *Cumming v. Eder*, 1 Cow. 70.

77. The pendency of two suits for the same cause of action cannot be pleaded in abatement of each other, unless commenced at the same time. *Haight v. Holley*, 3 Wend. 258.

78. In a suit against two defendants, founded upon a joint cause of action against both, one of the defendants cannot defeat the action, by pleading, in abatement, matters which are applicable to himself alone. To make a plea in abatement effectual in such a case, all the defendants must unite in the plea, and it cannot be interposed by one alone. *De Forrest v. Jewett and Parsons*, 1 Hall, 137.

79. In an action of *assumpsit* against the defendants for money had and received, one appeared by his own attorney, and pleaded the general issue; while the other by a separate attorney appeared, and pleaded, in abatement of the whole suit, the pendency of certain foreign attachments in the state of Connecticut, which

had been issued against himself alone. Upon demurrer to this plea, it was held to be bad, the cause of action not being covered by the plea. *Ibid.*

(c) *Misnomer.*

80. Grantis and Gerardus are different names. *Mann v. Carley*, 4 Cow. 148.

81. So are Quartus and Gerardus. *Ibid.*

82. A defendant, sued by a wrong name, may plead the misnomer in abatement, after he has appeared and given notice thereof specially. *Ibid.*

83. And in a case where he moved before appearance, the Court set aside the *capias* and subsequent proceedings for irregularity. *Ibid.*

84. But they refused to do this in a case where the defendant had appeared, though specially. *Ibid.*

85. And they will not hereafter do it in any case; having adopted a general rule, that, hereafter, the misnomer of the defendant shall in all cases be pleaded in abatement. *Ibid.*

86. Process will not hereafter be set aside for misnomer, but the party must plead it in abatement. *Reg. Gen.* 4 Cow. 157.

87. A mistake in the declaration as to the Christian name of a plaintiff is not a ground of nonsuit at the trial; and such mistake cannot be taken advantage of, except by a plea in abatement. *Collman et al. v. Collins*, 2 Hall, 569.

(d) *Joinder of improper, and omission of proper parties.*

88. A defendant, to prevent the plaintiff's recovering a demand against him and another under a declaration against him alone, must in all cases plead the nonjoinder in abatement. *Williams v. Allen*, 7 Cow. 316.

89. Where one of several joint debtors is sued alone, he must plead the nonjoinder in abatement, and cannot take advantage of it on the trial. *Gay v. Cary*, 9 Cow. 44.

90. And the bill of particulars may run against the defendant alone, without mentioning his co-debtors. *Ibid.*

91. A suit brought against the members of an incorporated company, made by statute individually liable as carriers, at common law, for the loss of a packet intrusted to their agent, should be against all the copartners, as the action is *quasi ex contractu*; the nonjoinder of all must be plead in abatement. *Allen v. Sewall*, 2 Wend. 327.

(e) *How and when to be pleaded; verification and judgment.*

92. A plea in abatement cannot be received after a plea in bar. *Palmer v. Evertson*, 2 Cow. 417.

93. A plea in abatement praying judgment of the writ and declaration, where the suit is commenced by bill, is bad; it should pray judgment of the bill and declaration. *Haywood's Executors v. Chestney*, 13 Wend. 495.

94. Such plea must be set forth in precise technical form; it is not enough that matter in abatement is contained in it. *Ibid.*

IV. *General requisites of pleas in bar: (a) Each subsequent pleading must be an answer to the previous pleading of the opposite party.*

95. Where the defendant pleads several facts

all constituting but one point of defence, or in other words, one defence, the plaintiff may traverse, and tender an issue on all or any one of the facts; otherwise, if they are distinct and independent of each other, and not necessary to the single point or defence. *Trucker v. Ladd*, 7 Cow. 450.

96. Thus where, to account for money had and received, the defendants pleaded, 1. That the money belonged to one Y., for whom the plaintiffs were trustees; 2. That the promise to pay was made to them in that capacity; 3. That the defendants and one P. had a judgment against Y.; 4. That this judgment was for the sole benefit of the defendants; and offered to set it off against the plaintiffs; held, that the plaintiffs might reply, taking issue on all these facts. *Ibid.*

97. But, *semble*, that the plea was bad; a set-off not being pleadable, but only the subject of notice under the general issue. *Ibid.*

98. A plea purporting to be an answer to the whole declaration, but being in truth but an answer to part, is bad on demurrer. *Jackson v. M'Cluskey*, 2 Wend. 541.

99. Whatever is necessarily understood, intended, and implied in a plea, is traversable as much as if it were expressly alleged. *Haight v. Holley*, 2 Wend. 268.

100. A justification, good as to a part only of the trespasses complained of in the declaration, is bad if it professes to answer the whole declaration. *Dutton v. Holden*, 4 Wend. 643.

101. Where a plea answers only a part of a declaration, though it begins only as an answer to such part, it will be bad on general demurrer. *Etheridge v. Osborn*, 12 Wend. 399.

102. A plea commencing as an answer only to a part of the cause of action, and praying judgment of the action generally, is bad; so a plea to a part of a count will be bad, even though the commencement and conclusion be good; and notwithstanding that a separate plea of the general issue has been put into the whole declaration. *Loder v. Phelps*, 13 Wend. 46.

103. Every plea must contain in itself an answer to the whole declaration, or to one count in the declaration, whichever it professes to answer; a defendant may justify a part, and deny the residue of trespasses charged against him; but the whole *gravamen* must be answered in the same plea. A separate plea of the general issue to the whole declaration will not dispense with this requisite. *Underwood v. Campbell*, 13 Wend. 78.

104. A plea is bad which in its commencement purports to be an answer to the whole, but is, in truth, an answer to only part of a declaration. *Gillespie v. Thomas*, 15 Wend. 461.

(b) *It must not be double.*

105. *Ne unques accouple* and alienation *tout temps pris* may be pleaded together. *Allen v. Smith*, 1 Cow. 182.

106. The pleas of *nul tiel record*, no judgment against the defendant in the original suit, and no *ca. sa.* sued out against him, are not incompatible, under the statute allowing double pleading in an action on a recognisance of bail. *Shiland v. Cory et al.* 2 Wend. 246.

107. A plea by a vendor that he was *not requested* to convey, and that he did *not* refuse, is bad for duplicity on special demurrer. *Connelly v. Pierce*, 7 Wend. 129.

(c) *Nor a departure from the previous pleading.*

108. In an action of trespass *quare clausum*, &c., it is no *departure*, if the defendant, after pleading *liberum tenementum*, rejoins to the replication which sets forth a demise, that in the demise there was a reservation of the right to the acts complained of as trespasses. *Dutton v. Holden*, 4 Wend. 643.

V. *Pleas in bar: (a) General issue.*

109. A constable who joins with a pleading the general issue waives his right to justify, and forfeits his claim to double costs, if such party, as well as the constable, cannot make out a justification. *Merrill v. Near et al.* 5 Wend. 237.

110. A party, who turns out property, and directs it to be taken by a constable, cannot, in an action against him and the constable for taking the property, set up the defence that he acted in aid or assistance or by command of the constable; to entitle a party to such defence, there should either be a request from the officer, or it should appear that aid or assistance was necessary, from which a request might be implied. *Ibid.*

111. In *covenant or debt*, the plea of *non est factum* only puts in issue the giving of the deed, and it is not necessary in such a case for the plaintiff to prove the *averments or breaches* contained in his declaration; the plea admits all the material averments. *Legg v. Robinson*, 7 Wend. 194.

112. Thus, where in a Justice's Court, to a declaration on an appeal bond, containing all the necessary averments to charge the defendant, he pleaded that he *never gave such a writing*; it was held, that the plaintiff was bound to prove only the execution of the bond. *Ibid.*

113. In a suit for a breach of covenant of warranty, where the defendant pleads no other plea than *non est factum*, the plaintiff, to entitle himself to a recovery, is bound only to prove the execution of the deed; he cannot be required to prove the eviction by production of the record of recovery against him or the writ of possession executed. *Cooper v. Watson*, 10 Wend. 202.

114. *Non detinet* is a bad plea by an executor to a declaration on a judgment against his testator, and being shown to be false, will on motion be struck out, with costs. *Ames v. Webber's Executors*, 10 Wend. 624.

115. A plea, which amounts to the general issue, is bad on special demurrer, and it will amount to the general issue when it shows a state of facts from which it appears that the plaintiff at no time had any cause of action. But when a plea is overruled, as equivalent to the general issue, it must be very clear that it is so. *Richards and Sherman v. Cuyler*, 2 Hall, 201.

(b) *Notice with general issue.*

116. Notice of special matter cannot be given with the plea of *nil tiel record*. Such notice can only accompany a plea which pre-

sents an issue to be tried by a jury. *Barkeydt ads. Haverly*, 1 Wend. 70.

117. An officer joining in a plea of the general issue, and in a notice of justification, with others who could not avail themselves of it, does not lose the benefit of such justification. *Jennings v. Carter*, 2 Wend. 446.

118. One who comes in aid of an officer may justify as the officer may do. *Ibid.*

119. A notice of special matter, to be given in evidence on the trial of the cause, may be subjoined to a plea of *non est factum* in debt or bond. *Beach v. Springer*, 4 Wend. 519. S.P. *Provost v. Calder*, 2 Wend. 517.

120. In an action for the recovery of the price of an article sold with warranty of its goodness, or in relation to which there was a fraudulent misrepresentation, the defendant, on notice given with his plea, may give evidence of the fraud or breach of warranty, in diminution of the plaintiff's claim. *Reab v. M'Kister*, 8 Wend. 109. See also *Smith v. Gregory*, 8 Cow. 114.

(b) *Statement of the defence.*

121. In an action against a firm as makers of a promissory note, a plea by one of the defendants of want of knowledge and consent in Smith did not amount to the general issue; but was merely a denial of actual knowledge or consent in the particular transaction; and left legal knowledge and consent to be implied from the nature of the connexion between the partners and from the law merchant. *Smith v. Lusher*, 5 Cow. 688.

122. The second section of the act "for the more easy pleading in certain suits," allows any matter to be given in evidence which, if specially pleaded, would be a defence to the action; but not matter which would be no defence, though specially pleaded. *Van Steenberg v. Bigelow*, 3 Wend. 43.

123. A plea which alleged that two years after the plaintiff became possessed of the equity of redemption, he sold the mortgaged premises for a sum far exceeding the debt, was held bad, for want of an averment that the property was of the same value, when the equity of redemption was conveyed to the plaintiff, as when he subsequently sold it. *Spencer v. Harford's Executors*, 4 Wend. 381.

124. A plea that a plaintiff in an action of *assumpsit* assigned all his property, as an insolvent debtor, after the making of the promises set forth in the declaration, is good, although the promises are laid as of a day subsequent to the discharge, the day laid in the declaration not being material. *Garr v. Gomez*, 9 Wend. 649.

125. A plea of tender before suit brought must contain a proffer in Court of the money tendered, and must be pleaded in bar of the damages *ultra*, &c., and not in bar of the action. *Ayres v. Pease et al.* 12 Wend. 393.

126. A plaintiff is not bound to take judgment by *nil dicit*, where a defective plea is interposed, but he may demur. *Underwood v. Campbell*, 13 Wend. 70.

127. A plea of license in an action *quare clausum fregit*, from one having only a possessory right to the *locus in quo*, without giving

colour to the plaintiff, is bad, as amounting only to the general issue. *Ibid.*

(d) *Formal requisites of a special plea.*

128. A replication that the discharge of the defendant as an insolvent debtor was obtained by fraud, accompanied with notice of the facts which will be insisted upon at the trial, is not a special pleading, requiring the signature of counsel. *Alexander v. Miller*, 10 Wend. 603.

129. An averment in a plea of an insolvent discharge, that the defendant was "of the county" to a judge of which he presented his petition for a discharge, is sufficient to show that the judge had jurisdiction. *Porter et al. v. Miller*, 3 Wend. 329.

130. Where a deed is executed by one as the attorney of another, and it becomes necessary to plead its execution, an averment that it was delivered as the deed of the attorney is bad; it should be averred to be delivered by the attorney as the deed of the principal. *Church v. Gilman*, 15 Wend. 656.

VI. *Plea puis darrein continuance.*

131. The last continuance is the last day of the return of the *venire facias*. *Palmer v. Hutchins*, 1 Cow. 42.

132. And a plea *puis*, &c. cannot be interposed after a verdict, or a *relicta* and *cognovit*. *Ibid.*

133. Matter of defence arising after issue joined must be pleaded *puis darrein* continuance. *Jackson v. Ramsey*, 3 Cow. 75.

134. This rule applies as well to ejectment as to other actions; as where the defendant acquires title by deed after issue. *Ibid.*

135. But where R. purchased the premises at sheriff's sale, on a judgment and execution against M., and took no deed; and then M.'s devisee brought ejectment, after issue joined, in which R. obtained a sheriff's deed; *held*, that this need not be pleaded, but might be given in evidence under the general issue. *Ibid.*

136. A plea *puis darrein* continuance may, in general, be pleaded without being verified by affidavit. *Jackson v. Peer*, 4 Cow. 418.

137. And the defendant may enter a rule of course to amend such a plea, as in other cases. *Ibid.*

138. Under a rule of course to amend his plea, the defendant may alter it so as to modify, or vary entirely, the ground of the defence taken by the original plea. *Ibid.*

139. An insolvent's discharge, obtained during term, (17th May,) may be pleaded *puis darrein continuance*, at the circuit, (5th June,) the delay not being unreasonable; and in the discretion of the judge, the plea may be received without its being verified. *La Forge v. Carrier et al.* 1 Wend. 89.

140. An objection that a plea *puis darrein continuance* was not put in time must be made by motion to set the plea aside, and cannot be taken on demurrer. *Ludlow v. McCre*, 1 Wend. 228.

141. A plea *puis darrein continuance* of a discharge under the act abolishing imprisonment for debt in certain cases, is not a waiver of a plea in bar before put in; and the plaintiff can-

not confess the plea and take judgment, but must proceed and try the former issues. *Rayner et al. v. Dyett*, 2 Wend. 300.

142. After an administratrix has pleaded the general issue and a plea of *plene administravit præter* a certain sum, and the plaintiff in the action has replied, admitting the truth of the second plea, praying judgment, &c., a plea *puis darrein* continuance, setting forth a judgment confessed by the administratrix in a suit commenced since the action in which the plea is interposed was at issue and noticed for trial, will be received and considered good. *Lawrence v. Bush*, 3 Wend. 305.

143. Matter of defence arising after issue joined, intermediate the term and the circuit, must be pleaded at the circuit. A plea *puis darrein*, under such circumstances, cannot be served in vacation. *Field et al. v. Goodman*, 3 Wend. 310.

144. A plea *puis darrein* continuance waives all previous pleas; and if the matter of that plea be determined against the party, it is a confession of the matter in issue. *Kimball v. Huntington*, 10 Wend. 675.

145. By operation of law the previous pleas are stricken from the record, and every thing confessed except the matter contested by the plea *puis*. *Ibid.*

146. A plea *puis darrein continuance*, in bar of the action, is a waiver of all former pleas. Even upon a plea in abatement pleaded *puis darrein*, the judgment, whether upon demurrer or verdict, is final *quod recuperet*, and not a *responded ouster*. *Culver v. Barney*, 14 Wend. 161.

147. The rule, however, does not apply where the matter of the plea affects the remedy only, and not the right of action; thus a plea *puis darrein* of discharge under the act abolishing imprisonment, &c., is not a waiver of a plea in bar previously pleaded, but the plaintiff must proceed and try the issue before joined. *Ibid.*

VII. *Particular pleas: (a) Payment.*

148. A special plea in bar, in affirming a fact in avoidance of the action, admits the cause of action stated in the declaration, (e. g. plea of payment to a declaration on a judgment.) *Raymond v. Wheeler*, 9 Cow. 295.

149. In pleading, a fact asserted on one side, and not denied on the other, is admitted. *Ibid.*

150. Where the amount of a judgment has been collected, which is subsequently reversed for defect of form merely, and restitution and costs of reversal awarded to the defendant in the original judgment, which he has never received, such defendant cannot plead the payment made by him on the erroneous judgment in bar to a second suit for the original cause of action. *Close v. Stewart*, 4 Wend. 95.

(b) *A former action or recovery for the same cause.*

151. A former recovery for a previous payment is no bar to a second action for a subsequent payment, although the evidence in both actions is in part the same. *Buller v. Wright*, 2 Wend. 369.

152. A plea that the defendant was not served with process, and had not notice of the pending or prosecution of the suit, is equivalent

to a denial of appearance in person or by attorney, and a bar to the action. *Helbrook et al. v. Murray et al.* 5 Wend. 161.

153. In an action on such a judgment against several, who sever in their defence, if the plea of one be adjudged good, and the judgment as to him be pronounced void, it is void as to all the defendants. *Ibid.*

154. The former recovery for the amount of moneys paid at the commencement of the first suit, is no bar to a second action for other moneys subsequently paid on the same account; the former recovery being as for so much money paid at the request of the defendant, implied from his legal liabilities to indemnify the plaintiff. *Wright v. Butler*, 6 Wend. 284.

155. A record of recovery in a former action between the same parties, in which the jury decided that there was sufficient evidence of demand and notice of nonpayment, is sufficient in a subsequent action to establish the fact of demand and notice. *Ibid.*

156. Where a party has no opportunity to plead a former verdict as an estoppel, the record thereof may be given in evidence, and is conclusive and binding on the party, the Court, and the jury. *Ibid.* *S. P. Wood v. Jackson*, seq.

157. Where a party may avail himself of a former verdict or decree by way of estoppel, he must plead the same in bar of a suit, or in answer to a plea, or he will be deemed to have waived the estoppel, and to have consented that the jury shall re-investigate the facts, and find according to the truth of the case. A former verdict is not conclusive as evidence; it is so only when pleaded. This rule, however, does not apply to actions of ejectment or assumpsit, nor to cases where the plaintiff's title is by estoppel, or where the party has had no opportunity to plead the matter specially as a bar. *Wood v. Jackson*, 8 Wend. 1.

158. The fact that a judgment has been reversed, and the verdict upon which it is founded set aside, is a complete answer to a verdict argued by way of estoppel. A purchaser under a judgment may claim every benefit which the judgment creditor could have claimed had he been the purchaser, and, notwithstanding the reversal of the judgment, is entitled to the land purchased while the judgment was in existence, but not to the benefit of a collateral fact settled by a verdict set aside as illegally rendered. *Ibid.*

159. Where a plea was interposed setting forth a former recovery for the same cause of action in the state of Vermont, and a satisfaction of the judgment there by appraisement of lands upon execution issued upon such judgment; it was held, that such satisfaction being by a course of proceeding unknown at common law, the defendant was bound, if the proceeding was authorized by the statute law of the state of Vermont, to set forth the statute, so that the Court might see that the proceedings had been conformable thereto; and that a general averment that the proceedings were according to the laws of the state of Vermont, and fully authorized thereby, was not sufficient. *Hulmes v. Boughton*, 10 Wend. 75.

160. The Court of Errors cannot take judicial

cognisance of any of the laws of the other states of the union at variance with the common law. *Ibid.*

161. It seems, however, that upon a common law question, the legal presumption is, that the common law of a sister state is similar to that of our own. *Ibid.*

162. Demands cannot be split up, and several suits brought upon them; a recovery in one of such suits is a bar to a recovery in another. *Colvin v. Corwin*, 15 Wend. 557.

(c) *Nul tiel corporation.*

163. A plea of *nul tiel corporation* is bad upon special demurrer, as amounting to the general issue; for whatever the plaintiff is bound, in the first instance, to prove, in order to support his cause of action, cannot be specially pleaded by the defendant. And this principle applies as well to foreign corporations as to our own. *Farmers' and Mechanics' Bank v. Rayner*, 2 Hall, 195.

164. The plea of *nul tiel corporation* is bad on special demurrer. *Wood v. Jefferson County Bank*, 9 Cow. 194.

(d) *Plene administravit.*

165. Where the defendants, being executors, pleaded the general issue, with an outstanding judgment, and *plene administravit præter*; and ruled the plaintiff to reply to the last plea, which he omitted; held, that the only effect of the default would be judgment for the defendant, with the costs on that breach of the defence founded on the special plea; but the plaintiff might still go to trial on the issue; and if he succeeded, take his judgment *quando acciderint*; and the judgment could not be perfected for the defendant till that issue was disposed of. *Ford v. Crane*, 6 Cow. 71.

166. An averment of the value of goods in a plea of *plene administravit præter* is not material and traversable. *Burr v. Baldwin*, 2 Wend. 580.

167. The plaintiff in error, being sued, in the Marine Court, as administratrix of her husband, on a promissory note made by him, pleaded *non assumpsit* and *plene administravit*. To support the last plea, she called her son as a witness, and offered to prove by him the payment of certain debts of the intestate by her, in the due course of administration; and by another witness that the estate had been overvalued. *Vultee v. Rayner*, 2 Hall, 376.

168. The defendant in error contended that the administratrix must first produce the inventory of the estate, before she could offer such evidence; and the Court below rejected the testimony as incompetent. Held, that the burden of the issue was on the plaintiff in the original suit, who should have produced a copy of the inventory from the public records, if he wished by it to charge the administratrix with assets. Held, also, that although no person can be a witness to increase a fund in which he is interested, yet that the son of the administratrix was competent to answer the questions proposed to be put to him. *Ibid.*

VIII. *Replication.*

169. The omission to conclude the replication to a plea of *nul tiel* record, without *hoc*

penalut, &c., is a formal defect, and, as such, a ground for special demurrer, which, if served within twenty days after receipt of the replication. (or forty days, if the replication be served on the agent,) will prevent an inquest, or be good cause for setting it aside, whether taken before or after the service of the demurrer. *Hawley v. Hanchet*, 1 Cow. 152.

170. If it is plain from the nature of the pleadings which plea the replication is intended to answer, this is certain enough, without expressly pointing out the plea intended by its numerical order, or in any other way. *Carey v. Hanchet*, 1 Cow. 154.

171. A replication which supports and fortifies a declaration is not a departure. *Wyman v. Mitchell*, 1 Cow. 316.

172. To a declaration on promises of indemnity, the defendant pleaded a former recovery on the same promises; the plaintiff replied that the recovery was on other and different promises; and prayed judgment because the defendant had not answered the promises thus newly assigned; the defendant rejoined *non assumpsit* to the promises so newly assigned, and on the trial no record of the former recovery was produced, and objection was taken that the *onus* was on the plaintiff to avoid the plea by sustaining the replication; on verdict at the circuit for the plaintiff, subject to the opinion of the Supreme Court on this among other points, that Court being with the plaintiff on the other points; *held*, that the issue on this plea was informal, but amendable after verdict; that the replication admitted the former recovery; that the *onus* of proving that the former and present cause of action were not the same was on the plaintiff, and that unless the defendant would relinquish his plea, there should be a new trial to enable the plaintiff to give the requisite proof. *Hale v. Andrus*, 6 Cow. 225.

173. *Held*, also, that the proper replication would be, that the former and present cause of action are not the same, and a direct issue to the country. *Ibid*.

174. To a plea of *non assumpsit infra sex annos*, the plaintiffs replied that within six years after the cause of action accrued, to wit, July 6th, 1826, they sued out process, &c., and that the defendant promised within six years next before that day. Rejoinder, that the plaintiffs did not, within six years next after the cause of action accrued, sue out the process, &c., and that the defendant did not promise within six years next before the issuing of the process. *Held*, on demurrer, that the replication was bad in substance, in not denying the material fact that the process issued at the time stated; but tendering an immaterial issue as to the time of issuing the process. *Held*, also, that the rejoinder was bad, as being inconsistent. A pleading bad in part is insufficient for the whole. *Satterlee v. Sterling*, 8 Cow. 233.

175. The requisites to give the Jefferson County Bank existence as a corporation, according to the statute, (sess. 39, ch. 231.) pleaded and set forth particularly in reply to a plea of *nul tiel* corporation, put in at the suit of the bank, and issues taken upon those several requisites in a rejoinder. *Wood v. Jefferson County Bank*, 9 Cow. 194.

176. Though a party, in pleading matters which constitute his right, (e. g. the organization of a bank under its charter,) set forth more matters than are necessary, upon which, with those that are necessary, issue is joined; yet he need prove those matters alone which are necessary. *Ibid*.

177. Thus, when a bank, having sued on a note, replied to a plea of *nul tiel* corporation, (instead of demurring as it might,) setting forth all the steps made necessary by the act (sess. 39, ch. 231.) to give it existence as a corporation, with several others; upon all which matters issue was joined; yet *held*, that at the trial it need prove no more than would be necessary upon the general issue. *Ibid*.

178. Where an executor pleads an outstanding judgment and no assets *preter*, a replication of fraud and covin generally, without showing such fraud specially, is good. *Sherwood v. Johnson*, 1 Wend. 443.

179. An averment in a plea of acceptance by the plaintiff of money paid into Court by a sheriff, on the return of an execution, is material and traversable. *Dyger v. Crane*, 1 Wend. 534.

180. Double replications or rejoinders cannot be interposed but by leave of the Court, obtained on special application. *Lines v. Wal*, 4 Wend. 211.

181. If the promise to pay a debt barred by an insolvent discharge be conditional, it must be alleged as a conditional and not as an absolute promise in the replication, or the plaintiff cannot recover. *Wail v. Morris*, 6 Wend. 394.

182. To a plea of discharge under the act to abolish imprisonment for debt in certain cases, a replication that the moneys claimed were not due or contracted for *previous* to the day of making the assignment, and that the debts were contracted *after* that day, is good. *Rose v. Briggs*, 7 Wend. 70.

183. A plea that the promise declared on was made by the defendant and a third person, and that a release was executed to such third person, a replication denying both the joint promise and the release is bad for duplicity. *Tubbs v. Caswell*, 8 Wend. 129.

184. Where a replication admits a bar set up in a plea, and avoids it by new matter, a traverse is not necessary. *Love v. Humphrey*, 9 Wend. 204.

185. Moneys arising from the sale of real property in Connecticut, on an order of a Court of Probate there, are not assets in the hands of the executor here, and cannot be so averred in a replication to a plea of *plene administravit*. *Peck v. Mead*, 9 Wend. 470.

186. A replication to a plea of *non assumpsit infra*, &c., that within six years before the commencement of the suit the defendant promised, &c., stating the day on which the capias issued, without showing its return, or connecting it with subsequent process, is good; such allegation of the issuing of the capias being mere surplusage. *Livingston v. Ostrander*, 9 Wend. 306.

187. A replication to a plea of *non assumpsit infra*, &c., that a capias was issued to save the statute, must set forth the return, and by regular continuances connect the first with the subse-

quent process on which the defendant is arrested; where the plaintiff relies on a new promise, the time of the commencement of the suit is matter of evidence, and need not be pleaded. *Ibid.*

188. A replication containing no new matter, and barely denying the facts alleged in the plea, concluding with an averment, is bad; but such defect can be taken advantage of only by a special demurrer. *Morris v. Wadsworth*, 11 Wend. 100.

189. A plaintiff cannot reply doubly to a defendant's plea, without the leave of the Court, although he reply several matters in answer to the plea as applicable to distinct and separate counts of the declaration. *Frisbie v. Riley*, 12 Wend. 240.

190. The general replication *de injuria*, &c., is bad where the defendant justifies or insists on a right as justification, and is good only when he pleads matter of excuse; in such a case, the plaintiff is bound to traverse the right. *Cuburn v. Hopkins*, 4 Wend. 577.

191. Alleging the accidental loss of the process under which the party justifies does not turn the defence into matter of excuse instead of justification. *Ibid.*

192. Where a replication contains two distinct matters in avoidance of the plea, either of which is a good and perfect answer, the defendant is not bound to demur for duplicity, or to answer to both matters, but may take issue upon either of the matters set up in avoidance. *Gould v. Ray*, 13 Wend. 633.

193. If, however, such issue be found for the defendant, and the other matter set forth in the replication which remained unanswered, and was of course admitted, be decisive of the merits of the case, the plaintiff will be entitled to judgment *non obstante veredicto*. *Ibid.*

194. Where a defendant pleads that the cause of action did not accrue within six years before the commencement of the suit, it is better to take issue upon the plea than to reply the suing out of process and continuances thereof, &c. If, however, the defendant, instead of pleading that the cause of action did not accrue within six years before the commencement of the suit, pleads that it did not accrue within six years before the exhibiting of the plaintiff's bill, and the bill or declaration was not in fact filed until more than six years after the accruing of the cause of action, then the plaintiff is bound to reply specially the suing out of the first process within the six years, and by proper continuances connect it with the process on which the defendant was arrested. *Orange County Bank v. Haight*, 14 Wend. 83.

195. An agreement not to plead the statute, *et cetera*, may be replied in answer to a plea of the statute of limitations, where such agreement is made previously to the attaching of the statute. *Gaylord v. Van Loan*, 15 Wend. 308.

196. A replication is not subject to the charge of duplicity, unless it sets up two or more answers to the matter relied on as a defence in the plea; if it contain no more facts than are necessary to be stated to establish the point set up by way of answer to the plea, it is unobjectionable. *Ibid.*

197. Surplusage in general will not vitiate a pleading. *Ibid.*

198. To an action of debt, on judgment, the defendant pleaded a discharge under the act to abolish imprisonment for debt. The plaintiffs replied that on the day appointed for the appearance of the creditor to show cause against the discharge, a certain creditor appeared to oppose the application, when the defendant, to induce said creditor to withdraw his opposition, secured to him the payment of one-half of his debt, whereby the plaintiffs withdrew their opposition, and the defendant obtained his discharge. Issue was taken on the replication, and a verdict found for the plaintiffs. The defendant then moved in "an arrest of judgment," or for some order directing an entry on the record qualifying the judgment, so that no execution should issue against his person. *Held*, that the facts stated in the replication (though found to be true) were not so pleaded as to avoid the discharge; and that the judgment, although it could not be arrested, must be so modified as to prevent the execution from issuing against the defendant's person. *Phania and Whitney v. Slagg*, 1 Hall, 635.

199. In an action upon a guarantee where the defendant, relying upon the statute of frauds, pleads that "the promise mentioned in the declaration is a special promise to answer for the debt of a third person; and that no note or memorandum in writing, showing the consideration of such promise, was ever signed by him;" the plaintiff, if the consideration of the guarantee was the sale of goods to a third person, made at the same time with the guarantee, must set forth by his replication what he would be bound to show in evidence if the statute were not pleaded. It must appear by the replication that the sale of the goods and the making of the guarantee were simultaneous acts, constituting parts of one and the same agreement. *Whelwright v. More*, 1 Hall, 648.

200. The third and fourth counts of the plaintiff's declaration set forth that one S. made certain promissory notes to the plaintiff, the payment of which the defendant guaranteed "in consideration of value received by S. and the defendant." The defendant having pleaded the statute, the plaintiff replied, setting forth a written promise of the defendant containing copies of the notes, which were expressed to be "for value received." The guarantee also set forth, "that in pursuance of the understanding" between the plaintiff and S., the defendant stipulated to pay the notes if S. did not. *Held*, that the replication did not support the averments in the declaration; the contract there set forth not appearing with sufficient certainty to rest on the same consideration. *Ibid.*

IX. Rejoinder.

200*. It is not allowed to a plaintiff to *surre-join* doubly to the rejoinder of the defendant. *Oakley v. Romeyn*, 6 Wend. 521.

201. Where, to a plea of the statute of limitations, the plaintiff replies the suing out of process, and a promise within six years previous to such process, a rejoinder denying both the suing out of process and the promise alleged in the replication is bad for duplicity. *Tuttle v. Smith*, 10 Wend. 386.

202. Where several facts constituting one point of claim or defence are pleaded by a party, his adversary is not at liberty to traverse each

fact, but must confine himself to the denial of one of the facts alleged, if such denial, verified by proof, will bar the claim or defeat the defence. *Ibid.*

203. First count of *narr.* on bond from jailer and his sureties, defendants, to the sheriff, plaintiff, stating condition, that if the former executed his trust, and would not suffer any prisoners to escape, then, &c., averring that O. S. T. was committed to jail on a *ca. sa.*, on the suit of O. H., and jailer negligently suffered him to escape, whereby the plaintiff sustained damages to \$5000. Second count the same; averring, also, a suit against the sheriff for the escape, and judgment against him; and notice to the defendants of the pendency of that suit, whereby the plaintiff had sustained damages to \$5000. Pleas to first count, 1. That jailer did not permit O. S. T. to escape. 2. That O. S. T. was not committed, and issue to the country on both pleas. 3. That O. H., plaintiff in the *ca. sa.*, permitted O. S. T. to escape, concluding with a verification. 4. That O. H. did not sue the sheriff within one year after escape; and that the sheriff sustained no damage from the escape within the year, concluding with a verification. Pleas to the second count, 1. No escape, and that defendants had no notice of suit pending, concluding with a verification. 2. No commitment, and no notice of suit pending, with the like conclusion. 3. That O. H. permitted the escape, and no notice of suit pending, with the like conclusion. 4. That O. H. did not sue sheriff in one year from time of escape, no notice of suit pending; and that sheriff neglected to avail himself of statute of limitations, with the like conclusion. Replications to the third plea to first count, and issue to the country. To fourth plea to first count, judgment against the sheriff for the escape, and notice to the defendants of the suit pending, concluding with a verification. To third plea to second count, and issue to the country. Rejoinder to replication to fourth plea to first count, denying notice of suit pending, and averring that it was defended without defendant's knowledge; that sheriff neglected to avail himself of statute of limitations. On special demurrers to the first, second, and fourth pleas to the second count, and to the rejoinder to the replication to the fourth plea to the first count; *held*, that the rejoinder was not double within the rule which denies the right to include two distinct and independent matters, requiring two separate answers, in the same pleading; that the several facts contained in it were connected and dependent, all tending to the point of defence sought to be introduced, viz. that judgment against the plaintiff was recovered through his default, in not availing himself of the statute of limitations. (1 R. L. 497, sec. 26.) *McClure v. Erwin*, 3 Cow. 313.

204. *Held*, also, that the rejoinder properly concluded with a verification; inasmuch as it introduced new matter, viz. the neglect of the plaintiff in not setting up a proper defence to the action for the escape, which matter was not set up in the plea. *Ibid.*

205. But, *held*, also, that the plea, being properly one of *non indemnificatus*, was bad, as being inapplicable to the condition of the bond,

and the breach assigned; also, that the matter of substance set up in the rejoinder, viz. want of notice, neglect, &c., were not bar even when taken in connexion with the plea which it followed. *Ibid.*

206. *Held*, also, that the fourth plea to the second count was bad for the same reasons, and that the first and second pleas to the second count were defective in form, inasmuch as they were a mere denial of the substance of the declaration, and should, therefore, have concluded to the country. *Ibid.*

207. The plea of *non demnificatus* is applicable to an action on a bond to save harmless and indemnify the obligee, but to an action on no other bond. *Ibid.*

208. A plea, &c. which introduces several facts, all of which are necessary to constitute but one point of defence, is not bad for duplicity. *Ibid.*

209. A plea, &c. which introduces new matter, should conclude with a verification; but where it denies the whole substance of the plaintiff's declaration, it should conclude to the country. *Ibid.*

X. Demurrer.

210. Where there are two counts in a declaration on the same instrument, and there is no plea to the second count, but the plea to the first count contains an averment that the instrument set forth in that count is the same identical instrument set forth in the second count, it cannot be objected upon general demurrer that there is a defence to only one of the causes of action set forth in the declaration. *Case v. Boughton*, 11 Wend. 108.

211. On demurrer, the one who commits the first fault in pleading shall have judgment against him. *Wyman v. Mitchell*, 1 Cow. 316.

212. Where there are several pleas, some of which are carried to an issue of law, and some to an issue of fact, the plaintiff may first argue the demurrer, or try the issue of fact, at his election. *Shaw v. Raymond*, 2 Cow. 512.

213. Though a demurrer must be signed by counsel, yet if it is not so signed, and the opposite attorney, on its being served, sign an admission that he has been served with a demurrer, &c., this is a waiver of the defect, and he cannot treat it as a nullity. *Anonymous*, 3 Cow. 578.

214. On demurrer, the party who commits the first substantial fault in pleading shall have judgment against him. *Gristwood v. The National Insurance Company*, 3 Cow. 96.

215. A plea which is bad in substance is not aided by a replication. *Ibid.*

216. Matter which comes more properly from the plaintiff need not be stated in the plea. *Ibid.*

217. A survey is always made at the instance and for the benefit of the owner or master of the vessel, and goes, of course, into his hands. The assurers are not parties to the survey. *Ibid.*

218. The plea stated a survey made at Cadiz, and the replication traversed that the survey was made at Cadiz or elsewhere; *held*, bad on special demurrer. *Ibid.*

219. The issue must be as broad as the traverse, and a rejoinder to such a replication would be a departure. *Ibid.*

220. In an action against insurers in pleading a survey, an averment that the ship was, by such survey, declared unseaworthy, by reason of being rotten, is sufficient within the rotten clause; but an averment that the ship was found by the survey to be in a very bad and rotten condition, is not good. It implies a mixed cause of unseaworthiness; whereas, to make a survey a flat bar within the rotten clause, it should appear plainly that the unseaworthiness arose from rottenness solely. *Ibid.*

221. Where the defendant pleads two distinct pleas, neither of which is, in itself, a defence, though both together would be; and to the plaintiff replies separately, and goes to trial; and the pleas are found for the defendant, judgment shall be for him; for the cause is with him on the whole record; and the Court will consider the two pleas substantially one, though in form two; and to avail himself of the defect, the plaintiff should demur. *Shook v. Fulton*, 4 Cow. 424.

222. A plea in trespass *quare clausum fregit*, that a third person was seised in fee, and demised to the defendant for years, without giving express colour, amounts to the general issue; and is bad on special demurrer. *Collett v. Flinn*, 5 Cow. 466.

223. A party demurring in good faith, this being shown on affidavit with merits, may withdraw his demurrer, and plead; though the demurrer be overruled as frivolous. *Miller v. Heath*, 7 Cow. 101.

224. The motion for this purpose is most properly non-enumerated. *Ibid.*

225. In slander for charging the plaintiff with perjury, the defendant pleaded that the words were spoken in reference to certain parts of the plaintiff's testimony on a trial, which were immaterial, (setting forth particulars,) and that they were so understood by the hearers. Replication *de injuria*, &c. On demurrer to the replication; held, that the plea would have been bad as amounting to the general issue, on special demurrer; but this could not be objected on an issue in law upon the replication. *Allen v. Crofoot*, 7 Cow. 46.

226. A plea containing matter of fact and matter of record may conclude to the country. *De injuria*, &c. is a good answer to matter of excuse set up in a plea. *Ibid.*

227. Though, on demurrer, the party committing the first fault shall have judgment against him, yet this must be a fault in substance. Any fault of form cannot be noticed within the rule beyond the immediate plea demurred to. *Ibid.*

228. A declaration by a plaintiff, as administrator, containing counts for goods sold and delivered, and work done, with the common-money counts, without stating any indebtedness to the intestate, or referring to the plaintiff in his representative character in any subsequent part of the declaration, except in a profert of letters of administration, is bad on demurrer. *Christopher v. Stockholm*, 5 Wend. 36.

229. Each count should distinctly state the indebtedness of the intestate. *Ibid.*

230. In an action by the Utica Insurance Company (incorporated by stat. sess. 39, ch. 52.) against the endorser of a promissory note, he pleaded that the plaintiffs, contrary to the statute, (sess. 36, ch. 71, s. 2.) subscribed to, and became members of an association, institution, or company, and became proprietors of a bank or fund, for the purpose of issuing notes, receiving deposits, making discounts, and transacting all other business which incorporated banks may and do transact by virtue of their respective acts of incorporation; that for this purpose they established an office or banking house, and issued notes, received deposits, and made discounts, as incorporated banks may, &c.; and averred that the note in question was made for the purpose of being, and was, discounted at their office, they knowing for what purpose it was made. The plaintiffs replied the act constituting them a corporation, which authorized them to loan their surplus funds; and alleged that they lent a part of their surplus funds on the security of the note, showing the particulars; without this, that the plaintiffs had subscribed and become members of an association, &c. (as in the plea,) for the purpose in the plea set forth, concluding with a verification. Special demurrer, assigning for cause, that the plaintiffs had avoided, traversed, or denied that they illegally and corruptly established an office or banking house, and issued notes, received deposits, and made discounts, as stated in the plea. Held, that the plaintiffs were entitled to judgment upon the demurrer. *Utica Insurance Company v. Scott*, 8 Cow. 709.

231. On demurrer, judgment should be against the party who commits the first fault in substance. *Per Spencer and Colden, Senators. Ibid.*

232. When a plea which has been adjudged bad is put in, the plaintiff may demur specially, and notice the cause for argument, claiming priority, as in the case of a frivolous demurrer or bill of exceptions. *Harford Bank v. Murrell*, 1 Wend. 87.

233. The omission to make a profert of letters of administration is only cause for a special demurrer. *Atison v. Wilkin*, 1 Wend. 153.

234. The want of profert of letters of administration can be taken advantage of only by special demurrer. *Ibid.*

235. Where a plea is an answer to but a part of the declaration, the plaintiff must demur, and doing so, he shall have judgment. *Hiscox v. Coates*, 2 Wend. 419.

236. Where a plaintiff sets up title by purchase to personal property, claimed under a dormant execution, it is not necessary for him to aver on his replication the time or place of purchase, nor the time when directions were given to suspend proceedings under the execution, nor that such directions were given to defraud, nor is it necessary to set forth the consideration paid; and the omission in the pleadings to set forth these particulars cannot be taken advantage of, even by special demurrer. *Ibid.*

237. Where in a contract relative to the transportation of merchandise on the canal, the dangers of canal navigation are excepted out of a warranty for delivery by a specific time, a

plea generally alleging such dangers, without specifying them as an excuse for nonperformance, is not sufficient on special demurrer. *Woodworth v. M' Bride*, 3 Wend. 227.

238. A demurrer to a declaration containing several counts will not be sustained if either count is good. *Cochran v. Scott*, 3 Wend. 229.

238*. A defendant cannot both plead and demur to the same part of the declaration. *Rickett v. Snyder*, 5 Wend. 104.

239. Where a defendant pleaded *non assumpsit* and three special pleas, and the plaintiff put in a general demurrer; it was held, that such demurrer did not apply to the plea of the general issue, the demurrer purporting to be an answer in the several pleas of the defendant, by him pleaded to the first, second, and third counts of the declaration, and the plea of the general issue being to the whole declaration, and not specifically to either count. *Gomez v. Garr*, 6 Wend. 583.

240. The rule that on demurrer judgment shall be given against the party who commits the first fault, applies only where the previous pleading is bad in substance, and not defective merely in form. *Tubbs v. Caswell*, 8 Wend. 129.

241. If a plea profess to answer only a part of a count, and is in truth but an answer to part, the plaintiff may demur, and is not bound to take judgment for the part unanswered; so held, where, in covenant, two breaches were assigned, and the defendant put in a plea as to the breach first assigned, without taking any notice of the second breach. *Slocum v. Despard*, 8 Wend. 615.

242. So also, where a plea professes to answer all the breaches assigned in a declaration where there are two or more, and is in fact but an answer to one, the plaintiff may demur. *Ibid.*

243. A demurrer, whether general or special, must have the signature of counsel, or the opposite party may treat it as a nullity. *Schuyler v. Yates*, 11 Wend. 185.

244. Where a demurrer to a declaration is overruled by a justice, and the defendant subsequently pleads the general issue, and after verdict against him appeals to the Common Pleas, that Court is authorized to pass upon the validity of the demurrer, and, if well taken, to give judgment for the defendant. *Wickware v. Bryan*, 11 Wend. 545.

245. On a general demurrer to several pleas, if either of the pleas is good, the defendant is entitled to judgment. *Cuyler v. Trustees of Rochester*, 13 Wend. 165.

246. In *indebitatus assumpsit*, it is not a cause of demurrer that the declaration states the indebtedness of the defendant, and his promise to pay, in a sum greater than what, from the cause of action set forth in the declaration, he is entitled to recover. *Waite v. Barry*, 12 Wend. 377.

247. A demurrer book should contain only those pleadings on which the question of law arises, or which are necessarily connected with the demurrer. *Underwood v. Campbell*, 13 Wend. 78.

248. When a defendant demurs to a replication, and the replication is adjudged good, he is not at liberty to object to the declaration. Where in such case the demurrer is sustained, and the plaintiff turns round and attacks the

plea of the defendant, then the defendant may object to the declaration, but otherwise not. *Dearborn v. Kent*, 14 Wend. 183.

249. So, where a defendant has pleaded the general issue, he cannot, on a demurrer to subsequent pleadings, object to the sufficiency of the declaration. *Ibid.*

250. Where a defendant has pleaded the general issue, he cannot, upon a demurrer to the replication, attack the declaration. *Russell v. Rogers*, 15 Wend. 52.

251. The declaration alleged that it was agreed between the plaintiff and the defendants, 1. That the plaintiff should subscribe for and take eighty lots of ground in a certain tract in the city of New York, "agreeably to the conditions as set forth in said articles of subscription."

2. That he should pay over, at the meeting of the said subscribers for the division of said lots, a certain sum of money. 3. That the defendants should allow to the plaintiff, on the settlement for said lots, a certain sum as commissions, &c. It then averred a performance on the part of the plaintiff in the words of the agreement, as set forth, and assigned, as a breach, the nonpayment of the sum to be allowed as commissions. Upon general demurrer to this declaration, for the want of a sufficient statement of the cause of action; it was held to be sufficient, although liable, perhaps, to objections upon a special demurrer. *Smith v. Winall and Price*, 2 Hall, 469.

252. A defect of duplicity in pleading cannot be taken advantage of by general demurrer, but it must be specially pointed out; and upon a general demurrer to two or more counts, if one be good, there will be judgment for the plaintiff. *Wolff v. Luyster*, 1 Hall, 146.

253. The first count of the declaration set forth that the defendant (an auctioneer) received certain goods of the plaintiff, to be sold for him under an agreement not to part with or dispose of them below a certain stipulated price; and that, in violation of this agreement, he had sold the goods for a sum below that to which he was restricted, and had not accounted for the proceeds. The second count alleged that the defendant received the plaintiff's goods for sale, and agreed to render, as the amount brought by said goods, the full sum of \$500. The breach assigned was, that the defendant had not rendered a just account of the goods, nor paid the full sum of \$500. Upon a general demurrer to these two counts, the first was held to be good in substance, although defective for duplicity in assigning the breach; but the second was held to be bad on the face of it, for the want of an averment of the sale of the goods. *Ibid.*

254. A rejoinder averring that the defendants has assets, but not more than sufficient to pay and satisfy a judgment of upwards of \$1000, is not a departure in pleading from a plea of *plene administravit præter*, averring the goods unadministered to be of the value of only \$1. So held, on demurrer. *Burr v. Baldwin*, 2 West. 580.

XI. Repleader.

255. A repleader will be awarded where, in pleading an *insolvent discharge*, the defendant

omits to aver that he was an *inhabitant* or *imprisoned* in the county where his discharge was granted. *Otis v. Hitchcock*, 6 Wend. 433.

XII. Judgment.

256. In pleading, a party should show in what Court it was obtained; and cannot say generally, it was a Court having competent jurisdiction: and in declaring on a promise to indemnify against a recovery of moneys, it is not sufficient to aver generally that the plaintiff was compelled to pay. *Packard v. Hill*, 7 Cow. 434.

257. But *held*, that the pleading in both instances is good on general demurrer, the defects being formal. *Ibid*.

XIII. Pleadings in *assumpsit*: (a) Declaration.

258. On a sale, with warranty of the article sold, upon a credit, after the credit has expired, the goods being delivered, and the contract thereby executed, the vendor may, in a suit for the price, declare in general *indebitatus assumpsit* for goods sold. *Reynolds v. Cleveland*, 4 Cow. 283.

259. In an action by the assignee of an order or draft not negotiable, in the name of the assignee against the acceptor, on an express promise by the latter to pay, it is proper to set forth all the circumstances which go to form the consideration of the order. *De Forest v. Frary*, 6 Cow. 151.

260. Where such an order is payable to two persons, for a debt due to them from the drawer, one alone cannot assign the order; they being tenants in common of the debt due on the order; and in declaring on an assignment by one, it must be shown that he was a partner with the other, or in some other way had authority to assign, or the declaration will be bad; and this, even though the draft be drawn payable to the order of either of the payees. *Ibid*.

261. An order payable on the sale of certain carriages is not negotiable as an inland bill of exchange, though it be in terms made payable to the order of the payee. *Ibid*.

262. In *assumpsit* on a promise to endorse the note of another, the declaration should aver that a note was drawn and tendered for endorsement. *Gallagher v. Brunel*, 6 Cow. 346.

263. Counts on promises from an intestate, and on a promise from the administrator, upon a consideration arising after the intestate's death, cannot be joined in the same declaration. *Demott v. Field*, 7 Cow. 58.

264. Where a contract was to pay different sums for work and labour, accordingly as the labourer should board himself or be boarded by his employers; and he worked at the less sum, being boarded; *held*, that in declaring specially upon this contract, he must state it in the alternative; and could not declare and recover upon it as a contract simply to pay the lesser sum. *Match v. Adams*, 8 Cow. 35.

265. His declaration contained special and general counts in *assumpsit*; and his proof was offered and received under the former, from which it varied; but would support the common count; and he was nonsuited for the variance; *held* well, because he did not insist on the common count at the trial. *Ibid*.

266. In *assumpsit*, where the plaintiff declares in several counts, he cannot be compelled on the trial to elect which count he will proceed upon. *Norris v. Durham*, 9 Cow. 151.

267. Where the declaration contains counts upon a special contract unexecuted, which is proved, and an extension or alteration of the contract is shown, the plaintiff cannot recover at all, because of variance. *Ibid*.

268. Four counts were on a special contract to carry, and the fifth against the defendant as a common carrier. The special contract to carry being proved, and evidence given to vary the terms of it; *held*, the jury should be charged, that if they believed the parties had varied the terms of it, they should find for the defendant; for he would not be liable as a common carrier, but only on the special contract. *Ibid*.

269. The omission to assign a breach to one of several counts in *assumpsit* is aided by the verdict, and may be amended. *Wood v. The Jefferson County Bank*, 9 Cow. 194.

270. In declaring on a note as the endorsee of a firm, it is not necessary to set forth the names of the members of the firm. *Cochran v. Scott*, 3 Wend. 329.

271. A declaration is bad for misjoinder of counts, where, in an action of *assumpsit* against an administrator, a count of *in solutum compulsaet* with the defendant as administrator, of and concerning moneys from the defendant, as administrator, to the plaintiff, before that time due and owing, is joined to counts on promises made by the intestate. *Reynolds v. Reynolds*, 3 Wend. 244.

272. In declaring on *assumpsit* for the breach of a contract, it is not necessary to set forth the payment of a part of the consideration, admitted by the contract to have been received; nor where the contract is to deliver on demand, is it necessary to allege the precise day of the demand; the day not being material. *Doe v. Dey*, 3 Wend. 356.

273. In an action on the case for a fraudulent representation, a count in a declaration is good, which charges that the defendant induced A., by letter addressed to him, to assist B. to procure goods on credit, the defendant well knowing that B. was not worthy of credit; that A. did assist B. to procure goods of the plaintiff on credit, and that the plaintiff, confiding in the letter of the defendant, and in the representations of A., made at the instance of the defendant, sold goods to B. on credit; concluding with an averment that the defendant fraudulently deceived and caused the plaintiff to be deceived, and that by means of, &c., the plaintiff lost his goods and the value thereof. So a count is good, charging the defendant with falsely and fraudulently inducing another to assist an insolvent person in obtaining goods on credit, &c. *Allen v. Addington*, 7 Wend. 10.

274. It is a general rule in pleading in *assumpsit*, that it must be stated that the defendant undertook and promised, &c., or something equivalent thereto, or the declaration will be *held* bad, even after verdict and judgment. *Candler v. Rossiter*, 10 Wend. 487.

275. In declaring in *assumpsit* on a collateral undertaking, the declaration must be special,

setting forth the contract; but if the undertaking be original, the plaintiff may declare generally. *Northrup v. Jackson*, 13 Wend. 85.

(b) *Plea.*

276. Whether, in *assumpsit*, a former trial for the same cause may be given in evidence under the general issue? *Quære. Gardner v. Buckbee*, 3 Cow. 220.

277. *It seems*, that in pleading an unsealed assignment of a chose in action, the consideration for such assignment must be set forth at large. It is not sufficient to aver, generally, that the assignment was for a valuable consideration paid by the assignee to the assignor. *De Forest v. Frary*, 6 Cow. 151.

278. *Modo et forma* puts in issue matter of substance only. *Middle District Bank v. Deyo*, 6 Cow. 739.

279. A plea to the common counts in *assumpsit*, that the parties had accounted together, and the defendant had given to the plaintiff the defendant's promissory note for the plaintiff's demand, payable to the plaintiff or order, or to the plaintiff or bearer, which he accepted on account of his demand, is bad in substance. *Hughes v. Wheeler*, 8 Cow. 77.

280. A promissory negotiable note is not an absolute extinguishment of a simple contract debt, but only *sub modo*, and therefore, cannot be pleaded in answer to a declaration upon a simple contract. It is but evidence under the general issue; which may be answered by producing and cancelling the note on the trial. *Ibid.*

281. Formerly in *assumpsit*, a defendant might traverse, not only the contract itself, but the consideration, and the plaintiff's performance of a condition precedent; but now the practice is obsolete; and where the defence consists of matter of fact, amounting to a denial of the allegation which the plaintiff must prove in support of his declaration, the general issue must be pleaded, or it will be good cause of special demurrer that the plea amounts to the general issue. *Wheeler v. Curtis*, 11 Wend. 654.

282. Where a defendant pleads the general issue, and also a special plea, to which the plaintiff replies, and a demurrer is interposed to the replication, although the plaintiff may object to the plea if bad in substance, the defendant cannot overleap the general issue, and object to the declaration; he cannot plead and demur to the same count. *Ibid.*

283. Where a party has a right of action on a promissory note, on its arriving at maturity, no subsequent neglect or improper act of his, in relation to a collateral matter, will deprive him of that right. Thus where the holder of a note accepted bridge stock as collateral security for the debt, and agreed to dispose of it, and apply the proceeds to the payment of the note; it was held, that the neglect of the payee to dispose of the stock until after the bridge was carried off by a flood, whereby the value of the stock was greatly lessened, could not be pleaded in bar of an action on the note. *Taggard v. Curtin*, 15 Wend. 155.

284. Matters of defence or of relief in equity are not in general pleadable at law. *Ibid.*

XIV. *Pleading in covenant.*

285. A declaration on a policy of insurance upon a vessel need not aver any interest in the assured; and if interest be averred, this may be rejected as surplusage. *Buchanan v. Ocean Insurance Company*, 6 Cow. 318.

286. Where, in an action on a covenant, that a farm contained eighty acres, the plaintiffs averred that it did not contain more than fifty; and the defendant pleaded that it contained more than fifty, that is to say, eighty acres; and the plaintiff replied that it did not contain eighty acres, nor more than fifty; held, that the averment of eighty acres in the plea being material, though under a videlicet, the issue was upon that, and not on the fifty acres. *Glessner v. McVicker*, 7 Cow. 42.

287. The plea of *non infregit conventionem* to a declaration in covenant is bad on demurrer, as being argumentative, but not void; and if issue be taken upon it by the plaintiff, and a trial had, the defect is cured by the verdict. *Roosevelt v. The Heirs of Fulton*, 7 Cow. 71.

288. F. covenanted to pay on certain letters patent being delivered to, and accepted by him. In an action of covenant, the declaration averring the delivery and acceptance; held, that the plea of *non infregit conventionem* put in issue the delivery and acceptance, and that the plaintiff was bound to prove them upon the trial. *Ibid.*

289. In covenant, the single plea of *non est factum* admits the breaches. *McNish v. Stewart*, 7 Cow. 474.

290. *Non est factum* puts in issue the execution of the deed only. Every material averment, besides that of execution, is admitted. *Dale v. Roosevelt*, 9 Cow. 307.

291. And this, though the plaintiff stipulate that, under the plea, the defendant may give any special matter in evidence, as if pleaded. *Ibid.*

292. What may be given in evidence upon *non est factum*. *Per Savage*, Ch. J., in assigning reasons, and per *Dayan*, Senator. *Ibid.*

293. The declaration was on a covenant to pay \$4400; breach that the defendant had not paid \$4000; and per *Viele*, Senator, that is a good breach. *Ibid.*

294. It merely limits the damages to the amount of the breach assigned. *Ibid.*

295. The covenant with the plaintiff was to pay the United States \$1150, and the plaintiff the residue in notes, at six, twelve, and eighteen months; breach that the covenantor had not paid the plaintiff, in the manner mentioned in said agreement; held, a good assignment of breach. *Ibid.*

296. In an action of covenant, the plaintiff is bound to aver enough to show that he has been damaged. *Gould v. Allen*, 1 Wend. 182.

297. In an action on a covenant to indemnify and save harmless a party from all claims, &c., under a bond for the payment of money, executed by him, the breach assigned was that he was compelled and forced to pay the same. Held, that on special demurrer, the declaration was bad; it should have stated how and in what manner the obligee was compelled to pay the bond. *Patton v. Fiske*, 1 Wend. 207.

298. A declaration in covenant must not assign two breaches of the same specific covenant in the same Court. *Ibid.*

299. In an action of covenant against the assignee of a term, though an eviction of three-eighths of the estate has taken place, the defendant is not entitled to ask for an apportionment of rent, under a general plea denying his holding as assignee. To entitle a defendant, in such case, to ask for an apportionment on account of an eviction of part, he must plead the facts specially, and not in bar of the whole action. *Lansing v. Van Alstyne*, 2 Wend. 561.

300. Though the defendant tenders an issue on his holding as assignee, the plaintiff must prove the averment in his declaration, that the premises came to the defendant by assignment. *Ibid.*

301. In an action of covenant, the assignment of the breach according to the substance, though not according to the letter of the covenant, is good. *Potter v. Bacon*, 2 Wend. 533.

302. Where, on the dissolution of a firm, one of the partners covenants to pay all the company debts, in an action against him for a breach of that covenant by his partner, who has been compelled to pay a debt of the firm, it is not necessary to aver notice to the defendant of the debt, nor of the suit, recovery, and payment. *Clough v. Hoffman et al.* 5 Wend. 499.

303. In an action of covenant, to recover money agreed to be paid on the completion of a certain work by the plaintiff, an averment that the plaintiff *had, as nearly as it was possible*, in all things well and truly performed, and that such performance was *accepted* by the defendant as a full and perfect performance of the contract, met by a denial of the defendant as to the acceptance, presents the simple question whether or not there was an acceptance; and on failure to establish the fact by evidence, the plaintiff must be nonsuited. *Stagg v. Munro*, 8 Wend. 399.

304. A declaration, averring that the plaintiff had performed as nearly as it was possible, without adding that what was done was accepted as a full performance, would be bad. *Ibid.*

305. Where promises are mutual and independent, one party may maintain an action against the other without averring or showing performance on his part; and the defendant in such case cannot plead the nonperformance of the plaintiff in bar of the action; but whether the promises be independent or not, if the agreement is wholly executory, and the promise, covenant, or performance on the one part, is the consideration for the promise, covenant, or performance on the other, a suit for the recovery of damages cannot be maintained by the party who has refused to fulfil his part of the agreement. *Dey v. Dey*, 9 Wend. 129.

306. A plea that a covenantee agreed to release one of several covenantors from the covenants in a lease, in consideration that such covenantor would, at his request, relinquish to a third person his situation as a partner in business with the other covenantors, and that they would receive such third person as a partner, is not good, although it be averred that he did relin-

quish, and that they did accept, unless it be alleged that such covenantor agreed to relinquish, or that he did relinquish, at the request of the covenantee. *De Zeng v. Bailey*, 9 Wend. 336.

307. In an action of covenant on a deed, for breach of the covenant of seisin, it is sufficient to allege the breach by negating the words of the covenant, and the same rule applies to the covenant, that the grantor has good right to convey; but the covenants for quiet enjoyment and of general warranty require the assignment of a breach by a specific ouster, or eviction by paramount legal title. *Rickert v. Snyder*, 9 Wend. 416.

308. It is not necessary to state all the facts constituting an eviction, but a declaration setting forth such facts would be good. *Ibid.*

309. The plea of *non est factum* in covenant or debt, on speciality only, puts the execution of the deed in issue, and not the breach of covenant or any matter of defence. It admits the breaches assigned, and every other material allegation in the declaration, provided the deed itself is proved. *Cooper v. Watson*, 10 Wend. 202.

310. Where a party, having an equitable estate in the moiety of a lot, for a valuable consideration, released his interest to the owner of the other moiety, who held the legal estate in the whole premises by deed from A. B., and covenanted, in case it should thereafter appear that A. B., at the time of his conveyance, had no title to the lot, and a recompense for the same could not be obtained from A. B. in a reasonable time after his title thereto should be found defective, that he would pay to the other party the value of the one-half of the lot; *it was held*, in an action against the covenantor to recover such value, (in which action the plaintiff in his declaration alleged that it had been discovered that A. B., at the time of his conveyance, had no title to the lot, and at the time of such discovery was wholly insolvent, and unable to make any recompense for the lot, and so continued until his death, so that the plaintiff was unable, by due course of law or otherwise, to obtain such recompense,) that it was not necessary for the plaintiff to aver in his declaration that recourse to legal proceedings had been had against A. B., or his representatives, for the recovery of the value of the moiety of the lot; and that a plea that no suit at law or in equity had been instituted against A. B., or his representatives, for the recovery of such value, was no bar to a recovery, and therefore bad on demurrer. *Morris v. Wadsworth*, 11 Wend. 100.

311. Where a plaintiff, in an action for a breach of the covenant of seisin, has denied by replication the delivery of the deed under which the defendant claims to have had a title, alleging that such deed was not delivered before the sealing and delivery of the deed declared upon, a rejoinder that it was delivered before the commencement of the suit is bad, although a date antecedent to the date of the deed declared on be alleged, where such date is given under a videlicet. *Church v. Gilmer*, 15 Wend. 656.

312. Since the revised statutes, a failure of

consideration may be pleaded in bar to a recovery on a sealed instrument. *Case v. Boughton*, 11 Wend. 106.

313. In assigning breaches in an action of covenant, it is sufficient, in general, to follow and negative the words declared upon. *M'Geehan v. M'Laughlin*, 1 Hall, 33.

314. Where the words of a lease provided that the lessee should pay "for all necessary repairs put upon the premises" during the term, and in declaring upon it the breach assigned was, that the lessee "did not nor would" during the said demise, and whilst she was "possessed of the premises," pay or cause to be paid to the plaintiff, the repairs that "were necessary" and were made upon the "premises by the plaintiff;" it was held to be well assigned; and a demurrer to the declaration was overruled. *Ibid.*

315. The general rule is, that the breach will be sufficiently assigned by negating the words of the covenant; and the exception is of cases where such general assignment does not necessarily amount to an averment of a breach of the covenant; but further averments are necessary to show that the covenant has been broken; and in these cases the breach must be specially assigned. *Ibid.*

XV. Pleadings in debt. (a) Declaration.

316. In a declaration upon a bond, conditioned to pay the taxable costs of a suit, *licet scilicet requisitus* is good on general demurrer. *Bacon v. Wilber*, 1 Cow. 117.

317. In declaring on a bond, conditioned to pay a judgment in three months, or surrender the body of the defendant in execution, at the suit of the plaintiff, in thirty days thereafter, the taking out execution by the plaintiff within the thirty days is a condition precedent, and must be shown in the declaration. *Whitney v. Spencer*, 4 Cow. 39.

318. Form of declaration in debt against the sheriff for suffering an escape from execution, on a surrogate's decree for distribution. *Dakin v. Hudson*, 6 Cow. 221.

319. Such a declaration must aver that the surrogate's Court, which made the decree, granted the administration. *Ibid.*

320. For otherwise it has no jurisdiction to decree distribution. *Ibid.*

321. In a declaration against the sheriff, for suffering an escape from execution, it is not good cause of demurrer that the judgment appears to be against A. and his wife, and the execution against A. only; nor that the execution appears to have been endorsed with a direction to receive interest, when no interest runs on the judgment; nor that the judgment and execution appear to be in favour of D. and others, without saying what others. *Ibid.*

322. Any or all of these defects in the proceedings are no excuse to the sheriff who suffers the escape. *Ibid.*

323. Such a declaration must describe the record and proceedings correctly; and if, when produced on the trial, they do not correspond, the objection may then be made on the ground of variance. *Ibid.*

324. Such a declaration set out, in the first

count, a surrogate's decree, execution to the sheriff, and a voluntary escape. The second count set out a similar decree, execution, &c., and an involuntary escape. In setting out the decree, this second count said a certain other judgment or decree, but then dropped the word *other*, and referred to the judgment, &c. by the word *said*. It set forth the execution as issued on the *last mentioned judgment*, &c., but afterwards referred to this execution by the word *said*. On general demurrer to the whole declaration, held, well, and that there was no repugnancy between the two counts. *Ibid.*

325. Precedent of a declaration in debt on a judgment in a Justice's Court. *Smith v. Mumford*, 9 Cow. 26.

326. It is sufficient to say the party recovered so much, (a sum within the justice's jurisdiction,) for such a cause, (being a matter within his jurisdiction,) without setting forth any of the previous proceedings. *Ibid.*

327. The declaration on a justice's judgment averred a recovery for a debt, and also 93 cents for the party's damages, as well by reason of detaining the debt as for his costs, &c. Proof of \$50 debt, and 93 cents costs. Held, no variance. *Ibid.*

328. The term used in the declaration imported costs only. *Ibid.*

329. Though the legal effects of altering, by consent of parties, the time limited to do an act (e. g. to make an award) in the condition of a bond, leaving the original date to stand, is to destroy the bond as a pre-existing one, and to give it effect only from the time of the alteration; yet the bond may be declared on as bearing its original date, with or without an averment that it was delivered afterwards. *Tomkins v. Corwin*, 9 Cow. 255.

330. A bond for performing an award was dated the 19th of September, 1825, and conditioned that the award should be made, &c. on or before the 31st of December then next; and afterwards the parties extended the time for the award twice by erasure and interlineations; and the last time to the 19th of January, 1826. Held, that the plaintiff might either declare on the bond simply, as both dated and made on the 19th of September, or as dated that day and made afterwards. *Ibid.*

331. Where the merits of the case are affected by the time when a deed becomes valid, the time of delivery should be stated and shown; for the delivery gives it effect as a deed: otherwise, where time is immaterial. *Ibid.*

332. A contract may be set forth in pleading according to its legal effect, though this vary from the precise words. *Ibid.*

333. A deed executed on a particular day may, in general, be pleaded as made on any other day. *Ibid.*

334. The Supreme Court have often held, that in pleading time, the words next, or then next, may be considered as referring to the day of the month, and not the month itself. *Ibid.*

335. Where, in an action of debt, two several sums are demanded as due and owing in two separate counts, the declaration should, in the commencement, demand the aggregate amount,

the first count should describe the sum demanded in it as parcel, &c., and the second count the sum demanded in it as the residue, &c. *The People v. Van Eps*, 4 Wend. 387.

336. In a suit on a bond given by a deputy sheriff for the faithful performance of the duties of his office, the plaintiff must assign breaches, and cannot, without such assignment, take a verdict for even nominal damages. *Barnard v. Darling*, 11 Wend. 30.

(b) *Plea.*

337. Where the first count of a declaration is in form upon a bond for the payment of money, though the bond may be, in fact, one for the performance of an award, a plea of revocation is a nullity; and this, though it be joined in the same declaration with a count upon another bond in the same words conditioned to perform an award. *Freis v. Freis*, 1 Cow. 335.

338. A plea to a declaration on a bond for the performance of an award, that the defendant by a writing sealed revoked the powers of the arbitrators, need not aver notice to the arbitrators, or the opposite party. *Ibid.*

339. Nor is such a plea exceptionable, as attempting to put in issue matters of law. *Ibid.*

340. The addition to such a plea, that the defendant also revoked the bond, is mere surplusage, and does not vitiate it. *Ibid.*

341. The prayer of a plea of revocation in answer to a declaration setting forth a bond and award, may be in bar of the action. It need not be simply in bar of the award. *Ibid.*

342. To a declaration in debt on bond setting out the condition and breach, *nil debet* is not a good plea; but if pleaded, and not demurred to, it puts in issue every material fact in the declaration. *Jansen v. Ostrander*, 1 Cow. 670.

343. A plea of *non est factum* puts in issue the execution of the deed only. All other material averments in the declaration are admitted. *Thomas v. Woods*, 4 Cow. 173.

344. In an action upon the judgment of a neighbouring state, the defendant may show, by plea, that the Court had no jurisdiction of his person, or the subject-matter of the suit. *Shumway v. Stillman*, 4 Cow. 292.

345. But where the defendant, to a declaration on such a judgment, pleaded that, at the time of the commencement of the suit, and when the judgment was rendered, and during all the intermediate time, he was, and ever since had been, an inhabitant of and resident in the city of Schenectady, county of Schenectady, and state of New York; *held* bad on general demurrer; this plea not being inconsistent with the fact of his having actually appeared, in person, or otherwise, and defended the suit. *Ibid.*

346. The record of a judgment in a neighbouring state is *prima facie* evidence that the Court by which it was rendered had jurisdiction; and, to do away the effect of the record, the contrary should be clearly and fully shown. *Ibid.*

347. The only plea of the general issue, applicable to a declaration upon the judgment of a neighbouring state, is *nil tiel record*. *Ibid.*

348. A plea of *nil tiel record*, to a declaration on a judgment in a Justice's Court, is not triable

by the record, but by jury; and may be joined with a plea of payment. *Witherwax v. Averill*, 6 Cow. 589.

349. The plea of *nil debet* to an action of debt on recognisance of bail, is bad on general demurrer. *Niblo v. Clark*, 3 Wend. 24.

350. The imprisonment of a defendant on a justice's execution is a satisfaction of the judgment while the imprisonment continues; and may be pleaded in bar to an action on a bond given by the defendant and a surety to stay the execution for ninety days. *Sunderland v. Loder*, 5 Weqd. 58.

351. To an action of debt on a judgment rendered in a sister state, commenced by an attachment of goods, &c., a defendant may plead, in bar of a recovery, that no process was ever served upon him in the suit in which the judgment was rendered, and that he never appeared thereto in person or by attorney, notwithstanding that in the record it is averred that the defendant appeared to the suit. *Starbuck et al. v. Murray*, 5 Wend. 149.

352. It is not a good plea in such action that the defendant, at the time of the commencement of the suit in such sister state, was and ever since has been an inhabitant and resident of another state, and that he was not, during all the time aforesaid, within the state where the judgment was rendered. *S. P. Holbrook et al. v. Murray et al.* 5 Wend. 161.

353. To an action of debt on bond for the payment of money, a plea averring an agreement by the obligee to accept a surrender of lands mortgaged as collateral security, and a tender of performance by the defendant, is not a bar. *Russell v. Lytle*, 6 Wend. 390.

354. The suing out of a *certiorari*, to remove a justice's judgment, may be pleaded in answer to a declaration in debt upon such judgment, although the *certiorari* is not sued out until after the commencement of the suit on the judgment. *Wemple v. Johnson*, 13 Wend. 515.

355. As a general rule, such defence should be pleaded in *abatement*; but where, in a suit in a Justice's Court, the defendant added notice of such defence to the plea of the general issue, and the plaintiff, at the joining of the issue, did not object to the form of the pleadings; *it was held*, that he could not subsequently object, in the Common Pleas, to which the cause was removed by appeal, that the defence was available only by plea in *abatement*. *Ibid.*

356. Where, in an action on the official bond of a sheriff, it was alleged by way of breach, that an execution had been delivered to a deputy of the sheriff, by virtue whereof the deputy levied upon property of the defendant in the execution, to an amount exceeding the sum directed to be levied, but neglected to advertise and sell such goods, &c.; and that subsequently a second execution was delivered to another deputy against the goods, &c. of the same defendant, but in favour of another plaintiff, by virtue whereof the same goods were levied upon and sold by the second deputy, and the avails of the sale exceeding the amount of the first execution paid over to the plaintiff in the second execution: and the defendants pleaded that pre-

vously to a sale of the goods, &c. of the defendant in the executions, and before any moneys came to the hands of the sheriff, the sheriff, on entering on the second year of his term of office, executed a new bond with new sureties, who thereafter became the sureties of the sheriff; it was held, that the plea was bad, and would not bar a recovery; that the gist of the action was the neglect of the first deputy to advertise and sell, and such neglect having occurred previously to the change of sureties, the first sureties were liable; that the allegations in reference to the second execution were mere surplusage, of which the defendants could not avail themselves under the state of pleadings, nor could they take advantage of the informality of alleging that the omission to advertise was the default of the deputy, instead of the default of the sheriff. *The People v. Ten Eyck*, 13 Wend. 448.

357. It seems, where, to a declaration on a bond for the performance of covenants, a plea of *non est factum* only is put in, without a notice of special matter attached, that the defendant may both demur and plead; but that he cannot do both where such notice is attached to the plea, as the plea and notice conjoined will be considered equivalent to a special plea to the whole declaration. *Ibid*.

358. In an action upon a judgment obtained in the Courts of another state, it is competent for the defendant to show by a special plea, that the Court in which the judgment was rendered had no jurisdiction either of his person or the subject-matter. *Harrod v. Barretto*, 1 Hall, 155.

359. But every presumption is in favour of the Court which rendered the judgment; and the plea must negative, by positive averments, every fact from which that jurisdiction might arise. *Ibid*.

360. Where, therefore, to an action of debt on a judgment obtained in the "Court of Common Pleas for the County of Suffolk, in the Commonwealth of Massachusetts," the defendants pleaded, that at the time of rendering the said judgment, and from the time of the commencement of the action upon which the same was founded up to the time of its rendition, they "were, and ever since have been, inhabitants and residents of the city of New York," and "never were inhabitants of or residents in the state of Massachusetts, nor subject or amenable to the laws" of that state, nor within the jurisdiction of any of its Courts, "the first process was never served upon them, nor did they, or either of them, ever have any notice of said suit;" the plea was held to be bad upon demurrer, because it did not contain a direct and positive averment that the defendants had not appeared in the suit in which the judgment was obtained. *Ibid*.

(c) Replication.

361. In an action on a judgment of a Court of a sister state, to a plea that the defendant was not personally served with process, and had no notice of the suit; the plaintiff may reply that the defendant appeared in the suit by attorney,

and the record of the judgment stating the fact that the defendant *did appear by attorney* will be evidence of the fact, until contradicted. *Shumway v. Stillman*, 6 Wend. 447.

362. Where, in an action on the bond of a county treasurer, the plaintiffs in their replication assigned a breach, alleging an accounting and a balance of \$5000 found due, the subsequent receipt by the treasurer of \$30,000, and the drawing of orders on him in favour of divers individuals for various sums, setting forth the orders specially, and a presentment and non-payment of the same; and the defendants rejoined, denying the accounting and the subsequent receipt of money, and yet undertook to answer in reference to such particular order for money set forth in the replication, alleging some to be paid, others not presented, &c.; it was held, that the assignment substantially presented but one breach, and that the rejoinder of the defendants was bad for duplicity, and as presenting immaterial issues. *Supervisors of Moore v. Beach*, 9 Wend. 143.

363. If to an action of debt, on a judgment obtained in another state, the defendant plead that he "was never an inhabitant of, or resident in," the state where the judgment was rendered, "nor within the jurisdiction of its Courts," that "the original process was never served upon him personally," and that he "never appeared to the suit, nor had notice of the same," the plaintiff cannot set up, by way of estoppel, in his replication, that the "judgment record declares and avers" that the defendant did appear; but must take issue upon the fact of his appearance in the Court which rendered the judgment. *Harrod v. Barretto et al.* 2 Hall, 302.

364. To an action of debt on a judgment obtained in the state of Alabama, the defendant pleaded that he was not within the jurisdiction of the Court at the time the suit upon which the judgment was obtained was commenced, nor at any time afterwards; that he did not appear to said suit in person, nor authorize any one to appear for him, and that he had no notice of the pendency of the suit until after the judgment was obtained. *Wilson v. Niles*, 2 Hall, 358.

365. The plaintiffs replied, that by a law of Alabama, it is enacted, "that when a writ shall be issued against all the partners of any firm, service of the same on any one of them shall be deemed equivalent to a service on all, and the plaintiff may file his declaration, and proceed to judgment, as if the writ had been served on each defendant, and the judgment shall be equally valid and effectual on all the defendants;" that the cause of action upon which said judgment was obtained was a bill of exchange, drawn by the defendants, under their copartnership firm; that they were at the time of the drawing of said bill copartners, having a house of trade established at Mobile; that the writ on which said judgment was obtained was issued against all the defendants, as copartners; and that it was personally served on the defendant, Niles, in the county of Mobile. *Ibid*.

366. The defendant rejoined, that the copartnership had been dissolved before the suing

out of the writ, and specially traversed the allegation that the writ was served on Niles during the continuance of the copartnership. Upon demurrer to the rejoinder, *it was held*, that the replication was bad; that the law of Alabama could not give jurisdiction over the person of the defendant, who was not within that state; and that the judgment did not, therefore, bind him personally, nor subject his separate property to its power. *Wilson and Hallett v. Niles et al.* 2 Hall, 358.

(d) *Assignment of breaches on a bond conditioned to perform covenants, and proceedings and judgment thereon.*

367. In pleading a proceeding of an inferior jurisdiction, the facts necessary to give it jurisdiction must be set forth, and then the pleader may say, *taliter processum fuit.* *Dakin v. Hudson*, 6 Cow. 224.

368. The Surrogate's Court is a creature of the statute, and in pleading its decree it must be shown affirmatively that the facts upon which it acted gave jurisdiction of the subject-matter and the person. *Ibid.*

369. Where a party bound himself to pay a sum certain as the consideration of lands to be conveyed to him by discharging two mortgages, (encumbrances upon the property,) and paying the balance to the vendor; *it was held*, that a breach was ill assigned which alleged generally the nonpayment of the mortgages and of the balance to the vendor, without averring the mortgages to be due, or that the vendor had sustained injury by such nonpayment. *Thomas v. Van Ness*, 4 Wend. 549.

370. Where a breach gives no data to regulate the assessment of damages, it is not well assigned, though it negative the words of the condition of a bond. *People v. Russell et al.* 4 Wend. 570.

371. A bond reciting a conveyance of land, and covenanting to indemnify and save harmless the obligee against all actions for the recovery of the land, and against all costs and expenses in consequence, is an indemnity against *lateful* claims only; and the assignment of a breach that one has brought suit for the recovery of the land, without alleging title in the party prosecuting, will not give a right to recover. *Luddington v. Pulver*, 6 Wend. 404.

372. The fact that a warranty deed was given simultaneously with the bond will not vary the construction of the covenant. *Ibid.*

373. Though one of two breaches assigned in a *narr.* be bad, if the other breach is well assigned, the plaintiffs must have judgment on the demurrer, notwithstanding the defectiveness of the first; but they will be precluded from assessing any damages under the defective breach. *People v. Brush*, 6 Wend. 454.

374. It is no cause of demurrer to a breach that the plaintiff claims more than he is entitled to. *Ibid.*

375. In an action on a constable's bond, charging the defendant with neglect of duty in carrying an execution into effect, the facts necessary to give the justice who issued the execution jurisdiction must be specifically stated; a mere

general averment of jurisdiction in the magistrate is not sufficient. Thus, where the statement of the party was that he had recovered the judgment in a Court holden by and before A. B., a justice of the peace in and for the county of O., and having full power and competent authority to hold such Court, and to render such judgment, *it was held* insufficient. *Lawton v. Erwin*, 9 Wend. 233.

376. A breach in an action on such bond, that the constable *did not levy* the amount of the execution, or *take the body* of the defendant, is not good, without averring that the defendant in the execution had property upon which a levy might have been made, or that his body might have been found. *Ibid.*

377. Charging that the constable *did not return the execution* within the limited time is a good breach, and well assigned. *Ibid.*

378. If a plaintiff assigns a good breach of the condition of a bond, and then proceeds and specifies the items of damage sustained by him, the defendant cannot demur to such specifications; the question whether the plaintiff is entitled to recover the items specified will be determined on the trial. *Williams v. Maden*, 9 Wend. 240.

379. In debt on bond for the performance of covenants, a breach is sufficient if assigned in the words of the covenant, although the plaintiff under it may be entitled to only nominal damages. *Albany Dutch Church v. Vedder*, 14 Wend. 165.

XVI. Pleadings in replevin.

380. An avowry of taking goods off the demised premises, for rent in arrear, should show affirmatively that such possession continued, if the lease have expired, or it will be bad on general demurrer. *Burr v. Van Buskirk*, 3 Cow. 263.

381. The avowry must aver that this was done, or it will be bad on demurrer. *Ibid.*

382. An avowry substantially bad in part is bad for the whole. *E. g.* in an avowry for rent in arrear, of taking goods off the demised premises, if only a part of the rent avowed for is the subject of distress, the avowry is bad for the whole. *Ibid.*

383. In avowry for a distress for rent, the defendant must set forth his title; but this rule does not mean that he must deduce it down from the remotest source. If he be seised in his demesne as of fee, it is enough for him to say so generally; or if seised or possessed of an inferior estate, he must show the seisin in fee of the one under whom he claims, and then trace the title to himself, particularly down through its different stages; so if the demise was made by another, he must show the lessor's estate, and trace it particularly down to himself. *Wright v. Williams*, 5 Cow. 338.

384. In avowing as executor for a distress for rent, the avowant must show affirmatively that the rent fell due before his testator's death. *Ibid.*

385. An avowant for a distress of cattle of a stranger for rent need not show that they were *levant et couchant* on the demised premises. It

is enough to say they were there; and it lies with the plaintiff to plead that they were not *levant et couchant*. *Ibid*.

386. Where a plea simply denies certain facts set up in an avowry, introducing no new matter, it should conclude to the country; but if it conclude with a verification, it will be good on general demurrer. *Terboss v. Williams*, 5 Cow. 407.

387. A wrong conclusion of a plea in bar can be taken advantage of only by special demurrer. *Ibid*.

388. Where an executor avows for rent as due subsequently to his testator's death, he cannot show, in proof, rent due before it. *Wright v. Williams*, 5 Cow. 501.

389. The defendant in replevin must set out strictly and truly, in his avowry, his authority for making the distress. *Ibid*.

390. A plea to an avowry or cognisance need not allege any place of taking. It is enough that it refer to the property mentioned in the declaration and avowry or cognisance. *Judd v. Fox*, 9 Cow. 259.

391. The declaration in replevin stated the chattels to be the property of the plaintiff, and to have been taken from the building of a third person. Avowry and cognisance. Pleas to the avowry and cognisance that the property and possession of the chattels were in the plaintiff; *held*, no departure from the declaration; for the plea did no more than render certain what was not in terms alleged by the declaration, but which was perfectly consistent with it. *Ibid*.

392. Where a plaintiff replies a claim of property to a plea justifying a taking of goods under a plaint in replevin, he must designate the time of the claim with precision, so that issue can be taken upon it, and there must be an averment that the taking and carrying away complained of was after such claim and notice. *Lisher v. Pierson*, 2 Wend. 345.

393. An avowry in replevin, showing a conclusive bar to the action, is a perfect pleading requiring an answer; although it follows immediately after a plea of property in a stranger, it is not to be considered as matter pleaded to induce a return of the property; a party under such plea being entitled to a return without an avowry or cognisance. *The People v. New York Common Pleas*, 2 Wend. 644.

394. In an action by the sheriff on a replevin bond, it is not necessary to aver in the declaration the issuing of a writ of *retorno habendo* and return of *elongata* thereon. Such averment need not be made, whether the bond be under the fourth or the eighth section of the act of 1813 regulating replevins. *M'Furland v. M'Nitt*, 10 Wend. 329.

395. A plea of property in the defendant or a stranger in an action of replevin must contain a traverse of the right of the plaintiff; and if issue be taken upon such plea by a replication, affirming the property to be in the plaintiff, the material inquiry for the jury is, is the property in the plaintiff? If the plaintiff fail to establish an *exclusive right* to possess and control the property, the defendant is entitled to a verdict. *Rogers v. Arnold et al.* 12 Wend. 31.

396. A release executed by a defendant in a

replevin suit is no bar to a suit prosecuted by the sheriff on the replevin bond, where such release is executed subsequent to the commencement of the suit. *Armstrong v. Burrell et al.* 12 Wend. 302.

397. Where a suit on a replevin bond is prosecuted by the sheriff, and the defendants have satisfied the claims of the parties for whose benefit the bond was taken, *i. e.* the defendants in the replevin suit, the remedy of the parties is by motion to the Court for relief. *Ibid*.

398. In replevin, as in other actions, an officer, prosecuted for an act done by him by virtue of his office, may plead the general issue, and give the special matter in evidence without notice. *Coon v. Congden*, 12 Wend. 496.

XVII. Pleadings in slander, and actions for libel.

399. Different sets of words, importing the same charge, laid as spoken at the same time, may be included in the same counts. *Rabbins v. Emigh*, 6 Wend. 407.

400. A second count in slander may refer to the first for *time and place*. *Ibid*.

401. A declaration in slander is bad, charging the defendant with saying to the father of the plaintiff, "You have brought up your sons to break open letters, and steal money out of them; they have broken open letters, and stolen money out of them," if there is no *colloquium* averred of, and concerning the plaintiff, or the sons of the person addressed; although it be stated, in the antecedent part of the declaration, that the plaintiff is a son of the person addressed. *Milligan v. Thorn*, 6 Wend. 412.

402. In slander, for charging a plaintiff with having burnt his own barn, with the intent to defraud an insurance company, it is not necessary to aver that the barn was insured, where the natural import and meaning of the words spoken is to impute the crime of arson. *Case v. Buckley*, 15 Wend. 327.

XVIII. Pleadings in trespass: (a) Plea.

403. In trespass *quare clausum fregit*, the defendant may give in evidence under the general issue, title or possession in himself or those under whom he claims. *Babcock v. Lamb*, 1 Cow. 238.

404. But an authority or easement must be pleaded, or notice given thereof. *Ibid*.

405. In trespass, a plea of justification by overseers of the poor, that they seized the plaintiff's property by virtue of a warrant of two justices, issued for that purpose, on the defendant's application, upon the ground that the plaintiff had left his wife and children a charge to the town, pursuant to the twenty-second section of the act for the relief and settlement of the poor, (1 R. L. 286, 7.) which proceeding was afterwards affirmed by the General Sessions, must state affirmatively and expressly, that the plaintiff had left his wife and children a charge, &c. *Bowman v. Russ*, 6 Cow. 234.

406. This is necessary to give the justice jurisdiction, and it may be traversed by the replication. *Ibid*.

407. A party is not estopped by the proceedings and judgment of a Court of inferior juris-

diction, to question its jurisdiction; and enough must be stated by the party who would avail himself of such proceedings and judgment to show that it had jurisdiction. *Ibid.*

409. Where the defendant in a Justice's Court pleads title to an action of trespass *quare clausum fregit*, he is bound to abide by his plea, on the same action being brought in the Common Pleas, though the action in the Common Pleas be not commenced at, or before the term of the Common Pleas next after the plea is interposed in the Justice's Court. *Ex parte Drew*, 6 Cow. 610.

409. A former recovery is not admissible evidence under the general issue, in an action of trespass; *e. g.* an action of assault and battery. *Coble v. Carter*, 6 Cow. 691.

410. Whether it is otherwise, in an action on the case, or *assumpsit*? *Quære. Ibid.*

411. Where, in trespass against a constable and another, for taking goods on a justice's execution in one county, the venue being laid in another, the defendants pleaded the general issue jointly; and the jury found that the other defendant acted officiously, and not in aid, or assistance, or by command of the constable, so that he (the other defendant) was not within the statute for the more easy pleading in certain suits, (1 R. L. 155.) *held*, that the constable, having joined in the same plea, was also thereby deprived of the protection of the statute. *Bradley v. Powers*, 7 Cow. 330.

412. Matter of justification or excuse must be pleaded in trespass *quare clausum vel domum fregit*. *E. g.* a license in law, as that the defendant went to the plaintiff's house to demand a debt. *Van Buskirk v. Irving*, 7 Cow. 35.

413. This cannot be given in evidence under the general issue, either as a full defence or in mitigation of damages. But title, whether freehold or possessory, and in general any matters which *prima facie* show that the right of possession is not in the plaintiff, but in the defendant, are evidence of the general issue. *Ibid.*

414. In trespass *quare clausum fregit*, if the declaration be general, without naming the *locus in quo* or the abutments of the close, and the defendant pleads *liberum tenementum*, upon which the plaintiff takes issue instead of new assigning, the defendant verifies his plea by showing title to any lands in the town where the premises are alleged in the declaration to be situate. *Austin v. Morse*, 8 Wend. 476.

415. The plea of *liberum tenementum* to a declaration in trespass for cutting down and destroying trees, growing and being upon certain lands, situate in a certain town, is not supported by proof that the defendant is the owner and possessor of a lot of land in the same town, different from that on which the trespass was committed: to entitle the defendant to a verdict in such case, he must show title to the land where the trespass was committed. *Shank v. Cross*, 9 Wend. 160.

416. The defendant may in such action plead a special *liberum tenementum*, setting forth specifically the place in which he justifies, when, if the plaintiff takes issue, and does not new assign, he assumes upon himself to show a

cause of action at the place set up in the plea. *Ibid.*

(c) Replication.

417. Where the plaintiff declared in assault and battery; and the defendant, after pleading not guilty, pleaded *non assault demesne*, to which the plaintiff replied *de injuria, &c.*, and the defendant also pleaded that the plaintiff was beating one C., and that the defendant *moliter manus, &c.* to prevent injury to C.; to which the plaintiff replied that he was constable, and had a warrant against C., and had arrested him; and that the defendant was aiding him to escape; that C. got into the defendant's carriage, who was driving him off; and, therefore, the plaintiff seized C. and drew him out of the carriage, which was the same assault upon C. mentioned in the defendant's plea. Upon the trial, the defendant abandoned this last plea, and relied upon *non assault demesne*; and the plaintiff would have shown the facts stated in his replication to the last plea, under the general replication *de injuria, &c.* to the first plea; and that when the defendant was about driving C. off in his carriage, the plaintiff seized the lines of the horses, and prevented him, and seized C., &c. But *held*, that these facts were inadmissible in evidence upon *de injuria, &c.*, and that they should have been specially replied. *Brown v. Bennett*, 5 Cow. 181.

418. If the plaintiff have new facts or circumstances justifying his own assault, in answer to the plea of *non assault, &c.*, he should reply setting them out specially; and cannot give them in evidence under the general replication *de injuria, &c.* *Ibid.*

419. The replication *de injuria, &c.* is good only where the plea contains matter of excuse, and not where it contains matter of justification. *Grinwold v. Sedgwick*, 1 Wend. 126.

XIX. Pleadings in real actions.

420. The *mise* in a writ of right puts in issue the whole title, including the statute of limitations; and when a plea after the *mise* denied the seisin of the ancestor within twenty-five years, it was *held* bad on special demurrer, as amounting to the *mise*. *Ten Eyck v. Waterbury*, 7 Cow. 51.

421. A special plea in a writ of right is triable by a common jury, but the *mise* by the grand assize alone. *Ibid.*

422. Hence, where special matter is included with the *mise* in the same plea, it is bad, as requiring different modes of trial. *Ibid.*

423. A plea bad in part is bad in the whole. *Ibid.*

424. Under the *mise*, every special matter of defence may be given in evidence, except collateral warranty. *Ibid.*

XX. Pleadings in actions against unlicensed bankers.

425. In declaring on the first and second sections of the statute (sess. 41, ch. 236.) against the unlicensed bankers, it is sufficient to set forth the act so far as it relates to the offence charged, and then to describe the offence according to the statute, averring that, by force of the

statute, the defendant forfeited, &c., and an action arose, &c., without saying "contrary to the form of the statute." *The People v. Bartow*, 6 Cow. 290.

496. An individual keeping an office of deposit for the purpose of discounting notes is an offender within the act, though the office be not for the purpose of any other banking operation: *Ibid.*

497. An individual keeping an office for carrying on any single banking operation is within the act. It is not necessary to subject him to the penalty, though it should be for carrying on banking business generally, or in more than one branch. *Ibid.*

498. A declaration under the act that the defendant kept an office of deposit for the purpose of carrying on banking business and operations, without saying what, is not too general, as it follows the words of the statute. *Ibid.*

499. A declaration on a penal statute creating an offence unknown to the common law, and giving an action, should, in some way, show an offence against the statute; but it is not always necessary to say *contra formam statuti*. It is enough that the offence appears to be, in truth, against the statute. *Ibid.*

430. On a demurrer to the whole declaration, if either count be good, judgment will be for the plaintiff on that count, though the other counts be bad. *Ibid.*

POOR.

- (a) *How a settlement is gained*; (b) *Order for the relief of the poor*; (c) *Order of removal*; (d) *Appeals*; (e) *Actions by and against overseers.*

(a) *How a settlement is gained.*

1. One who had been occasionally and partially relieved by the town, and whose circumstances had undergone no material change for the better after being relieved, was holden to be a pauper. *Supervisor, &c. of Sandlake v. Supervisor, &c. of Berlin*, 2 Cow. 485.

2. If it do not appear that one has gained a settlement in his own right, his settlement follows that of his father. *Niskayuna v. Albany*, 2 Cow. 537.

3. But a change in the settlement of the father will not affect that of the son, if the father's settlement is obtained after the emancipation of the son. *Ibid.*

4. What shall amount to an emancipation. The grandfather had a settlement in N., his son's settlement follows the father's, and the son not having gained a settlement in his own right, the grandson's is in the same place. *Ibid.*

5. To acquire a settlement by apprenticeship, the services must be under an indenture, or a deed, contract, or writing not indented; a parol binding is not sufficient. *Ibid.*

6. The place of birth is *prima facie* the place of settlement; but if the father's settlement

be in another place, the settlement of the child follows his. *Ibid.*

7. It appeared that at the Albany almshouse certain books are kept, in which the names of paupers, &c. are entered; and also quarterly returns made to the corporation. To show that a pauper was settled at Albany, by being entered and recognised as a pauper of that city, the almshouse books being (as insisted) burnt, parol proof of their contents was offered; *held*, that admitting the books to have been burnt, parol was not the next best evidence, but the quarterly returns should be produced. *Ibid.*

8. The purchase of an equitable interest in lands, and paying \$75, constitute a settlement; but this must be an indefeasible interest, derived from a grantor having title. *Bridgewater v. Brookfield*, 3 Cow. 299.

9. An adjudication as to the settlement of paupers, for whose relief expenditures have been incurred by a town, may be made subsequent to such expenditures, and the county subjected to the payment of money thus expended. *The People v. Supervisors of Oswego*, 2 Wend. 291.

10. The penalty given by statute for bringing an indigent person not having a settlement into any city or town within this state without legal authority, is incurred as well by bringing such person from one town to another within the state as by bringing him from without the state. *Thomas v. Rose*, 8 Wend. 679.

11. To subject a party to the penalty, it must be shown that he acted *mala fide*. *Ibid.*

12. Proof by an inhabitant long a resident in the town, that he had never known the pauper, is *prima facie* sufficient evidence that the pauper has not a legal settlement in the town. *Ibid.*

(b) *Order for the relief of the poor.*

13. To warrant the board of supervisors in allowing the expense of supporting a transient pauper as a county charge, a previous adjudication of two justices upon the question of settlement is not necessary. *Ex parte Dow*, 1 Cow. 205.

14. The usual order of a single justice is enough. *Ibid.*

15. Where a magistrate makes an order to maintain a pauper, as a non-resident of this state, and unable to be removed, this, it seems, is conclusive upon the board of supervisors. *People v. Supervisors of Cayuga*, 2 Cow. 530.

16. The county cannot be charged with the maintenance of a pauper, under the 25th section of the act for the relief and settlement of the poor, (1 R. L. 879.) without a previous adjudication by two justices, pursuant to the seventh section of the same act, that the pauper has no settlement in this state. *Ex parte Overseers of Gates*, 4 Cow. 137.

17. The statute (1 R. L. 986, s. 91.) requiring a grandchild to support his indigent grandparents, extends to the case of his indigent maternal grandparents. *Ex parte Hunt*, 5 Cow. 204.

18. Paupers must be supported, since the 27th November, 1824, by the county in which they happened to be on that day, although previous to the passage of the act of that date,

the legal settlement of such paupers was in another and different county. *Palmer v. Vandenberg*, 3 Wend. 193.

19. An order of a justice of the peace, authorizing an annual allowance for the relief of a pauper, is authority sufficient to an overseer to contract for the support of such pauper. A formal adjudication of the settlement of the pauper in such case is not necessary. *Ibid*.

20. Overseers of the poor may make contracts within the scope of their authority, which are binding upon them in their official capacity, and upon their successors in office. *Ibid*.

21. A contract for the support of a pauper for an indefinite time may be rescinded by the overseers; and where no objection is made as to the particular time of its termination, it may be put an end to at any time. *Ibid*.

22. An agreement between overseers of the poor and an individual, that the latter should support a bastard child until it arrive to the age of five or six years, or as long as the child should be chargeable to the town, at a stipulated price per week, the payment for the support to be made weekly if desired, is not within the statute of frauds, avoiding agreements not to be performed within one year from the making thereof. *M'Lees v. Hale*, 10 Wend. 426.

(c) Order of removal.

23. It is too late for the respondents on appeal to the Sessions from an order of removal, to object that the notice of appeal was not in season, after they have appeared, and prayed and obtained time for a hearing upon it. *Guilderland v. Knox*, 5 Cow. 363.

24. *It seems*, that an order of removal may be served by the pauper himself delivering it to the overseers of the poor of the town to which he is removed. *Ibid*.

25. But the mere circumstance that the overseers of the town found the order among the papers of their predecessors, is not sufficient proof of service. *Ibid*.

(d) Appeals.

26. On appeal to the Sessions from an order of removal of a pauper, the order is no evidence of the facts it contains; but the respondents are bound to begin *de novo*, and make out their case independent of the order. *Olsego v. Smithfield*, 6 Cow. 760.

27. An order removing a pauper appealed from, and abandoned by the town who remove, who consent to take back the pauper without trying the appeal, is not conclusive as between that town and the county. *The People v. Supervisors of Cayuga*, 3 Cow. 530.

28. The latter is not protected by it from maintaining the pauper, as one having no residence in the state. *Ibid*.

29. On an appeal to the Sessions from an order of bastardy, the appellant is not entitled to a trial by jury. *Roy v. Targoe*, 7 Wend. 359.

30. The order of a Court of Sessions, confirming an order of bastardy by two justices, directing the payment of *lying in expenses*, will not be reversed on the ground that no evidence of such expenses was given in the Sessions, if no objection to the confirmation of the order on

that ground was taken in the Sessions; the proof will be deemed as waived. *Ibid*.

31. A Court, in the exercise of a sound discretion, may require counsel to state the substance of evidence offered to be given, so as to enable them to judge of its relevancy; and a Court of review will not control an inferior tribunal in the exercise of such discretion. *Ibid*.

32. The *lying in expenses*, and the costs of the order and appeal, may be enforced by attachment, where the bond of indemnity executed by the appellant, under the order of Sessions, provides only *against* future expenses. *Ibid*.

33. Where an appeal from an order of removal of a pauper was entered in a Court of General Sessions, previous to the repeal of the "act for the relief and settlement of the poor;" *it was held*, that the appeal might be prosecuted and completed under the repealed statute, by virtue of the saving clause in the general repealing act. *The Overseers of the Poor of the Town of Milan v. The Supervisors of Dutchess*, 14 Wend. 71.

34. An attachment may be issued under that act against the overseers of the poor of a town for the costs and expenses of an appeal, and a discharge by the Sessions of overseers arrested on such process will be presumed to have been ordered, on the ground that the overseers had not moneys in their hands belonging to the town, not specially appropriated to other objects. *Ibid*.

35. The repeal of the act did not deprive the Sessions of jurisdiction of causes depending before them, the power of the superintendents of the poor to decide such disputes being *prospectively*. *Ibid*.

36. The award or determination of the Sessions, as to the payment of the costs and expenses, is, within the meaning of the act, a judgment rendered authorizing the supervisors to cause the amount thereof to be levied. *Ibid*.

37. *It seems*, that adjudications of superintendents of the poor, and of justices of the peace, which are to be enforced in like manner, would also for this purpose be considered judgments. *Ibid*.

(e) Actions by and against overseers.

38. The office of overseers of the poor of a town is, for certain purposes, a corporation. *Todd et al. v. Birdsell*, 1 Cow. 260.

39. And the capacity to sue and be sued is of necessity incident to that office, in order to execute the particular trust reposed in them. *Ibid*.

40. Accordingly they are subject to an action for debt, contracted by their predecessors as overseers. *Ibid*.

41. Where P., an overseer of the poor of the town of C. in 1820, gave an order as overseer on B. in favour of G., for the support of the poor of the town of C., which was accepted and paid by B.; *held*, that T. and M., overseers of the poor of the same town in 1822, were liable as a corporation in *assumpsit*, for the debt thus contracted by P. *Ibid*. and see 1 Cow. 261, note (a).

42. Overseers of the poor are a *quasi* corporation, and their successors may sue for a debt,

or duty, due to their predecessors, in their official capacity. *Grant v. Fancher*, 5 Cow. 309.

43. And where they contract a debt, or neglect a duty which devolves upon them as overseers, by which they become liable to another, and then go out of office, they cannot be sued as late overseers; but the action should be against their successors. *Ibid.*

44. Whether, where a pauper, having no residence in this state, on the application of overseers of the poor, is removed by an order of justices to another town, and the order being reversed, they, on request, refuse to take back the pauper or provide for him; by which, the town to which he is removed is put to expense in his maintenance; are liable to an action at the suit of the overseers of the poor of the injured town? *Quære. Ibid.*

45. Whether, on the reversal of such order, the injured town should not procure an order to remove the pauper back to the town whence he was sent, and thus relieve itself? *Quære. Ibid.*

46. No action lies by a physician or surgeon, against overseers of the poor, for services in attending upon a pauper, though upon the most pressing necessity; these services not being done at the request of the overseers, and they not having promised to pay. *Gourley v. Allen*, 5 Cow. 644.

47. Overseers have no right to appropriate the public moneys, &c. for the support of the poor, in any case, without a previous order of a justice or justices of the peace. *Ibid.*

48. Overseers of the poor are not liable for medical or other services rendered to a pauper, without their request or express promise to pay. *Flower v. Allen*, 5 Cow. 654.

49. These officers have no right to appropriate the moneys of their town, in any case, without the previous order of a justice of the peace. *Ibid.*

50. Whether overseers of the poor are ever liable in their corporate capacity? *Quære. Per Spencer, Senator. And, per Tullmadge, President, they are. Ibid.*

51. A pauper may, under certain circumstances, sue the overseers of the poor for a total neglect of duty; but third persons not interested cannot do this. *Ibid.*

52. Overseers of the poor are liable, sometimes in their corporate, and sometimes in a personal capacity. In the former case, their persons or property are not affected by the judgment; but only the corporate property. Otherwise, where they are personally liable. *Per Tullmadge, President. Ibid.*

53. An action will not lie against overseers of the poor for omitting to apply to a justice to obtain an order for the relief of a pauper settled in their town, at the suit of one who, after giving them notice, and requiring them to provide for the pauper, supports him at his own expense voluntarily, and without request from the overseers of the poor. *Minklaer v. Rockefeller*, 6 Cow. 276.

54. The appropriate remedy is by *mandamus*, in behalf of the pauper, to compel the overseers to apply to a justice, and cause the case to be considered. *Ibid.*

55. *Seemle*, that if an action would lie, it must be in the name of the pauper. *Ibid.*

56. In an action against public officers for a nonfeasance, the plaintiff must show the neglect of duty, by proof on his part; and if an action would lie against the overseers of the poor, for not taking the proper steps to obtain an order for the relief of a pauper, the *onus* of showing the neglect lies with the plaintiff. It is not enough that he shows it to be their duty; but he must show the negative, that they did not do their duty. *Ibid.*

57. An execution cannot issue against parties suing as superintendents of the poor; satisfaction of a judgment against them is obtained by application to the supervisors of the county of which they are officers. *Superintendents of Tompkins County v. Smith*, 11 Wend. 181.

POT AND PEARL ASHES.

1. The statute relative to the inspection of pot and pearl ashes does not place that article of merchandise upon a footing different from that of other property, in reference to the protection of the purchaser; the act does not authorize the inspector to declare who is the true owner. *Williams v. Merle*, 11 Wend. 84.

POWER.

1. The power to execute an instrument of known and definite signification in the law will not authorize the execution of one having a different effect. Thus a power to convey does not authorize the attorney to insert in the conveyance a covenant of *seisin*. *Wilson v. Troup*, 2 Cow. 195.

2. The words even of a naked power are not always confined to what they necessarily import in their strictest legal sense. *Ibid.*

3. But they are to be construed according to the intent of the parties. *Ibid.*

4. This rule considered upon authority. *Ibid.*

5. And applied. *Ibid.*

6. The distinction between powers appendant and in gross. The first is where the donee of the power has an estate in the lands, and the estate to be created by the power does, or may take effect in possession, during the continuance of the estate to which the power is annexed. *Ibid.*

7. As a power to a tenant in life for possession to make levies, the latter is where the donee of the power has an estate in the lands; but the estate to be created under the power is not to take effect till the determination. *Ibid.*

8. Where any number of persons are appointed to act judicially in a public matter, they must all concur, but a majority may decide, though the minority dissent, and refuse to be farther considered members of the board. *Ex parte Rogers*, 7 Cow. 526.

9. Whether, under a general leasing power, a lease can be made to commence in *future*, after the expiration of a subsisting lease given under the same power? *Quære. Sinclair v. Jackson*, 8 Cow. 526.

10. If it can, yet both terms must not exceed the time or term limited in the power. *Ibid.*

11. Such excess would make it void at law in toto, though it might be good in equity *pro tanto*. *Ibid.*

12. Where an attorney professes to act with power, having none, he is personally liable. *Ibid.*

13. Otherwise, where he has power, but only errs in its execution. *Ibid.*

14. Though equity will supply a defect in the execution of a power, yet a right cannot therefore be set up under it at law. *Ibid.*

15. The remedy is in equity only. *Ibid.*

16. H. made his will, by which he devised his house, &c. to his wife, and a comfortable maintenance to her, out of the income of his real estate, so long as she remained his widow; to his two sons B. and T. the use and improvement of all his real estate, except their mother's maintenance during her natural life; and directed that after her decease all his real estate should be sold; and gave to his two sons E. and I. 150*l.* a piece, and to his five sons all the the rest of his estate of all kinds, to be equally divided between them, and appointed L., D., and his son I., executors for the purposes in his will mentioned. L. and D., strangers to the family, alone proved the will, and took upon themselves its execution. The testator died, leaving a widow and his five sons, and the children of a deceased. The widow having died, I. having also died without issue, and E. and another son having died leaving issue, the two executors L. and D. sold the real estate. *Held*, that the objects of the testator having been in a great measure defeated, and his intentions in giving the power frustrated, the power itself failed, and the sale was consequently void, so far as it depended upon the power; but the two surviving sons having also conveyed all their interest to the grantees of the executors, that their conveyance passed two-fifths of the real estate; that the power being inoperative, the real estate descended to the heirs at law. *Sharpsteen v. Tillou*, 3 Cow. 651.

17. Where one directs his executors to sell land, *if seems* this is a naked authority, not coupled with an interest. There is no estate vested in the executors as such; and on the death of one executor, the power would not survive at common law, (opinion of the Supreme Court not considered on error.) *Ibid.*

18. *It seems*, that the eleventh section of the act concerning wills (1 R. L. 366.) merely provides for the case of an executor who refuses to act; but where executors are directed to sell the land, thus having a naked authority, if one die, though he never qualified as executor, the power is gone. *Ibid.*

19. *It seems*, that where land is devised to executors to be sold, the survivor or survivors might sell at common law. *Ibid.*

PRACTICE.

I. *Original writ: process and out-lawry.*

II. *Appearance: (a) Endorsing appearance; (b) Appearing by attorney.*

III. *Entitling and signing papers.*

IV. *Notices.*

V. *Service of papers.*

VI. *Affidavits.*

VII. *Common rules.*

VIII. *Agreements and stipulations between the parties or their attorneys.*

IX. *Removal of causes by habeas corpus or certiorari.*

X. *Declaration: (a) Filing and serving declaration; (b) Rule to plead, and to answer.*

XI. *Judgment of non pros.*

XII. *Imprarlanee; time for pleading, and filing, and delivering plea, &c.*

XIII. *When a cause is at issue, and the effect of it.*

XIV. *Judgment by confession, and on warrant of attorney.*

XV. *Judgment by default: (a) When, and how a default may be entered; (b) Interlocutory judgment and assessment of damages; (c) Settling aside the default.*

XVI. *Striking out counts, &c.*

XVII. *Frivolous demurrer.*

XVIII. *Particulars of demand and set-off.*

XIX. *When the venue will be changed.*

XX. *Consolidating actions.*

XXI. *Bringing money into Court.*

XXII. *Examining witnesses de bene esse, and perpetuation of testimony.*

XXIII. *Commission: (a) When a commission will be granted, and how it is to be obtained and executed; (b) Effect of a commission as a stay of proceedings.*

XXIV. *Discontinuance and nolle prosequi.*

XXV. *Judgment as in case of nonsuit: (a) When it will be granted; (b) Stipulation to go to trial; (c) Consequences of not going to trial according to stipulation, and what will be an excuse.*

XXVI. *Trial: (a) Proceeding to trial or inquest; (b) Putting off the trial; (c) Preventing and setting aside the inquest.*

XXVII. *Nonsuit.*

XXVIII. *Demurrer to evidence.*

XXIX. *Reference: (a) When a cause may be referred; (b) Proceedings on a reference, and for what a report will be set aside.*

XXX. *Notices of motion.*

XXXI. *Stay of proceedings, and certificate of probable cause.*

XXXII. *Non-enumerated motions.*

XXXIII. *Cases for argument.*

XXXIV. *Enumerated motions; notice for arguments, points and argument.*

XXXV. *Special rules and orders.*

XXXVI. *Feigned issue.*

XXXVII. *When taking a step in a cause cures a previous irregularity of the opposite party.*

XXXVIII. *Rule for judgment, and entering, filing, and docketing judgments.*

XXXIX. *Petitions and suggestions.*

XL. *Verdict.*

I. *Original writ; process and outlawry.*

1. The teste and return of a writ issued and delivered to the sheriff cannot be altered so as to make it returnable at a subsequent term. *People v. Singer*, 1 Cow. 41.

2. Service of a writ on Sunday by defendant's endorsing his appearance, is void. *Vanderpool v. Wright*, 1 Cow. 209; and see 210, note (a).

3. Nor is a general notice of retainer a waiver of the irregularity. *Ibid.*

4. As to the right of amending a sheriff's return generally. 1 Cow. 10, note (k).

5. How his return is to be made in general, its nature, and the degree of certainty necessary. 1 Cow. 14, note (c).

6. On a return of *cepi corpus*, the plaintiff may proceed to file common bail, and take judgment, though the sheriff in fact had suffered the defendant to go at large without bail. *Byrne v. Morris*, 2 Cow. 472.

7. A return by a sheriff thus: "I have taken the defendant, who remains under my custody, so sick that I cannot have his body before the justice," &c., is a return of *cepi corpus* simply, and the addition "so sick," &c. is surplusage. *Ibid.*

8. *It seems*, that the English return of *langui-dus* has no application to this state. *Ibid.*

9. One attending as a witness from a foreign state before arbitrators, being arrested by virtue of a *capias ad respondendum*, was discharged absolutely, without being required to file common bail. *Sanford v. Chase*, 3 Cow. 381.

10. A *capias ad respondendum*, tested out of term by mistake, set aside on the defendant's stipulating, on payment of costs, to discontinue an action of false imprisonment which he had brought against the plaintiff. *Chandler v. Brecknell*, 4 Cow. 49.

11. Mesne process against the body tested out of term is not amendable. *Ibid.*

12. Where more than a term intervened between the teste and return of a *capias ad respondendum*, *held*, that it was void. *Ex parte Root*, 4 Cow. 648.

13. Putting in special bail without process warrants the plaintiff's proceeding against the defendant as if process had been served. *Wright v. Jeffrey*, 5 Cow. 15.

14. And where the *capias ad respondendum* was returnable on Sunday, yet *held*, that putting in special bail, though without knowledge of the defect, was a waiver of it. *Ibid.*

15. And so, *it seems*, even if it had been served on Sunday. *Ibid.*

16. If process against the body, out of any Court, do not, on its face, authorize an arrest, it is void, and will not protect any person concerned in the arrest; even the officer to whom directed. *Griswold v. Sedgwick*, 6 Cow. 456.

17. Where Daniel S. Griswold was arrested on process of attachment, issued out of the equity side of the Circuit Court of the United States against Samuel S. Griswold; *held*, that an action of false imprisonment lay by Daniel S. Griswold against the marshal, his deputy, and the solicitors concerned in the arrest; and this, although Daniel S. Griswold was the person intended. *Ibid.*

18. Otherwise, of an execution against one by a wrong name, who appears in the suit, and omits to plead the misnomer in abatement; or, *it seems*, where he is known as well by the one name as the other. *Ibid.*

19. It is no objection to process issued to enforce an order of the Circuit Court of the United States that it recites the order as having been made on some day not appearing necessarily to be within the statute term of the Court. It will be intended, that the term continued to that day, unless the contrary appear, the duration of the term not being limited by statute. *Ibid.*

20. The issuing of the *capias ad respondendum* is, to every essential purpose, the commencement of the suit. *Hogan v. Cuyler*, 8 Cow. 203.

21. Whether the issuing of the writ may not be inquired of at *nisi prius*, as well to defeat as to sustain the action? *Quære*. See note (a) at the end of this case. *Ibid.*

22. A counsellor of the Supreme Court is privileged from arrest during the sitting of the Court, though not in actual attendance at term. But it is the duty of an officer to serve a process notwithstanding a claim of privilege. *Sperry ads. Willard*, 1 Wend. 32.

23. A defendant, as a counsellor, is not entitled to the service of papers and notices. *Ibid.*

24. An original writ must have fifteen days between its teste and return, and be made returnable on a general return day; the statute relative to writs and process not having made any alteration in the practice in these particulars. *Cook ads. Morrison et al.* 1 Wend. 84.

25. The return of process to a wrong officer is not an irregularity, for which proceedings will be set aside, where no merits are shown by the defendant. *Garlock et al. ads. Ontario Bank*, 1 Wend. 288.

26. A writ cannot be quashed before it is returned. But a *supercedas* may be granted. *Griswold ads. Lewis et al.* 1 Wend. 292.

27. A suitor attending Court is not privileged from having process served on him in a nonbailable action. *Hopkins ads. Coburn*, 1 Wend. 292.

28. A ministerial officer is protected in the execution of process, whether the same issue from a Court of limited or general jurisdiction, although such Court have not in fact jurisdiction in the case; provided that on the face of the process it appears that the Court has jurisdiction of the *subject-matter*, and nothing appears in the same to apprise the officer but that the Court also has jurisdiction of the *person* of the party to be affected by the process. *Summell v. Boughton*, 5 Wend. 170.

29. A constable is justified in executing process regular on its face, although the officer issuing such process be but an officer *de facto*. *Wilcox v. Smith*, 5 Wend. 231.

30. It is no cause for setting aside an arrest on a *capias* under an order to hold to bail, that the defendant was brought into this state as a fugitive from justices. *Williams v. Bacon*, 10 Wend. 636.

31. Where a *baul bond* is taken on the arrest of a defendant on a *capias*, under an agreement

that it is to be inoperative unless other and additional bail be procured by the defendant, and the defendant is permitted to go at large, the officer making the arrest may retake the defendant before the return of the process, if such other additional bail be not furnished. *Bronson v. Noyes*, 7 Wend. 188.

32. Where a bail bond is taken, conditioned for the appearance of a defendant at the return of a writ, but under the express agreement that it shall be considered only as security for the forthcoming of the defendant on the day succeeding the arrest, unless other or additional bail be given, and such bail is not given, the officer making the arrest may retake the defendant. *Ibid.*

33. It is not necessary that the names of all the clerks of the Court should be subscribed to process: the name of the clerk where the Court sits at *teste* of process is sufficient. *Smith v. Newell*, 7 Wend. 484.

34. A *capias*, directed to the sheriff of one county, but not delivered, is not *functus officio*; its direction may be altered, and then it may be delivered to the sheriff of another county. *Morrison v. Penniman*, 10 Wend. 573.

35. It is enough that the name of one of the clerks of the Supreme Court be subscribed to process, and that whether such clerk reside at the place where the process is tested or not. *Potter v. Holmes*, 12 Wend. 199.

36. A *capias* tested on the 7th of July, 1834, made returnable on "the 8th of July next," will not be set aside; the writ will be considered returnable on the 8th day of July next after its *teste*. *Scott v. Adams*, 12 Wend. 218.

37. A *capias* tested out of term may be amended; but if returnable out of term, it is void; and cannot be amended. *Park v. Heath*, 15 Wend. 301.

38. A bail bond taken on an arrest under a *capias* tested out of term is valid, and the defect in the process cannot be taken advantage of by plea. The remedy is by motion to set aside the process. *Ibid.*

II. Appearance: (a) Endorsing appearance.

39. An appearance endorsed on a *capias*, without the assent of the plaintiff, will not warrant the defendant to proceed to judgment of *non pros*. *Van Epps v. Clapp*, 1 Wend. 78.

40. Where the appearance of a defendant is endorsed on bailable process, the plaintiff, at the expiration of the rule to plead, may enter the defendant's default, although the declaration be filed *de bene esse*. *Cook v. Tuttle*, 2 Wend. 289.

41. It is the duty of the clerk to enter the appearance of a defendant in replevin, on the writ being returned summoned. *Kesler v. Haynes*, 6 Wend. 547.

(b) Appearing by attorney, &c.

42. The appearance for the purpose of objecting to the return of a writ in a real action is not a waiver of the irregularity. *Malcom v. Rogers*, 1 Cow. 1.

43. An appearance can be in but one of three ways: by filing special or common bail, or by

entering an appearance in the clerk's office. *Vanderpoel v. Wright*, 1 Cow. 209.

44. Where a defendant appears, though the process be void, and he is ignorant of this fact at the time of appearance, yet the Court will not afterwards set that or the subsequent proceedings aside. *Pixley v. Winchell*, 7 Cow. 366.

45. A notice of an intended motion in a cause, signed D. B., attorney for defendant, is a sufficient notice of retainer. *M'Kenster ads. Van Zandt*, 1 Wend. 13.

46. Where a suit is prosecuted by two attorneys, (doing business together as a firm,) who have no agent, at the place of one of the clerk's offices of the Supreme Court, a notice of retainer directed to them by the defendant may be posted in such office, although one of the firm has an agent there. *Pierson v. Miles et al.* 12 Wend. 221.

47. Where notice of appearance is not given until after the entry of a default for not pleading, the plaintiff is not bound to serve the defendant's attorney with notice of assessment. *Lynde v. West*, 12 Wend. 235.

III. Entitling and signing papers.

48. A joinder in error must have the signature of counsel. *Wemple v. Johnson*, 12 Wend. 219.

49. Double pleas must be signed by counsel, and if a default be entered against a defendant who has served double pleas without the signature of counsel, the Court will not set it aside, except upon an affidavit of merits. *Barrow v. Sabbaton*, 2 Hall, 348.

IV. Notices.

50. Notice of special bail from the defendant's attorney warrants the plaintiff in proceeding to judgment and execution against the bail named in the notice, though the bail piece be not in fact filed. *Nichols v. Sulfin*, 7 Cow. 492.

51. Notice for judgment as in case of non-suit may be given after a circuit has commenced at which the cause ought to have been tried, and after junior issues have been tried. *Latham ads. Winchell*, 1 Wend. 281.

52. Notice of a rule to amend a pleading, where such rule is of course, need not be given. *Anonymous*, 3 Wend. 424.

53. In an action against a constable for not returning an execution and paying over the money, where, in the declaration, the execution, and the judgment on which it issued, were fully described; *it was held*, that the plaintiff might prove the contents of the writ without giving notice to the defendant to produce it. *Story v. Patten*, 3 Wend. 486.

54. In a proceeding under the act to compel the determination of claims to real estate, notice of the rule to appear and plead, entered by the party instituting the proceeding, need not be given. *Williams v. Cox*, 6 Wend. 519.

55. Notice of application to a commissioner to supersede a writ of error, for want of the requisite bond or justification of bail, is not necessary. *Briggs v. Brown*, 6 Wend. 535.

56. A notice endorsed on a declaration served on a defendant, requiring him to take notice of a rule to plead within days, is sufficient,

where there is no complaint that the party has been misled. *Douw v. Rice*, 11 Wend. 178.

57. Notice to the attorney of a defendant to produce on the trial a certain letter, written by the plaintiff to the defendant, concerning an execution which was produced on a former trial in the same cause, and all other papers in your custody or power, relating to the matter in controversy in this cause; *was held* to be sufficiently explicit to apprise the attorney that the execution referred to in such letter was one of the papers which he was called upon and expected to produce, especially when it was shown that on such former trial the letter and execution had been produced by the defendant's attorney himself, who must have known that it was the principal paper wanted. *Walden v. Davison*, 11 Wend. 65.

58. Notice to produce a paper, given after the commencement of a circuit four days previously to the trial, where the residence of the party to whom notice has been given is within twelve miles of the place of trial, is sufficient. *Hammond v. Hopping*, 13 Wend. 505.

59. Where the pleadings give notice to a party to be prepared to produce a particular instrument at the trial, formal notice is not necessary. *Ibid.* See also *Utica Bank v. Hillard*, 5 Cow. 419.

60. In an action on a covenant of warranty, in a deed of lands from which the grantee has been evicted, parol notice to the grantor of the commencement of the ejectment suit is sufficient; the notice need not be in writing. Justice *Bronson*, dissenting. *Miner v. Clark*, 15 Wend. 425.

61. *It seems*, that though notice alone is sufficient to cast the defence upon the grantor, it is well also to put in a plea. *Ibid.*

V. Service of papers.

62. A copy of the affidavit on which the application is made to make a submission to arbitration a rule of Court, need not be served. *Knight v. Carey*, 1 Cow. 39.

63. Though an attorney be sued by *capias*, the service of all subsequent papers should be on him or his agent, as in ordinary cases. *Sheldon v. Cumming*, 1 Cow. 168.

64. And service of papers, by affixing the same in the clerk's office, is irregular. *Ibid.*

65. And a default taken upon serving a declaration in this manner was set aside. *Ibid.*

66. A delivery of the papers to the clerk of the attorney, while such clerk is in the office, is a valid service, whether the attorney is there present or is absent. *Jackson v. Yale*, 1 Cow. 215.

67. On *certiorari* to a Justice's Court, the defendant in error residing without this state, the plaintiff in error was allowed to serve the assignment of errors, and notice of the rule to join in error, by affixing the same in the clerk's office. The motion for this was *ex parte*. *Anonymous*, 1 Cow. 197.

68. A bill of privilege is in the nature of process, and must be served personally in all cases. *Lawrence v. Warner*, 1 Cow. 198.

69. Service upon the defendant's clerk,

though during the defendant's absence, will not be good. *Ibid.*

70. Where an attorney boards at one dwelling house, and has his office at another dwelling house, and he is absent, leaving no one in his office, the service of papers should be by delivery to some person belonging to the house where he boards, rather than to one belonging to the house where his office is kept. *Lathrop v. Judisvini*, 2 Cow. 484.

71. Service of paper on an attorney in the city of New York, by affixing it on the door of the office, no one being at the office, and the door locked, before 9 A. M., is not good service. *D'Shiel v. De Graw*, 6 Cow. 63.

72. Service of papers at the office of an attorney, in the city of New York, should be within office hours, which do not commence before 9 A. M. *Ibid.*

73. Copies of supplemental affidavits for a motion must be served the same length of time before the day mentioned in the notice of motion, as is necessary for the service of copies of the principal affidavits. *Wilcox v. Howland*, 6 Cow. 576.

74. Serving the copy of a judge's order is sufficient, unless the object be to bring the party into contempt; when the original order must be shown. *Bank of Utica v. Kirby*, 7 Cow. 148.

75. Where two attorneys are in partnership, the business being done in the name of one, yet service of papers may be on either, whether he be in his office or abroad on business. *Lanning v. McKilup*, 7 Cow. 416.

76. Distance should be computed by the usually travelled route, not the mail route, unless this be also the usually travelled one. *Smith v. Ingraham*, 7 Cow. 419.

77. *E. g.* distance between the residence of attorneys by which to determine when the service of papers may be on the agent. *Ibid.*

78. Serving notice of retainer on the agent during vacation, the attorneys residing within forty miles of each other, is not such a service as calls upon the attorney whose agent was served, to deny the receipt, on a motion to set aside the default entered in disregard of the notice. *Lynes v. Schooley*, 7 Cow. 516.

79. Where a notice (except notice of the rule to plead) is regularly affixed in the clerk's office, it need not be served on an attorney afterwards giving a notice of retainer. *Mayell v. Sprague*, 8 Cow. 116.

80. And if any other notice affixed be served on the attorney, upon notice of retainer received, the defendant cannot object that the second notice was a short one. *Ibid.*

81. Service of a paper necessary to an order may be waived by parol, and so any formal requisite of service; though a general rule of the Court require all agreements to be in writing. *Ex parte Crosby*, 8 Cow. 119.

82. There is a distinction, under such a rule, between waiver and agreement. *Ibid.*

83. After judgment, notice served in the clerk's office is irregular. *Barheydt v. Adams*, 1 Wend. 101.

84. The sheriff must be served with notice of a rule on him to bring in the body of a de-

pendant twenty days previously to the time when he is required to show cause. *The People v. Ten Eyck*, 1 Wend. 306.

85. It is not necessary to serve the opposite party with a copy of an error book. *Bagg v. Hunt et al.* 2 Wend. 243.

86. Service of a notice by leaving the same in an office is not good. *Canning et al. v. Pray*, 2 Wend. 626.

87. It is irregular to serve a copy of an affidavit, on which a motion is to be founded, previous to its being sworn to. *Wilson et al. v. Tiffany*, 3 Wend. 310.

88. Service of papers on an agent is good, where the attorneys for the adverse parties reside in different counties, although their residence is within forty miles of each other. *Anonymous*, 5 Wend. 82.

89. Notice to produce a paper as preliminary to parol evidence may be given to the attorney of the party on record, although such party be but a nominal party; notice to the real party himself is not necessary when the suit is prosecuted for his benefit. *Brown v. Littlefield*, 7 Wend. 454.

90. Fractions of a day in the service of process, notices, or pleadings, are not regarded in the computation of time. *Columbia Turnpike Road v. Haywood*, 10 Wend. 423.

91. The rule requiring notices of trial to be served fourteen days before the first day of the Court, excluding from the computation of time the first day of Court, confirmed. *Ibid.*

92. In this Court no copy of a declaration or other pleading can be served upon the opposite party, until after the original has been filed with the clerk, and an appropriate rule entered in the rule book. *Bracket v. Simonds*, 1 Hall, 76.

VI. Affidavits.

93. A motion to admit a landlord to defend in ejectment may be grounded on the affidavit of his agent, shewing the relation of landlord and tenant between him and the tenant in possession. *Jackson v. Stiles*, 1 Cow. 124.

94. An affidavit for a commission is sufficient if it show the witness to be material as advised, &c., and that he is out of the jurisdiction of the Court; it need not add that the party cannot safely proceed to trial without such evidence. *Bracket v. Dudley*, 1 Cow. 209.

95. The affidavit of the agent or attorney in fact is sufficient to move for a commission upon, without showing an excuse for its not being made by the party himself. *Murray v. Kirkpatrick*, 1 Cow. 210.

96. Whether the tenant in ejectment is in possession is not a question upon the merits, but merely of irregularity, and affidavits may be heard upon it upon both sides. *Jackson v. Stiles*, 1 Cow. 222.

97. It must appear by affidavit that the declaration and notice were served upon the tenant in possession before a default can be taken against the casual ejector. *Ibid.*

98. It seems, that an affidavit is inadmissible unless entitled in the cause in which the notice is made. *Dickinson v. Gilliland*, 1 Cow. 481.

99. The office of commissioner to take affidavits, &c., under the act of 1818 in the cities,

became vacant by the appointment of new commissioners for the cities under the act of 1823. *Browne v. Osborne*, 2 Cow. 457.

100. An affidavit for a *certiorari* to a Justice's Court may be entitled in the cause in the Court below, but not in the cause in this Court. *Whitney v. Warner*, 2 Cow. 499.

101. An affidavit wrongly entitled, though the cause be rightly described in the body of the affidavit, cannot be read. *Humphrey v. Cande*, 2 Cow. 509.

102. Counter affidavits will not be heard in support of a motion, even as to the character of witnesses. *Callen v. Kearney*, 2 Cow. 529.

103. An affidavit of sale under the eighth section of the act concerning mortgages (1 R. L. 374.) is sufficient, if certified in this form—"Sworn before me, this first day of November, 1821, George Dexter, Counsr. &c." without expressly certifying that the deponent appeared before him, &c. *Jackson v. Gumaer*, 2 Cow. 552.

104. *Feme sole* is sued, and marries pending the suit. This need not be noticed in the subsequent proceedings, but affidavits, notices, &c. should be according to the original title of the cause. If they treat the husband as a party, they are defective; otherwise, if the marriage be mentioned in the title as mere description of the person of the *feme*. *Roosevelt v. Dale*, 2 Cow. 581.

105. Where an affidavit was entitled in two causes, one of which was rightly and the other wrongly stated, and the affidavit proceeded to speak of the cause in the singular; *held*, that this was sufficient. *Ibid.*

106. An affidavit of merits to prevent an inquest, within the rule of November term, 1808, if made by the attorney, should contain a good excuse for its not being made by the defendant. *Ibid.*

107. Though not technically a party, yet one who marries a *feme* defendant pending the action is substantially a defendant, and may accordingly make an affidavit of merits. *Ibid.*

108. The affidavit for a reference need not state where the venue is laid. *Cleveland v. Strong*, 2 Cow. 448.

109. An affidavit for a reference should state that issue is joined. *Jansen v. Tappan*, 3 Cow. 34.

110. Affidavit taken before any notary public of New Hampshire allowed to be read. *Tucker v. Ladd*, 4 Cow. 47.

111. The affidavit upon which to move for judgment as in case of nonsuit must show there has been a circuit at which the plaintiff might have tried his cause. *Anonymous*, 6 Cow. 388.

112. The Court will not take judicial notice that there has been such a circuit. *Ibid.*

112*. The Supreme Court has no power to compel the making of an affidavit respecting a motion. *Bacon v. Magee*, 7 Cow. 515.

113. Where a statute requires that a certain affidavit shall be made, without saying before whom, (e. g. the first section of the stat. sess. 39, ch. 231, providing for the incorporation of the Jefferson County Bank;) it may be taken before any magistrate or officer having power to administer an oath. *Wood v. Jefferson County Bank*, 9 Cow. 194.

114. A party in interest in a suit pending in another state cannot be compelled to testify in

a proceeding under the act authorizing magistrates to take affidavits to be used in other states. *The People v. Irving*, 1 Wend. 30.

115. In the affidavit of the attendance of witnesses, their names must be stated. *La Forge v. Luce*, 1 Wend. 73.

116. On a motion for a *mandamus*, the affidavit must not be entitled; for there is no cause pending in the Supreme Court, and an indictment for perjury in making such an affidavit would fail. *People v. Tioga Common Pleas*, 1 Wend. 291.

117. An affidavit sworn to before a deputy clerk is defective, the principal being in full life. *Norton v. Coll*, 2 Wend. 250.

118. An affidavit on which a motion in Court is founded should be made by the attorney, and not by his clerk. *Chase v. Edwards et al.* 2 Wend. 283.

119. The *jurat* should be stated in the copy served, when it is an essential part of an affidavit which is to be served. *Ibid.*

120. Affidavits in opposition to an affidavit of merits are not received on a motion to open a default. *Hanford v. M'Nair*, 2 Wend. 286.

121. An affidavit showing the reason why an affidavit on which a *certiorari* was granted was not made by the party, may be made more than thirty days after judgment, and is receivable even on a motion to quash the *certiorari*. *Flanagan v. Murphy*, 2 Wend. 291.

122. A positive affidavit of indebtedness made on showing cause of action cannot be contradicted, but it may be confessed and avoided; e. g. the defendant may show an insolvent discharge. *Jordan v. Jordan*, 6 Wend. 524.

123. In ejectment by landlord for nonpayment of rent, the affidavit required by the statute may be filed without motion in Court. *Livingston v. Conner*, 7 Wend. 521.

124. In an affidavit to found or resist a motion for change of venue, the party must state that his witnesses are each and every of them material, and that without the testimony of each and every of them, he cannot safely proceed to trial. *Constantine v. Dunkham*, 9 Wend. 431.

125. An affidavit to found a motion for judgment as in case of nonsuit may be made by the defendant as well as by the attorney; but the affidavit of the clerk of the attorney will not be received. *Ames v. Merriman*, 9 Wend. 498.

126. Justification of bail in error is *ex parte* by affidavit; notice of time and place of justification need not be given. *Barnett v. Pardow*, 10 Wend. 615.

127. Form of certificates authenticating affidavits taken abroad, objected to by counsel and approved by Court. *Belden v. Devoe et al.* 12 Wend. 223.

128. The affidavit of a party to a suit, made in the progress of a cause, for the purpose of resisting a proceeding on the part of his antagonist, cannot be excluded by counter affidavits setting forth that the party making the affidavit is an atheist. *Leonard v. Manard*, 1 Hall, 200.

129. The competency of a witness cannot be attacked in this collateral way, as he has no opportunity for explanations or reply. *Ibid.*

130. But where a party has been induced to make an application to the Court, by the incorrect declarations of the opposite party, the

Court, although they may refuse the application, will compel the party in fault to pay the costs of the application. *Ibid.*

VII. Common rules.

131. A defendant may enter a rule of course to reply to a *plea puis darrein continuance*, or that the plaintiff be *non prosequat*. *Jackson v. Peer*, 4 Cow. 418.

132. An order for time to make a case under the sixth general rule of January term, 1799, cannot be enlarged after the order has expired, but only while it is running. *Hawkins v. The Dutchess and Orange Steamboat Company*, 7 Cow. 467.

133. A rule to plead, entered previous to the return day of a *copias*, although after the *copias* is returned to the clerk's office, is irregular. *Smith et al. v. Bush et al.* 9 Wend. 379.

134. A defendant, after demurring to the plaintiff's declaration, cannot enter a rule to amend as of course, and under it withdraw his demurrer and serve a plea. *Bleeker v. Bellinger*, 11 Wend. 179.

135. Where a party demurs and becomes satisfied, he has mistaken his defence; he can amend only by obtaining leave of the Court. *Ibid.*

136. A defendant may file a *casetur billa* the next term after he has received the same, and enter a rule in the common rule book for costs. *Provost v. Johnson et al.* 12 Wend. 289.

VIII. Agreements and stipulations between the parties or their attorneys.

137. On setting aside a proceeding in good faith for irregularity, where an action will, in consequence, technically lie, but apparently with only nominal damages, the Court will require the party moving to stipulate not to bring the action. *Rogers v. Chapman*, 7 Cow. 475.

138. Otherwise, where circumstances appear calling for greater damages. *Ibid.*

139. As where an irregular *ca. sa.* is executed oppressively. *Ibid.*

140. Where the terms of an agreement are reduced to writing, but not signed, and one of the parties takes a copy of the writing to submit to others interested with him in the matter, the other party is not at liberty to read such paper in evidence in a suit subsequently brought in reference to the subject-matter of the negotiation, the agreement being inchoate. *Mumford v. Whitney*, 15 Wend. 381.

IX. Removal of causes by habeas corpus or certiorari.

141. Suit is removed from Common Pleas by *habeas corpus*, and the plaintiff neglects to declare within two terms, and the defendant afterwards refuses to receive a declaration; then the plaintiff brings a second action here for the same cause. The Court will not stay proceedings in the last suit till the costs of the first are paid. *Lawrence v. Dickenson*, 2 Cow. 586.

142. Where the defendant removes a cause by *habeas corpus*, and the plaintiff does not follow him by declaring in this Court, he is not bound to pay costs. *Ibid.*

143. The two terms within which a plaintiff is allowed to declare on a *habeas corpus* must

be reckoned inclusive of the term at which bail is put in. *Bogart v. Brinkerhoff*, 2 Cow. 587.

144. Criminal cases tried at the Sessions or Oyer and Terminer will not for the future be heard upon a case made for the advice of this Court, unless brought up by *certiorari*. Rule of Court. 15 Wend. 163.

X. Declaration: (a) Filing and serving declaration.

145. The copy of a declaration, or other pleading served, cannot be disregarded on account of the pleading not being filed. *Irwin v. Deyo*, 7 Cow. 153.

146. The Court will compel this to be done *nunc pro tunc* at any time. *Ibid*.

147. An amended *narr.* cannot be served without a previous rule to amend. *Macomb v. Smith et al.* 1 Wend. 67.

148. In a case of two defendants, where one pleads the general issue and the other demurs, and the declaration is subsequently amended, both defendants are bound to receive an amended declaration. *Thomas v. Allen et al.* 2 Wend. 618.

149. Where a suit is prosecuted by a law firm, as attorneys for the plaintiff, it is enough that the name of the firm prosecuting the suit for the plaintiff is stated in the declaration; both Christian and surnames need not be stated. *Bank of Geneva v. Rice*, 12 Wend. 424.

150. Where a suit is commenced by the filing of a declaration in the clerk's office, &c., in a case where the cause of action accrues in vacation, and the declaration is filed before the next term, the declaration must be entitled specially as of the preceding term, as, for instance, "of January term, to wit, the 13th day of March, in the term of January, in the year," &c. *Paul v. Graves*, 5 Wend. 76.

151. Where a suit is commenced by the filing and service of a declaration, it may be amended as of course in the same manner as if filed after process. *The People v. Monroe Common Pleas*, 5 Wend. 105.

152. An infant defendant cannot be required to procure the appointment of a guardian, when the suit is commenced against him by declaration. *The People v. Hoffman*, 7 Wend. 489.

153. In a suit commenced by declaration against several defendants, the plaintiff cannot proceed until all the defendants be served with the declaration. *The People v. Superior Court of New York*, 7 Wend. 517.

154. A declaration delivered to a sheriff to be served, must be served and returned within a reasonable time; if the sheriff neglects his duty, he may be ruled as in the case of a *captias*. *Anonymous*, 10 Wend. 579.

155. Where a suit is commenced by declaration in the Common Pleas of one county, the copy of such declaration cannot be served on the defendant whilst in another county. *Ex parte Green v. Oneida Common Pleas*, 10 Wend. 592.

156. A defendant upon whom a declaration has been served out of the county in which the suit is commenced, waives the irregularity by obtaining a rule against the plaintiff to file security for costs. *Squires v. Broome Common Pleas*, 10 Wend. 600.

157. Where a suit is commenced in vacation by declaration, entitled generally as of the preceding term, and the cause of action arose since term, on a motion in arrest after verdict, the plaintiff will be permitted to amend on payment of costs, and to enter judgment on his verdict. *Thomas v. Leonard*, 11 Wend. 53.

158. Where a sheriff certifies that he has served a copy of the declaration on the defendant in an action commenced by the filing and service of the declaration, it will be intended that the service was personal. *Central Bank v. Wright et al.* 12 Wend. 190.

159. The service of a declaration on the same day that the original is filed is good, although the service precede the filing. *Hughes v. Patton*, 12 Wend. 234.

160. Where a suit is commenced by the filing and service of a declaration, the day of the actual commencement of the suit may be shown on the trial, where the rights of the parties require such proof. *Michaels et al. v. Shaw*, 12 Wend. 587.

(b) Rule to plead and to answer.

161. H. and W., attorneys, being partners, issued a *cap. ad res.* on which the defendant endorsed his appearance, in the name of W., as attorney, filed a declaration, and entered a rule to plead as on the motion of H. and W., and gave notice thereof in the name of W. The defendant's attorney searched the common rule book (W.), found no rule entered, and neglected to plead, the rule being entered in rule book (H.), and a default was, therefore, entered for want of a plea; and because the defendant was misled, the Court set aside the default without costs. *Stewart v. Atkins*, 3 Cow. 67.

162. When the twentieth day of a rule to plead happens on a Sunday, the defendant has the whole of the next day to plead in. *Borst v. Griffin*, 5 Wend. 84.

163. On a motion for leave to reply double, it must be shown that the matters sought to be replied are *true*. *M'Nair v. Bronson*, 6 Wend. 534.

164. Special order for rule to plead in ejectment may be obtained either at a general or special term. *Frost v. Snow*, 7 Wend. 591.

XI. Judgment of non pros.

165. A plaintiff may be *non prossed* as to his common counts only, leaving him to proceed upon his special count, for not furnishing a bill of particulars. *Symonds v. Crow*, 5 Cow. 279.

166. Furnishing a bill of particulars after a regular notice of a motion for judgment of *non pros*, for not delivering one pursuant to a judge's order, is an answer to the application, provided the costs be paid up to that time, but not otherwise. *Ibid*.

167. Judgment of *non pros* obtained by an infant defendant set aside, because he defended by attorney instead of guardian. *Comstock v. Carr*, 6 Wend. 526.

168. To *non pros* a plaintiff in error, the rule to transcribe the record must be entered in the Court below, and not in the Supreme Court. *Melvin v. Leaycraft*, 10 Wend. 574.

169. If a plaintiff laid under a rule to file se-

curity for costs does not forthwith comply with the same, the defendant may apply for judgment of *non pros*. *Glover v. Cuming*, 12 Wend. 295.

170. It seems, however, that on receiving notice of the motion of judgment of *non pros*, the plaintiff may still comply on paying costs of the motion, or, if necessary, obtain an extension of the time to file the required security. *Ibid*.

XII. *Imparlanee; time for pleading, and filing, and delivering plea, &c.*

171. A plea of alienation and *tout temps pris*, under the statute, (sess. 29, ch. 168, s. 1, 1 R. L. 66.) may be pleaded after a general imparlanee. So of nontenure. *Allan v. Smith*, 1 Cow. 182.

172. By an exception to bail, after copy plea served, though received without objection, the plea becomes a nullity; and to prevent a default, the defendant must plead *de novo* after justification. *Brigs v. Rowe*, 7 Cow. 508.

173. And this, though one of the defendants (joint debtors) be not arrested, and bail be put in as to both. *Ibid*.

174. Where a party has omitted to plead the statute of limitations, the Court will not suffer him to amend by adding that plea, although the action be for meane profits against a purchaser who has a covenant of warranty from his grantor. *Jackson v. Farick*, 2 Wend. 294.

175. Where a defendant obtains an order enlarging the time to plead for his own convenience, and not staying the plaintiff's proceedings until the delivery of a bill of particulars or the like, the time continues to run, notwithstanding the order; and if the order be revoked and the twenty days have expired, the plaintiff is at liberty to enter the default. *Knap v. Smith*, 7 Wend. 534.

176. An order enlarging time to plead may be vacated without previous notice to the defendant; whether notice shall or shall not be given, is discretionary with the commissioner. *Kingman et al. v. Rathbone's Administrators*, 12 Wend. 240.

177. An application to amend the declaration will at all times be granted upon payment of costs, where such amendments do not operate as a surprise upon the defendant, nor subject him to injury. But the defendant, in such a case, will be permitted to withdraw his pleas, and plead again *de novo*. *Penny et al. v. Van Clef*, 1 Hall, 165.

178. Where, upon a demurrer to the plaintiff's declaration, the demurrer is overruled, and leave given to the defendant to answer over upon payment of costs, it is the duty of his attorney to seek the opposite party without delay, pay the costs, and plead to issue. *Wolf v. Luyster*, 1 Hall, 220.

179. Where a plea in abatement has been interposed on the part of the defendant by mistake, and under a misapprehension of facts, the Court will, upon a proper application and upon prescribed terms, permit the plea to be withdrawn, notwithstanding it has been verified by affidavit, (*Tully v. Hamilton*, 1 Hall, 222.) but not amended. See *Trinder v. Durant*, 5 Wend. 72.

180. Where the attorney for the plaintiffs, through inadvertence, neglects to file a replica-

tion to the defendant's plea of payment, and takes an inquest against him before the pleadings are formally closed; the Court will, under proper circumstances, permit a replication to be filed after the inquest, *nunc pro tunc*. *Lockwood v. Flanagan*, 2 Hall, 545.

181. But where the defendant's attorney was aware of the fact that the replication was not filed, and lay by for the purpose of availing himself of the defect, and then upon the plaintiff's application for leave to file his replication *nunc pro tunc*, the defendant himself *savore to a defence upon the merits*, the Court refused to allow the replication to be thus filed, but compelled the defendant to pay all the costs of the inquest and the motion, as a condition upon which the plaintiff's application was refused. *Ibid*.

XIII. *When a cause is at issue, and the effect of it.*

182. Where a plaintiff takes issue upon a plea of an insolvent's discharge, and the issue is found for the defendant, the plaintiff is subject to the costs of the trial, but not to those of putting in the plea. *Conklin et al. v. Lupton*, 1 Wend. 30.

XIV. *Judgment by confession, and on warrant of attorney.*

183. On moving to set aside a judgment by confession, on bond and warrant of attorney, for usury, it appearing from the affidavits to be doubtful whether the allegation of usury was true or not, the Court directed a feigned issue to try the fact. *Morey v. Shearer*, 2 Cow. 465.

184. Form of the rule. *Ibid*.

185. What shall be deemed a valid confession of judgment before a justice, under the statute. (Sess. 41, ch. 94, s. 7.) *Marsh v. Lawrence*, 4 Cow. 461.

186. Form of a confession, specification, and affidavit, under that statute, recognised as valid. *Ibid*.

187. Where one becomes endorser or surety, and takes a bond and warrant to confess judgment from his principal as counter security, he may enter judgment and sue out execution for the sum for which he is liable as surety, the sum being due in part or in whole before actual payment by him. *Monell v. Smith*, 5 Cow. 441.

188. And this, though the bond be not for a specified sum, but conditioned to pay certain endorsements made and to be made by him for the obligors, and to indemnify against costs, &c. *Ibid*.

189. And he may issue execution for the whole penalty without motion, subject to specific directions to the sheriff as to the amount to be levied, as soon as he can ascertain it. *Ibid*.

190. If execution be issued for too much, the Court will correct this on motion. *Ibid*.

191. And they may also, on motion, make order for securing the sum to be levied to the creditors to whom the surety is bound, if they see that this is necessary. *Ibid*.

192. A judgment entered on a *cognovit* gives by a defendant while under arrest will not be set aside on the ground of *duress*, where the evidence is satisfactory that the act was voluntary. *Smith et al. ads. Storm*, 1 Wend. 37.

XV. Judgment by default: (a) When and how a default may be entered.

193. The defendant may appear at the circuit after the jury are empanelled for an inquest by default. *Miroen v. Ingersoll*, 3 Cow. 367.

194. A special verdict, finding that the defendant does not appear nor offer any evidence in support of his plea, is a nullity. *Ibid.*

195. The plaintiff cannot take judgment of course upon a special verdict, but it should be on motion in Court. *Ibid.*

196. The plaintiff cannot carry the cause down to trial, till a judgment by default is entered against the one who omits to plead. *Van Schaick v. Trotter*, 6 Cow. 599.

197. Where a plaintiff inadvertently takes a judgment by default, without filing common bail, or causing the defendant's appearance to be entered, the Court will allow either to be done on payment of costs; and if the omission be occasioned by the defendant's fault, then without costs. *Ibid.*

198. A judgment by default, entered at a term which commences after the defendant's death, is void. *Griswold v. Stewart*, 4 Cow. 457.

199. It is not made good by any statute, and is not good by a relation. *Ibid.*

200. A judgment does not relate back to a period beyond the first day of the term at which it is entered. *Ibid.*

201. On a *scire facias* upon such a judgment against the *terre tenants*, they may show by plea that the judgment was so entered. *Ibid.*

202. In an action of partition in case of default, the proof exhibited must at least be such as would establish a *prima facie* right of recovery in ejectment; and the proof must in the first instance be submitted to the clerk. *Griggs v. Peckham et al.* 3 Wend. 436.

(b) Interlocutory judgment and assessment of damages.

203. In an action against several, if one pleads to issue, and another suffers judgment by default, damages must be assessed against both at the same time, by the jury who try the issue. *Van Schaick v. Trotter*, 6 Cow. 599.

204. Though a *postea* may be filed on the first day of term, and the rule for judgment entered *nisi*, judgment cannot regularly be signed until four days in term have intervened. Yet none but the defendant can avail himself of such an irregularity. *Bank of Orange v. Brown*, 1 Wend. 31.

205. A rule for interlocutory judgment cannot be entered until four days in term after default. *Boyd et al. v. Seely*, 2 Wend. 242. *S. P. Merchants' Insurance Co. v. Simmons*, 10 Wend. 561.

206. A writ of inquiry of damages may be tested and made returnable after the second week in term. *Cook v. Tuttle*, 2 Wend. 289.

207. Where there are two defendants, one of whom suffers a default, and the other pleads, a rule for interlocutory judgment must be entered previously to the notice of trial. *Cuddeback v. Faneley*, 2 Wend. 624.

208. In an action against three defendants, two of whom plead, and the third suffers a default, the plaintiff may notice his cause for trial before entering interlocutory judgment against the defendant making default, and may take an inquest at the circuit, provided that before doing so, interlocutory judgment is entered against such defendant. *Bank of Rochester v. Boulton et al.* 5 Wend. 106.

209. Four full days in term must intervene after the entry of the default before interlocutory judgment: a rule for interlocutory judgment cannot regularly be entered on Saturday upon a default entered on the preceding Tuesday. *Merchants' Insurance Company v. Simmons*, 10 Wend. 561.

210. Where a default is suffered, the defendant, in addition to the usual terms which a plaintiff may impose, may be required to accept short notice of trial; and if he refuses to do so, unless he shows that he had not time to prepare for his defence, he will not be relieved although he swears to merits. *Buller v. King*, 10 Wend. 561.

211. Notice of inquiry must be given fourteen days before the day of executing writs of inquiry. *Nichols v. Nichols*, 10 Wend. 560.

212. When a writ of inquiry is directed to be executed *at the circuit*, the circuit judge, and not the sheriff, takes the direction of its execution; and the proceedings are in all respects similar to the taking of an ordinary inquisition. *Ellsworth v. Thompson*, 13 Wend. 658.

213. In such writ, the sheriff must be commanded to summon the jury, and the judge directed to take and certify the inquisition. *Ibid.*

214. On the execution of a writ of inquiry in an action of assault and battery, matter of provocation, happening so long before the assault that there has been time for reflection, and for the passions to cool, cannot be taken into consideration by the jury, in the assessment of damages; it is otherwise where the provocation and assault are simultaneous. *Ibid.*

(c) Setting aside the default.

215. Merits need not be shown to obtain relief against a regular default, accidentally incurred, for not assigning error. *Van Alstine v. Brower*, 1 Cow. 45.

216. Default against the defendant, for want of a plea, set aside, for variance between the writs and count in the Christian name of one of the defendants, the writs being Alexander and the count Andrew. *Henderson v. Ballantine*, 4 Cow. 549.

217. Where a rule taken by default is opened on excusing the default, it must be heard, as to the party who took it, on the same papers upon which he originally moved it. *Knowlton v. Bow-razon*, 8 Cow. 135.

218. He cannot enlarge the ground of the motion by way of reply to his adversary. *Ibid.*

219. *E. g.* a rule by default to change a venue, on being opened, cannot be maintained by affidavits of additional witnesses. *Ibid.*

220. A default at term on a *certiorari* case

will be opened at any time during the term, without any excuse. *Anonymous*, 1 Wend. 76.

221. Where a party is let in to defend after a default, the plaintiff is not bound to serve him with a declaration. *Hitchcock v. Barlow*, 2 Wend. 628.

222. A default for not pleading will be opened where it is suffered by the neglect of the attorney, and he is insolvent. *Meacham v. Dudley*, 9 Wend. 514.

223. A default for not pleading will not be opened, unless excused. *Johnson v. Clark*, 6 Wend. 517.

224. On setting aside a default for not pleading, the Court will not impose the condition that the party shall not plead the statute of limitations. *Gourlay v. Hutton*, 10 Wend. 595.

225. Where a plea is sent by mail, and the letter containing it comes to the hands of the plaintiff's attorney, who observes it to contain a paper in a particular cause, and a default is subsequently entered in that cause, such default will be set aside as irregularly entered, although the attorney immediately returns the letter to the box in the post-office where he found it, and gives notice that he will not take it from the office. *Clark v. M'Farland*, 10 Wend. 634.

226. Where a default for not pleading was entered on the wrong side of a common rule book, the Court refused to set aside the default, it not appearing that the defendant had in any way been misled or prejudiced by the mistake of the plaintiff; but the plaintiff was directed to pay the costs of the motion to set aside the default. *Cramer v. Fitzsimmons*, 12 Wend. 251.

227. A default regularly entered will never be set aside without an affidavit of merits. *Allan v. Thompson*, 1 Hall, 54.

228. A declaration in this case contained both special and common counts. The defendant pleaded specially to the former, but omitted the general issue to the latter. The plaintiff caused the special pleas to be stricken out as sham pleas; entered a *nolle prosequi* on the special counts, and a default for want of a plea to the common counts. The default was held to be regular; but the defendant was permitted to set it aside on payment of costs, and filing an affidavit of merits. *Ibid.*

XVI. Striking out counts, &c.

229. In *assumpsit* the defendant pleaded the general issue, and a second plea, false in fact, and about which there was some doubt as to its goodness in point of law; and on motion by the plaintiff, the Court ordered it stricken out. *Stewart v. Hotchkiss*, 2 Cow. 634.

230. A special plea, under the statute of double pleading, though it be an ordinary plea, and good in its face, if it be sworn to be altogether false, in fact, by the plaintiff, and not pretended to be true by the defendant or his attorney, will be set aside on motion, even after replication, demurrer, and joinder; and after the plaintiff's attorney has placed it on the calendar for argument; and even after the cause has been tried upon the general issue. *Brewster v. Hall*, 8 Cow. 34.

231. The Court will not set aside a plea, on the ground of its being false, unless it also appear to be intended artfully to draw the plaintiff into a course of special pleading which may compromise his rights, and not then if the defendant swear that he expects to be able to prove it. *Tucker v. Ladd*, 4 Cow. 47. *Young v. Gaderer*, 4 Cow. 48, note (b).

232. A plea will not be set aside as frivolous merely because the Court have held one precisely like it bad on demurrer, or on motion for judgment *non obstante veredicto*. *Davis v. Adams*, 4 Cow. 142.

233. Nor can the plaintiff treat it as a nullity, and enter a rule of course, for judgment, as by default, or confession by *nihil dicit*. *Ibid.*

234. The defendant has a right to retain it on the record, and have it passed upon, with a view to bring a writ of error. *Ibid.*

235. A general affidavit of merits is sufficient to resist a motion to strike out a plea as false, where there is no intricacy in the defence interposed. *Bowen v. Bissell*, 6 Wend. 511.

236. Where a count in a declaration contains an admission of a fact bearing upon a right of action, and a *nolle prosequi* is entered as to such count on the trial, it is considered as stricken out of the declaration, except so far as it is referred to in other counts. *Brown v. Feder*, 7 Wend. 301.

237. Where, since the revised statutes, a defendant to a declaration, in an action of trespass *quare clausum fregit* prosecuted in the Common Pleas in consequence of a plea of title interposed in a Justice's Court, puts in a plea different from that tendered to the justice, the remedy of the plaintiff, if he wishes to get rid of such plea, is by motion to have it struck out; and a like motion, it seems, may be made by a defendant, should the plaintiff declare for a cause of action different from that relied on before the justice. *Tuthill v. Clark*, 11 Wend. 642.

238. If such objectionable pleadings are not stricken from the record, the cause must be tried upon the pleadings as they exist; as an averment on the one hand that the pleadings are the same as those interposed in the Justice's Court, and on the other a denial of their identity, is not the subject of an issue. *Ibid.*

239. Where in a declaration in the Common Pleas of trespass *quare clausum fregit*, after a plea of title before a justice, the plaintiff averred the trespass to be the same complained of before the justice, and the defendant prefaced a plea of the general issue with a denial of the identity of the cause of action, and at the same time put in a plea of *liberum tenementum*; it was held, that such denial of identity was surplusage, and that the plea, stripped of such superfluous matter, being the general issue, gave the defendant the full benefit of such defence; and that he was not bound, in the first instance, to rely upon his plea of title. *Ibid.*

240. Sham pleas will be stricken out on motion. *Oakley v. Devoe et al.* 12 Wend. 196.

241. Generally an affidavit of merits is not sufficient to resist a motion to strike out a plea as false. *Belden v. Devoe et al.* 12 Wend. 223.

242. Laches in a plaintiff in moving to strike

out pleas as false cannot be objected by a defendant interposing such pleas. *Ibid.*

243. The *general issue* will not be stricken out as a false plea. *Wood v. Sutton*, 12 Wend. 235.

244. A plea palpably *frivolous* will be stricken out on motion, at a special term. *Heaton v. Bartlett et al.* 13 Wend. 673.

XVII. *Frivolous demurrer.*

245. A frivolous demurrer is in fraud of the ninth rule of April term, 1796, declaring a cause at issue after twenty days, &c., and though served within the time, will not be cause for setting aside an inquest. *Carey v. Hanchet*, 1 Cow. 154.

246. Though after a demurrer to a declaration is adjudged frivolous, the Court reluctantly gives leave to a defendant to plead anew; yet where, in such a case, an affidavit was made that the demurrer was put in in good faith, that the defendant had a defence on the merits, and that unless he was permitted to plead to the count demurred to, the whole cause of action would stand confessed upon the record, leave will be given to plead anew. *Patten v. Harris*, 10 Wend. 623.

247. It seems, that a demurrer put in, not with a view of disposing of the case on the merits, but solely in the hope of its proving successful, cannot properly be said to have been put in *bona fide*. *Ibid.*

XVIII. *Particulars of demand and set-off.*

248. An order to deliver a bill of particulars should be that the plaintiff deliver one at a given day, or then show cause why he has not done so. *Brewster v. Sackett*, 1 Cow. 571.

249. If no good cause is shown, the order becomes absolute, and the defendant may then move for a *non pros*, if no bill be delivered. *Ibid.*

250. The practice and practical forms in relation to bills of particulars, referred to and considered, upon the English and American authorities. 1 Cow. 573 to 575, note (a).

251. The defendant may demand a bill of particulars before appearance. *Roosevelt v. Gardiner*, 2 Cow. 463.

252. An order for a bill of particulars, staying the proceedings absolutely till a bill is delivered, is irregular. *Ibid.*

253. It should be that a bill be furnished by such a day, or cause shown against it. *Ibid.*

254. But though irregular, it stays the proceedings till vacated. *Ibid.*

255. The law knows of but one Christian name; and therefore the omission of V. S. in the name of one of the plaintiffs in the title to such an order, is not such a misentitling as will render it null. *Ibid.*

256. Orders for bill of particulars absolute in the first instance. The judge is requested to vacate the order for that reason, which he refuses to do. *Hazard v. Henry*, 2 Cow. 587.

257. Order, therefore, set aside for irregularity. *Ibid.*

258. Practice upon requiring a farther bill of particulars. *Humphrey v. Cottelou*, 4 Cow. 54.

259. The party under an order for a bill of particulars must state the time when the items of his demand arose with as much particularity as possible. If he cannot give the day, he should give the month, year, &c. *Ibid.*

260. Bill of particulars demanded and allowed in trover. *Ibid.*

261. On an order for a bill of particulars becoming absolute against the plaintiff, the defendant may move for a rule that the plaintiff furnish a bill in so many days, and pay the costs of the motion, or that judgment of *non pros* be entered. *May v. Richardson*, 4 Cow. 56.

262. After a cause is at issue, and noticed for trial three times, a judge at chambers has no power to allow an amendment to the plaintiff's bill of particulars. This power belongs to the Court exclusively. *Fuller v. Roosevelt*, 4 Cow. 144.

263. The plaintiff allowed to amend his bill of particulars after his cause was tried, a new trial granted, and two notices of trial after this; the cause being noticed for trial at the time of the amendment. *Spawen v. Veeder*, 4 Cow. 503.

264. This allowed on terms of paying all costs, if the defendant changed his defence. *Ibid.*

265. If not, then costs of the motion. *Ibid.*

266. The defendant has the same time to plead after service of a bill of particulars as he had on the day of serving the alternative order. *Mulholland v. Van Fine*, 8 Cow. 132.

267. In case of oyer, he has the same time after delivery as at the time of demand. *Ibid.*

268. In a suit by endorsees against endorsers, the bill of particulars stated the endorsement in blank. This was filled up on the trial. *Held*, no variance. *Norris v. Badger*, 6 Cow. 449.

269. A bill of particulars voluntarily furnished on request, without a judge's order, will not, *per se*, operate to enlarge the time for pleading. *Webster v. Schuyler*, 6 Cow. 595.

270. In an answer to a request by the defendant's attorney for a bill of particulars, the plaintiff's attorney wrote him that the claim was on the note specified on the declaration. No order for a bill was obtained. *Held*, that the plaintiff on the trial was bound by the letter as a bill of particulars. *Williams v. Allen*, 7 Cow. 316.

271. Where the defendant himself, in opposing the plaintiff's demand, specified in his bill of particulars, gives evidence which supports the plaintiff's declaration, though such evidence is out of the bill, the plaintiff may recover upon it. *Ibid.*

272. The plaintiff's declaration was upon a promissory note against the defendant alone, with the common counts. The plaintiff in his bill of particulars claimed the note alone. On the trial the defendant proved the note usurious, by showing that it was given for a note and account due to the plaintiff from the defendant and another, and also included usurious interest for the further delay of payment. *Held*, that the plaintiff might recover the amount of the original note and account, there being no plea in abatement. *Ibid.*

273. A bill of particulars referring to an account rendered is sufficiently definite. If a party is dissatisfied with a bill delivered, he must apply for an order for further particulars. *Goodrich ad. James*, 1 Wend. 289.

274. Under a bill of particulars, claiming to recover, as for money paid, evidence that the plaintiff as such has paid a debt of the defendant, by the conveyance of land accepted in satisfaction of the debt, is admissible. *Bonney v. Seely*, 2 Wend. 481.

275. Where a bill of particulars for services rendered to the defendant has been delivered by the plaintiff, in which all his charges are stated under the date of April, 1821, he will not be permitted to prove any services prior to 1821. *Quin v. Astor*, 2 Wend. 577.

276. Evidence of money paid offered by a plaintiff to rebut a claim set up by a defendant is admissible, although no charge of money is contained in a bill of particulars delivered by the plaintiff. *Brown v. Denison*, 2 Wend. 593.

277. An order nisi for a bill of particulars is not a stay of proceedings, unless a stay is directed by it. *Vermont Academy of Medicine v. Landon*, 2 Wend. 620.

278. Variances between a bill and the evidence are immaterial, unless calculated to mislead the defendant. *M'Nair v. Gilbert*, 3 Wend. 344.

279. An order for a bill of particulars may be made at any time before the trial, but after issue joined it should be made with caution. *Andrews v. Cleveland*, 3 Wend. 437.

280. It is not necessary in a bill of particulars to specify a promissory note declared on. *The People v. Monroe Common Pleas*, 4 Wend. 200.

281. A bill of particulars is sufficient, if it fairly apprise the opposite party of the nature of the claim, so that there can be no surprise. *Brown v. Williams*, 4 Wend. 360.

282. Question of variance between bill and proof. *Ibid.*

283. A bill of particulars is sufficiently certain and definite if it apprizes the party for whose benefit it is given, of the evidence which is to be offered to sustain the claim. *Smith et al. v. Hicks*, 5 Wend. 48.

284. Where there is an interlocutory order for a bill of particulars, and that in the mean time all proceedings stay, and a peremptory order be subsequently made, the plaintiff cannot proceed in the suit until he delivers the bill; the defendant is not bound to serve the final order. *Rouan v. Merritt*, 9 Wend. 443.

285. An order for a bill of particulars nisi, with a stay of proceedings, ceases to operate as a stay, if a peremptory order be not subsequently obtained. *Fussell v. Dorr*, 11 Wend. 177.

286. A party giving a bill of particulars under a judge's order is not held thereby to furnish evidence against himself; but is merely confined at the trial to the range of proof which he himself has chosen; and whereas referees allowed the plaintiff to resort to the particulars of the defendant's set-off to establish a fact, the evidence was held to have been improperly admitted. *Brittingham v. Stevens*, 1 Hall, 379.

XIX. When the venue will be changed.

287. It is a general rule, that in actions arising *ex delicto* the venue will be changed to the county where the cause of action arose, unless the plaintiff stipulate to give material evidence arising in the county where the venue is laid. *Serially v. Wells*, 1 Cow. 196.

288. A stipulation to give, &c. in an adjoining county will not do. *Ibid.*

289. Resolved in an action of assault and battery. *Ibid.*

290. Costs for preparing for trial allowed on changing venue. *Budd v. Malburn*, 1 Cow. 47, 48, note (a).

291. English and American decisions as to change of venue referred to. (1 Dual. Pr. 407 to 414.) *Ibid.* note (a).

292. A stipulating to give material evidence, meaning thereof, and how fulfilled. *Ibid.* note (a).

293. In general, costs are not granted upon denying motion to change the venue. *Sill v. Trumbull*, 1 Cow. 589.

294. But where the motion is denied because the mover's papers are defective, costs will be allowed. *Ibid.*

295. In case for a malicious prosecution, the venue will be changed to the county where the cause of action arose, without regard to the number of witnesses, unless the plaintiff stipulate to give material evidence arising in the county where he has laid his venue. *Vanderzee v. Van Dyck*, 1 Cow. 600.

296. It seems, the plaintiff may retain his venue by stipulating to pay the expense of the defendant's witnesses. *Harrower v. Betts*, 2 Cow. 496.

297. But the defendant has no right to a change of the venue by stipulating to pay the expense of the plaintiff's witnesses. *Ibid.*

298. The usual clause in the act dividing a county, that the division shall not affect any suit or action, &c., (vid. sess. 56, ch. 30, s. 2, in relation to Yates county,) applies to the venue, and retains the place of trial in the old county. *Jackson v. Dains*, 3 Cow. 526.

299. The affidavit to change the venue must state the advice of counsel as to the materiality of the witnesses. *Johnson v. Rogers*, 3 Cow. 14.

300. A defendant who is a counsellor of this Court, making an affidavit to change the venue, need not swear to the advice of counsel that his witnesses are material. *Cromwell v. Van Rensselaer*, 3 Cow. 346.

301. For the purposes of the motion, the Court will take notice that he is of the degree of counsel. *Ibid.*

302. In an action for a malicious prosecution in a neighbouring state, the plaintiff may lay his venue in any county of this state, and retain it there, on stipulating to give material evidence arising in the county where it is laid, though the defendant have a greater number of witnesses residing in the county to which he moves to change the venue. *Hall v. Coe*, 4 Cow. 15.

303. And this too, though the cause of

action in another county, in trover, in the same declaration, arose in the county to which he moves to change the venue. *Ibid.*

304. Replevin is a local action; and in general the venue will not be changed from the county where the cause of action arose. *Atkinson v. Hulcomb*, 4 Cow. 45.

305. Whether there be any exception to this rule, as where the action is in nature of an ordinary action of trespass *de bonis asportatis*? *Quære. Ibid.*

306. If this be an exception, yet the plaintiff may retain his venue upon the usual stipulation. *Ibid.*

307. The change of venue in an action for a libel dispersed in several counties, depends on the same principles as in an action on contract, and a change of venue will accordingly be denied, unless there is a decided preponderance of witnesses, or some other strong circumstance in favour of the change. *Root v. King*, 4 Cow. 403.

308. That witnesses reside in a neighbouring state, near the place where the venue is laid, is not a reason for retaining it. *Cansfield v. Lindley*, 4 Cow. 532.

309. On obtaining a rule to change the venue, the defendant must follow this up with serving a certified copy on the plaintiff's attorney. *Kepp v. Tyler*, 4 Cow. 541.

310. Till this be done, the plaintiff has a right to consider the original venue as the place of trial. *Ibid.*

311. A mere notice of the rule is not sufficient. *Ibid.*

312. The venue will not be changed, if the motion be made after issue joined, provided it appear that the plaintiff may lose a trial by the delay. *Chapin v. De Gröff*, 4 Cow. 554.

313. Where the action for rent is founded on privity of contract, as between the lessor and lessee, it is transitory; otherwise, if on privity of estate, as where an assignee is a party. *Bracket v. Abord*, 5 Cow. 18.

314. In a transitory action, the venue will not be changed from one county to another on the ground of the number of witnesses, unless the number in the latter exceed those in the former. It is not enough that the number be equal. *Wood v. Bishop*, 5 Cow. 414.

315. The affidavit for a change of venue should state that the witnesses, on account of whose place of residence the venue is sought to be changed, are such that, under the advice of counsel, the party cannot safely proceed to trial without them. *Satterlee v. Groot*, 6 Cow. 33.

316. The affidavit for a motion to change the venue must state the names of the witnesses. *Anonymous*, 6 Cow. 389.

317. And also, that, as the party is advised by counsel, and believes, he cannot safely proceed to trial without the testimony of each of them. *Ibid.*

318. Debt on judgment is not a local action; and the venue may be laid in any county in the state, without regard to the place of filing the record or the venue in the original cause. *Goodrich v. Colvin*, 6 Cow. 397.

319. To change the venue in an action for a tort, on the ground that the cause of action

arose in a particular county, the affidavit must state, not only that the cause of action arose there, but that it did not arise elsewhere; and this especially of an action for a newspaper libel. *Tillinghast v. King*, 6 Cow. 591.

320. The affidavit to change, or retain a venue, on the ground of a balance in the number of witnesses, must state that each of the witnesses are material, &c., without each of whose testimony, &c., as advised, &c. *Anonymous*, 7 Cow. 102.

321. The venue is never changed in a criminal cause. But when it appears that an impartial trial cannot be had in the county where the offence is laid, the Court will order a suggestion of this fact to be entered on the record; and a venire is then awarded to the sheriff of another county. *The People v. Vermilyea*, 7 Cow. 108.

322. But to warrant such a suggestion, the case must be a clear one upon the facts; the expression of a belief that a fair and impartial trial cannot be had, in an affidavit, goes for nothing, unless it be warranted by the facts particularly proved. *Ibid.*

323. A strong excitement existing in a county on the subject-matter of a libel suit is no cause for refusing to change a venue on the ordinary affidavit. *Bowman v. Ely*, 2 Wend. 250.

324. The residence of witnesses in an adjoining state, adjacent to the county where the venue is laid, is not sufficient to retain the venue if a change of it is properly applied for. *Peet v. Billings et al.* 2 Wend. 282.

325. The fact that the circuit judge of the district in which the county is situated where the venue is laid in a declaration, was, previous to his appointment, counsel in the cause, is a sufficient reason for changing the venue. *Van Rensselaer v. Douglass et al.* 2 Wend. 290.

326. The specifications of the times for which a judgment is confessed, as well as the oath of the defendant, should be in writing; but a constable and his sureties, sued for neglecting to return an execution issued on such judgment, cannot avail themselves of an omission to comply with the requirements of the statute in these particulars. *Germon v. Swartwout*, 3 Wend. 282.

327. To entitle a party to remove a cause from the Superior Court, or to change the venue, he must state that the witnesses named by him are each and every of them material to his defence; and that without the testimony of each and every of them, he cannot safely proceed to trial; stating as to both facts, as he is advised by counsel and verily believes. *Anonymous*, 3 Wend. 425.

328. The venue in a cause commenced in the Superior Court will not be changed, in ordinary cases, after a trial has been had. *Ten Broeck v. Middlebrook*, 4 Wend. 205.

329. The venue of an action will not be retained on the plaintiff's stipulating to pay the expenses of the defendant's witnesses. *Rathbone et al. v. Harman*, 4 Wend. 208.

330. The venue will not be changed on the application of one defendant, where there are several defendants in a cause. *Sailly v. Hutton*, 6 Wend. 508.

331. The residence of a greater number of witnesses in an *adjoining state*, adjacent to the place of trial laid in the declaration, is not sufficient to retain the venue, although the plaintiff has obtained the assurances of his witnesses to attend, &c. *Bank of St. Albans v. Knickerbacker*, 6 Wend. 541.

332. The venue will be changed from Albany to Rensselaer on motion, notwithstanding the proximity of the places of trial. *Williams v. Fellows*, 9 Wend. 451.

333. Where, on receiving notice of a motion to change the venue, the plaintiff agrees to change it according to the wish of the defendant, provided he will accept short notice of trial, the motion will not be granted if the defendant refuses such offer, unless he shows that it was impossible for him to prepare for trial on short notice. *Smith v. Prior*, 9 Wend. 498.

334. The venue will be changed, although the affidavit omit to state that the witnesses are each and every of them material, where there are no witnesses in the county where the venue was laid. *Brown v. Peck*, 10 Wend. 569.

335. Where the object of an order enlarging the time to plead manifestly is, to throw a plaintiff over the circuit, a motion to change the venue made in the mean time will be denied. *Haywood v. Thayer*, 10 Wend. 571.

336. If a defendant is outnumbered in witnesses on a motion to change the venue, he cannot renew his motion by alleging a greater number of witnesses than originally stated by him; if he does, he will be subjected to costs. *Purdy v. Wardell*, 10 Wend. 619.

337. The venue will not be changed, if the motion for that purpose is not made until after issue joined, and it appears that the plaintiff, if successful on the trial, will lose a term in entering his judgment, if the motion be granted. *Lee et al. v. Chapman*, 11 Wend. 186.

338. In an action against two defendants, one of them may move to change the venue where the other has suffered a default. *Chace v. Benham et al.* 12 Wend. 200.

339. The venue will be changed on the ground of excitement, after two ineffectual attempts to obtain verdicts in the county where the venue is laid. *Messenger v. Holmes*, 12 Wend. 203.

340. In an action against a public officer for acts done by him by virtue of his office, the venue will be changed on his application to the county where the fact complained of happened; unless there be a dispute whether the action be or be not local, in which case the motion will be disposed of upon the usual grounds. *Allen v. Forsay et al.* 12 Wend. 217.

341. A defendant not within the purview of the statutes declaring certain actions local, is not entitled to ask a change of venue on the ground that the action is local; his remedy is by demurrer, plea in abatement, or nonsuit at the trial. *Morgan v. Lyon*, 12 Wend. 265.

342. Where from the course pursued by a defendant in obtaining orders to stay proceedings, and amongst others, an order staying proceedings to enable him to move to change the venue, it is manifest that the object of the de-

fendant is delay, and the plaintiff outnumbers him in witnesses, the motion to change the venue will be denied, with costs. *Killbourne v. Fairchild*, 12 Wend. 293.

343. On a motion to change the venue, the plaintiff must swear, without qualification, that he has witnesses in or near the county where the venue is laid, who are equal in number to or more than those of the defendant, or the venue will be changed. *Sherwood v. Steele*, 12 Wend. 294.

XX. Consolidating actions.

344. Where several causes in favour of the same plaintiff, though against different defendants, concerning the title to property, depend on the same question and the same evidence, either party may move that only one of the causes be tried, and that the others abide the event; and if the fact that the questions and evidence are the same in all, be not disputed by affidavit, the motion will be granted; otherwise, if that fact be denied or appear to be doubtful. *Jackson, ex dem. Pioneer v. Schaubert*, 4 Cow. 78.

345. And when several causes concerning the title to land in favour of the same plaintiff against different defendants were noticed for trial, and one was tried, in which the plaintiff was nonsuited, upon which his counsel gave notice to the defendant's counsel, that as all the causes depended on the same questions, the others would not be tried, and a case was made and order obtained to stay proceedings in the cause tried with a view to a motion for a new trial, and on motion for judgment as in case of nonsuit, the plaintiff's attorney swore that the title and evidence of the plaintiff were the same in all the causes; held, that unless the defendants would file affidavits in twenty days, that the questions and evidence were not the same in all the causes, the motion should be denied; and that the causes untried should abide the event of the one last tried; and that if such affidavits should be filed, that then the plaintiff should pay costs of the circuit, &c. *Ibid.*

346. The rule which allows a plaintiff to try only one of several causes when the questions and the evidence are the same in all, without being subjected to costs for not trying the others, does not apply to actions of slander, &c., where the question is one of damages, to be determined by a jury, but is confined to questions of property. *Sherman v. M'Nitt*, 4 Cow. 85.

347. Several ejectment causes, depending on the same questions and substantially the same evidence, directed to abide the event of such cause among them as the plaintiff should notice for trial. *Jackson v. Stiles*, 5 Cow. 289.

348. A consolidation rule will be granted where several actions are pending between the same parties brought at the same time, the causes of action in which may be comprised in the same declaration. *Brewster v. Stewart*, 3 Wend. 441.

349. A defence in the merits need not be set up to entitle a defendant to the benefit of the rule. *Ibid.*

XXI. Bringing money into Court.

350. Forms and practice on paying money into Court. *Bank of Columbia v. Southerland*, 3 Cow. 336.

351. The sum paid in is to be deemed stricken out of the declaration, and unless a larger sum is proved by the plaintiff at the trial, verdict should be for the defendant. *Ibid.*

352. But where, in such case, a verdict is taken for the plaintiff, subject to the question of practice, to be settled by this Court, that question must be determined on a case made not as a non-enumerated motion. *Ibid.*

353. The clerk is not authorized to receive money paid into Court without rule. *Baker v. Hunt*, 1 Wend. 103.

354. Where money has been regularly paid into Court, it is payment *pro tanto*; the plaintiff has a right to take it out, and the defendant has not. The defendant's death subsequently, the revival of the action against his executor, or even the commencement of a new suit, will not change the effect of such payment. *Murray v. Belkune*, 1 Wend. 191.

355. Payment of money into Court admits the cause or causes of action stated in the declaration, to the amount paid in, but nothing more; beyond that amount the defendant may make his defence. *Spalding v. Vandercook*, 2 Wend. 431.

356. Where money is paid into Court after issue joined, and the plaintiff proceeds in the suit, but fails to establish his demand beyond the amount paid in, the defendant is entitled to the costs of the defence incurred subsequent to the payment of the money into Court, but not to the costs previously accrued. *Aikins v. Cotton*, 3 Wend. 326.

357. A plea of tender admits the plaintiff's cause of action to the amount of the sum tendered. To render such plea operative, the money must be paid into Court. *Eddy v. O'Hara*, 14 Wend. 221.

XXII. Examining witnesses *de bene esse*, and *perpetuation of testimony*.

358. Where it is certain, or probable, that the personal attendance of a witness cannot be procured at a trial, an examination *de bene esse* before a judge or commissioner, to do the chamber duties of a judge, is proper, and should be encouraged. *Jackson v. Kent*, 7 Cow. 59.

359. Whether the preliminary steps to the examination may be proved on the trial by affidavits, or must be proved *viva voce*? *Quere. Ibid.*

360. But they may be proved by affidavits, unless the proof is objected to specifically, on the ground that it is by affidavit, and *viva voce* testimony insisted on. *Ibid.*

361. *Semble*, that such preliminary proof may be by a party, or person interested as lessor of the plaintiff. *Ibid.*

362. The party cannot object that the notice of the examination *de bene esse* was too short, where he appears before the commissioners, and omits to object, for that reason, there; but puts his objection on other grounds. *Ibid.*

363. Forms of affidavits, order, and notice to

examine a foreign witness *de bene esse*. Note (a). *Ibid.*

364. Form of deposition. Note (a). *Ibid.*

365. A foreign witness, who comes to this state on the request of the party for that purpose, may be examined *de bene esse*. *Wait v. Whitney*, 7 Cow. 69.

366. And his deposition may be read, though it appear at the trial that he is at home in a foreign country, or out of the jurisdiction of the Court, and might have been examined on commission. *Ibid.*

367. And this, even though a commissioner may have actually been obtained for the purpose of examining him at his foreign residence. *Ibid.*

368. Notice of examination *de bene esse* should always be given. *Ibid.*

369. Depositions *de bene esse* may be taken at any stage of the cause, even before an issue of fact joined, and while a demurrer is pending and undetermined. *Packard v. Hill*, 7 Cow. 489.

370. In a proceeding under the act to perpetuate the testimony of witnesses, it is not necessary to state in the affidavit on which the order for examination is founded, the probable inability of the witness sought to be examined to attend the trial. *Jackson v. Perkins*, 2 Wend. 308.

371. If a party appear and cross-examine a witness, it is a waiver of a defective notice of the examination. *Ibid.*

372. Where a witness was more than seventy-four years of age, and it was testified by one possessing a knowledge of her situation and infirmities, that he believed she could not endure the fatigue of a journey to the place of trial without the most serious hazard to her health, her deposition may be read in evidence. *Ibid. S. P. Jackson v. Rice*, 3 Wend. 180.

XXIII. Commission: (a) *When a commission will be granted, and how it is to be obtained and executed.*

373. To entitle the exemplifications of a commission and depositions to be read in evidence, there must be an accompanying certificate of a judge or other officer, authorized by the statute (1 R. L. 520, sec. 11.) to receive and open commissions. *Oncida Manufacturing Society v. Lawrence*, 4 Cow. 440.

374. The interrogatories under a commission to examine witnesses, issued pursuant to the act, (sess. 36, ch. 56, sec. 11, 1 R. L. 519, 20.) may be signed by counsel without the addition of his character to the signature; it is enough that he is in truth a counsellor. *Homer v. Martin*, 6 Cow. 156.

375. A judge of the Common Pleas, of the degree of counsel in the Supreme Court, may direct as to the return of the commission, within the act. (Sess. 45, ch. 217, sec. 2.) *Ibid.*

376. So the first judge of the Common Pleas of New York. *Ibid.*

377. Form of the direction. *Ibid.*

378. A direction to return the commission by mail, directed to one of the clerks of the Supreme Court, is complied with if the commission be delivered from the post-office to the

clerk by any of the ordinary means; as by a messenger, the penny post, &c.; nor is it any objection that it be delivered by the attorney for any one of the parties. The true question is, was it delivered to the clerk in an unaltered state? If the Court be satisfied there has been no abuse, it may be received in evidence. *Ibid.*

379. An affidavit for a commission must show that issue is joined in the cause, or some reason for applying before. *Allen v. Hendree*, 6 Cow. 400.

380. Answers to interrogatories upon a commission cannot be objected to at the trial, as incompetent evidence, provided they are fairly within the scope of the interrogatories. *Francis v. The Ocean Insurance Company*, 6 Cow. 404.

381. The proper time to object is when the interrogatories are settled. *Ibid.*

382. But the answers must be restrained in their effect to matters of fact, and cannot be received to establish a matter of law; as where a master of a vessel answered that the voyage was fair and lawful, &c. This was held inadmissible beyond showing the bona fides with which he acted. *Ibid.*

383. A deed, or other exhibit, proved under a commission, must in general be annexed to and returned with the commission. *Jackson v. Shepherd*, 6 Cow. 444.

384. But where it is in the custody of the law, e. g. being a deed of a military lot, deposited with the clerk of the county of Cayuga, and forming part of the records of that county, annexing a copy is sufficient, and the exhibit may be produced on the trial, separate from the commission. *Ibid.*

385. Where a criminal cause is removed by certiorari into the Supreme Court, and retained on the civil side, a commission may issue to take the deposition of a foreign witness, as in a civil cause. *The People v. Vermilyea*, 7 Cow. 369.

386. A commission to take testimony may be sued out previous to default or issue. *Odienne v. Hills*, 1 Wend. 18.

387. On a motion for a commission, the affidavit must state that the party has a defence on the merits. *Brisban ads. Hoyt*, 1 Wend. 37.

388. A commission may issue to take the testimony of a witness residing out of the state, though his domicile is here. *Pooler v. Maple*, 1 Wend. 65.

389. Where a defendant gives notice of his intention to apply for a commission to examine witnesses, after he has received notice of trial, he will not be compelled to pay the costs of preparing for trial, if he has used due diligence. *Jones v. Ives*, 1 Wend. 283.

390. The party moving for a commission names all the commissioners, unless cause is shown. *Harris v. Wilson*, 2 Wend. 627.

391. Whether a party, who obtains a rule for a commission to examine witnesses, after having given notice of his motion for the same, is bound to serve his adversary with a copy of the rule? *Quare. Davenport et al. v. Averill*, 2 Wend. 646.

392. Under a commission to take testimony, depositions of witnesses will be received in evidence, although the oaths to the witnesses

were not administered by the commissioners, if it appears that they were prohibited from administering them, and they were in fact administered by the local authorities. *Lincoln v. Battelle*, 6 Wend. 475.

393. A commission to examine witnesses, with stay, &c. will issue, notwithstanding application is not made until fourth special term after issue joined. *Beall v. Day*, 7 Wend. 513.

394. An attorney may swear to the materiality of witnesses, without adding as advised by counsel. *Ibid.*

395. On a motion for a commission to examine witnesses, when doubt is cast upon the good faith of the application, the commission will not be granted on the common affidavit. If, however, at a subsequent term, a prima facie case is made out, the motion will be granted. *Rogers v. Rogers*, 7 Wend. 514.

396. On a motion for a commission to examine witnesses, an affidavit of merits is necessary only where the party asks for a stay of proceedings until the return of the commission. *Warren v. Harcey*, 9 Wend. 444.

397. A motion for a commission to examine witnesses will not be entertained, after a similar application to a circuit judge, and a refusal by him. *Allen v. Gibbs*, 12 Wend. 202.

398. The Marine Court of the city of New York have power to issue a commission to examine witnesses residing abroad. *Watson v. Smith*, 13 Wend. 51.

399. Where a party, upon an affidavit, sets forth the facts which he wishes to establish under a commission to a foreign country, and shows that those facts can only be proved by persons in the employment of his antagonist, whose names are unknown to him, the Court will either permit the commission to issue generally without the names of the witnesses, or grant a stay of proceedings until their names can be ascertained. *Shaffer v. Wilcox*, 2 Hall, 502.

(b) Effect of a commission as a stay of proceedings.

400. A rule or order for a commission to examine witnesses does not operate, *per se*, as a stay of proceedings; if it is intended so to operate, the Court or judge will so direct. *Magnard v. Chapin*, 7 Wend. 520.

401. Where a defendant gives notice of his intention to apply for a commission to examine witnesses, within a reasonable time (according to the circumstances of the case) after issue is joined, though not before he has received notice of trial, he will not be compelled to pay the costs of preparing for trial. *Ives ads. Jones*, 1 Wend. 283.

XXIV. Discontinuance and nolle prosequi.

402. The rule to discontinue, on receiving a plea of an insolvent discharge, is not a rule of course. *Fyfield v. Brown*, 2 Cow. 503.

403. In *assumpsit* against three, on a joint and several promissory note, two pleaded that the note was fraudulently and oppressively obtained, upon which the plaintiff entered a *nolle prosequi* as to them, and took judgment by default against the third; *held*, that the action

was discontinued as to all. *Hall v. Rochester*, 3 Cow. 374.

404. In actions *ex contractu* against several, unless the defence as to one go merely to his personal discharge, a *nolle prosequi* cannot be entered as to him, and the suit be continued as to another. *Ibid.*

405. A general submission of a case to arbitration is a discontinuance, but not where the parties agree that a judgment may be entered on the report. *Ex parte Wright*, 6 Cow. 399.

406. And in such a case, if the submission be revoked, the Court may proceed with the cause to trial, notwithstanding the submission. *Ibid.*

407. The attorney for the plaintiffs told the attorney for the defendant that the cause was discontinued, and being requested by the latter to enter a rule to discontinue, said this was not necessary; and in consequence, the defendant with the consent of his special bail went to Europe; whereupon, no rule being entered, the plaintiffs afterwards proceeded with the cause; on motion the Court ordered a discontinuance to be entered. *Gaillard v. Smart*, 6 Cow. 385.

408. A rule for discontinuance after appearance is ineffectual without the payment of the defendant's costs; and if such costs when taxed are not paid, the defendant may proceed in the suit, notwithstanding the rule for discontinuance, and is not bound to make up a record of discontinuance, and collect his costs, as on a judgment of *non pros*. *James v. Delavan*, 7 Wend. 511.

409. After the appearance of a defendant, a rule for a discontinuance is a nullity without the payment of costs. *McKenster v. Van Zandt*, 1 Wend. 13.

410. The submission of all suits and controversies to arbitration is a discontinuance of a suit depending in Court, where there is no provision made for its continuance by authorizing a rule for judgment on the award; but if a party appear at the trial of the cause, and defend it, he will waive such discontinuance. *The People v. Onondaga Common Pleas*, 1 Wend. 314.

411. Where the plea of infancy was interposed by the defendants, who had obtained merchandise on credit, the plaintiffs were permitted to discontinue without costs. *Van Buren et al. v. Fort et al.*, 4 Wend. 209.

412. The statutes directing suits against public officers to be brought in the county where the fact complained of happened, and giving judgment of discontinuance if the action is not laid in such county, do not apply where writs of inquiry are executed; they apply only to trials upon issues joined. *Lowe v. Humphrey*, 9 Wend. 500.

413. It seems also, that officers acting *mala fide* would not be entitled to the benefit of those provisions, even on trials of issues joined. *Ibid.*

414. Where judgment is given for the plaintiff on demurrer to part of a count, as to which a justification was attempted and failed, and where to the residue of the count there is an issue of fact, and a like issue upon other counts in the declaration, the plaintiff cannot proceed under the judgment on the demurrer, and have

his damages assessed by a sheriff's jury, by virtue of a writ of inquiry, without previously entering a *nolle prosequi* upon the counts and parts of counts as to which issues of fact are joined. *Ibid.*

415. It seems, that such *nolle prosequi* may be entered without special leave from the Court. *Ibid.*

416. If he seeks to recover damages on all the counts, he must suspend the assessment upon the judgment on the demurrer until the trial of the issue, and take out a *venire tam quam*. *Ibid.*

417. If after an assessment of contingent damages by a general verdict, one of the counts in the declaration be adjudged bad on demurrer, leave will not be given by a Court of review to enter a *nolle prosequi* as to such count. *Garr v. Gomez*, 9 Wend. 649.

418. Where a plaintiff enters a *nolle prosequi* as to one count in his declaration, the only effect of such entry is to strike from the record that count and all the issues joined upon it. *Keeler v. Bartine*, 12 Wend. 110.

419. Where a defendant is returned in *custodia* upon bailable process, and the plaintiff does not declare before the end of the term next after such process was returnable, the defendant may, on motion, obtain his discharge from imprisonment and judgment of discontinuance. *Judson v. Jones*, 12 Wend. 209.

420. It seems, a commissioner or judge at chambers has no power to grant a discharge in such a case; the application should be made to the Court. *Ibid.*

421. In actions *not referrible* under the statute, if the parties submit the cause to referees by stipulation or rule, or both, and merely provide that the referees report, such a reference is an arbitration, and operates as a discontinuance, although the submission contain a stipulation that either party may make a case; but if the submission provides that a judgment may be entered upon the report or award, and judgment is entered accordingly, the parties are concluded by their agreement, and cannot be heard to allege that the reference and judgment were not warranted by law. *Green v. Patchen*, 13 Wend. 293.

422. Where the defendant has obtained a discharge under the act "to abolish imprisonment for debt" after the commencement of the suit, the plaintiff will be permitted to discontinue without costs, though the defendant, relying upon a defence to the form of the action, offers to waive his discharge. *Ashworth v. Wrigley*, 1 Hall, 145.

XXV. Judgment as in case of nonsuit: (a) When it will be granted.

423. One of several defendants, though they have severed in their pleas, cannot move for judgment as in case of nonsuit. *Jackson v. Wakeman et al.*, 1 Cow. 177.

424. Otherwise, where the plaintiff declares against but one. *Ibid.*

425. Where the plaintiff in ejectment, having noticed his cause for trial, is then stayed by rule till the costs of a prior suit are paid, the Court will not in the first instance grant a judg-

ment as in case of nonsuit for not proceeding to trial upon the notice; but will order that, unless those costs are paid within a given time, the defendant may then take his judgment as in case of nonsuit. *Jackson v. Edwards*, 1 Cow. 596.

426. The defendant has no right to move for judgment as in case of nonsuit till all the pleadings in the cause are carried to an issue. *Mumford v. Stocker*, 1 Cow. 601.

427. One of several causes in favour of the same plaintiff, and involving the same defence, was tried, and verdict for defendant. The plaintiff declined trying the other causes, and made a case in the one tried; and the Court denied the motion for judgment as in case of nonsuit in the others. *Sherman v. M'Nitt*, 2 Cow. 452.

428. But to avoid paying the costs which accrue in the others subsequent to the trial of the first, the plaintiff should apprize the defendant of his intention not to try. *Ibid.*

429. Where a cause is called on the calendar at the first day of the circuit, but not reached afterwards, it is no excuse against a motion for judgment as in case of nonsuit, that the usual practice at the circuit has been to call over the calendar on the first day, without taking it up in order; unless the judge intimate that he will not consider the first the regular and orderly call. *Jackson v. Sutphen*, 2 Cow. 457.

430. Motion for judgment as in case of nonsuit cannot be made by one of several defendants, without the concurrence of the others. *Bancroft v. Wilson*, 2 Cow. 495.

431. Where all the defendants move for judgment, if it appear that either has no right to move, as if judgment be against him by default, the motion will be denied as to all. *Ibid.*

432. Where the circuit judge suspended the trial of a cause, on the suggestion of the plaintiff's counsel that it would be a long cause, and the business afterwards took such a course that the cause could not be tried at that circuit, a motion for judgment as in case of nonsuit was denied without costs. *Hart v. Hildbreth*, 2 Cow. 511.

433. Upon the ordinary rule for judgment as in case of nonsuit, *nisi*, the defendant must demand costs, &c., before he can have judgment. *Jackson v. Eddy*, 2 Cow. 598.

434. But where the rule is absolute for judgment as in case of nonsuit, and is opened upon motion, on the payment of costs and stipulating, the plaintiff must tender the costs and stipulate, as a condition to having the effect of the rule. *Ibid.*

435. It is not a good ground of opposition to a motion for judgment as in case of nonsuit, that the judge allowed the plaintiff to withdraw a juror because of an unexpected defect in his proof. *Chandler v. Bicknell*, 5 Cow. 30.

436. On moving for judgment as in case of nonsuit, it is enough *prima facie* that the defendant's affidavit show that the plaintiff had noticed the cause for trial at the circuit where it is alleged he omitted to try, without expressly stating that the same was laid there. *Case v. Belknap*, 5 Cow. 492.

437. On a plea of *riens per descend*, the venire need not be special. *Roosevelt v. Fulton*, 6 Cow. 48.

438. Though there be several issues of fact, the venire need not be special. *Ibid.*

439. The venire *'tam quam* applies only where there is a demurrer or default, as well as an issue of fact. *Ibid.*

440. On the rule for judgment as in case of nonsuit, *nisi*, &c., if it be not complied with, judgment may be entered *nunc pro tunc*, as of the term when the rule was taken, though another term is suffered to elapse before the second rule is entered. *Jackson v. Thompson*, 1 Cow. 426.

441. And in the latter case, *semble*, that it may also be entered as of the previous term, intermediate the entry of the first and second rules. *Ibid.*

442. The demand of costs under the rule *nisi*, for judgment as in case of nonsuit in ejectment, may be of any one of the lessors. *Ibid.*

443. Or, *semble*, of the plaintiff's attorney. *Ibid.*

444. Though judgment as in case of nonsuit cannot be rendered against the people, yet the defendant may have a rule to try by *proviso*. *The People v. Washington and Warren Bank*, 1 Cow. 519.

445. On noticing a cause for trial, unless the plaintiff file his *nisi prius* record during the first day of the circuit, the defendant may, on the next day, take a rule for a *ne recipiatur*; and yet move for judgment as in case of nonsuit. *Sage v. Robbins*, 8 Cow. 110.

446. When a *ne recipiatur* is entered, a motion for judgment as in case of nonsuit will be denied, if it appears that the defendant and his witnesses had not departed Court on the filing of the *nisi prius* roll. *Thompson et al. ads. Jackson*, 1 Wend. 76.

447. When a witness was kept out of the way by a defendant, a motion for judgment as in case of nonsuit was denied with costs. *Smith ads. Grover*, 1 Wend. 77.

448. Where a defendant suffered *four* non-enumerated terms to elapse before moving for judgment as in case of nonsuit, for the default of the plaintiff in trying his cause, he was deemed to have waived the default. *Chapman v. Van Alstyne*, 6 Wend. 517.

449. No excuse for delay in asking for judgment as in case of nonsuit is necessary, where the notice is given within ten or twelve days after the close of the circuit at which the cause ought to have been tried. *Harrison v. Stearns*, 7 Wend. 519.

450. Where no special term intervenes between a circuit and the next general term, a defendant is in season to apply for judgment as in case of nonsuit at any time previous to the second general term. *Lyon v. Hoffman*, 10 Wend. 576.

451. Motions for judgment as in case of nonsuit may be made at any time previous to the next general term after the circuit at which the cause might have been tried, or for which it ought to have been noticed; if made afterwards, excuse must be shown. *Anonymous*, 9 Wend. 461.

452. Judgment as in case of nonsuit cannot be obtained where the action is against two or more defendants, and one has suffered a default. *M'Gregor v. Cleveland*, 10 Wend. 596.

453. Where judgment as in case of nonsuit is rendered at a special term, a record or judgment roll may be made up as of such special term. *Superintendents of Poor of Tumkins County v. Smith*, 11 Wend. 181.

454. Where a cause is referred, the defendant is not entitled to judgment as in case of nonsuit for the neglect of the plaintiff to bring the cause to a hearing; his course is to obtain a rule giving him leave to notice the cause on his part. *Sheldon v. Erie Common Pleas*, 12 Wend. 268.

(b) *Stipulation to go to trial.*

455. After first default in trying a cause, plaintiff offers, if defendant will make out his bill, to stipulate and pay costs of circuit. Defendant does not make out his bill, but moves for judgment as in case of nonsuit; and rule that the plaintiff stipulate and pay costs of circuit, but that defendant pay costs of motion. *Jackson v. Hooker*, 3 Cow. 15.

456. On a rule for judgment as in case of nonsuit, unless the plaintiff shall stipulate and pay costs, "the plaintiff must stipulate *instantly*, or at least within twenty days," or the defendant may perfect his judgment without demanding costs. *Lown v. Rose*, 6 Cow. 394.

457. On setting aside an inquest regularly obtained, the defendant will be required to withdraw a plea of the statute of limitations. *Fox et al. v. Baker*, 2 Wend. 244.

458. Where there are several causes in the name of the same party, against several defendants, in which the question is the same, and the evidence the same, and on the trial of one of the causes the plaintiff is nonsuited, who presents a bill of exceptions and refuses to try the others, the defendants in the others are entitled to judgment as in cases of nonsuit, unless the plaintiff pays the costs of the circuit, and stipulates that the causes remaining untried shall abide the event of the cause tried. *Jackson v. Leggett*, 5 Wend. 83.

459. After one stipulation, a defendant is not bound at his peril to accept a second to proceed to trial, although furnished with the excuse of the plaintiff; he may insist upon submitting the sufficiency of the excuse to the Court. *Farnam v. M'Chure*, 7 Wend. 483.

460. Where the venue is laid in the city of New York, a plaintiff is bound to notice his cause for trial at an adjourned circuit; if he neglects to do so, he may be compelled to stipulate. *Parkins v. Stephenson*, 10 Wend. 620.

461. A plaintiff will be allowed to stipulate, although the defendant be a prisoner on the limits. *Ibid.*

(c) *Consequences of not going to trial according to stipulation, and what will be an escape.*

462. Twenty days are allowed only where the plaintiff is allowed to stipulate to try his cause on payment of costs. *Bradstreet v. Phelps*, 2 Cow. 453.

463. Form of the power from the attorney to demand costs. *Ibid.*

464. Absence of counsel on professional business not allowed as an excuse for not going to trial pursuant to a stipulation. *Jackson v. Wakenan*, 2 Cow. 578.

465. Otherwise of sickness or other inevitable accident. *Ibid.*

466. In an action against two or more defendants, where one suffers a default and the others plead to issue, although judgment as in case of nonsuit cannot be granted for the neglect of the plaintiff to bring the cause to trial, a rule may be obtained that the plaintiff try his cause, or pay the costs of the defence. *M'Gregor et al. v. Cleveland et al.* 12 Wend. 201.

XXVI. Trial: (a) *Proceeding to trial or inquest.*

467. A parol reservation or condition annexed to the receipt of a plea, and giving notice of trial, is void. *Starkweather v. Benjamin*, 1 Cow. 576.

468. And such a step will be deemed a waiver of default, though the condition be not performed. *Ibid.*

469. In determining the sufficiency of a notice of trial, e. g. a notice for the day before the circuit is appointed to commence, the Court will not only look to the face of the notice, but other circumstances, to see whether the opposite party was, in fact, misled by the mistake. *Bender v. Covill*, 4 Cow. 60.

470. When several are indicted jointly for an offence not capital, or where there is no right of peremptory challenge, it is in the discretion of the Court which tries to grant a separate trial to each defendant or not. *The People v. Vermilyea*, 7 Cow. 369.

471. So, it seems, in a capital case, or a case where the right of peremptory challenge prevails. *Ibid.*

472. Where a new trial is granted on the plaintiff's motion, he must take notice of it, and proceed to trial without notice from the defendant. If he do not, he may be nonsuited. *Jackson v. Johnson*, 7 Cow. 419.

473. Courts may, in the exercise of a sound discretion, allow a juror to be withdrawn, and still retain the cause upon the calendar for trial, instead of nonsuiting a plaintiff for a defect in his proof; as in case of surprise or mistake, on his part, in the preparation of his cause for trial; and this, even where the defendant has not wilfully misled the plaintiff. *People v. New York Common Pleas*, 8 Cow. 137.

474. Where there are two actions depending between the same parties, one of which only is noticed for trial, the notice must specify the action intended to be tried, or it will be considered insufficient. *Lisler v. Parmelee*, 1 Wend. 22.

475. When an inquest is taken out of its regular order on the calendar, an affidavit of merits not having been filed, all the defendant loses is the right of challenge of the jury, and to introduce testimony on his part. *Green ad. Willis et al.* 1 Wend. 78.

476. When a cause is called in its regular order on the calendar, the defendant has a right to appear, though no affidavit of merits is filed. *Starkweather ad. Carnwell*, 1 Wend. 77.

477. A notice of trial served on the last day

of noticing, after half past ten, P. M., which did not come to the knowledge of the attorney until the next day, *was held* insufficient. *Bowen v. Clarke*, 2 Wend. 249.

478. If a cause has been irregularly noticed and placed on the calendar by a party, the remedy of the other party is by motion to strike the cause from the list. *Truensend v. Wheeler*, 4 Wend. 196. See also *Allen v. Cathoun*, 6 Cow. 32.

479. Where there is both an issue of law and an issue of fact on the record, and the plaintiff goes to trial before the determination of the issue of law, he does so at the peril of losing the costs of the circuit if the demurrer be decided against him. *Booth v. Smith*, 5 Wend. 107.

480. Notice of trial to be good must be fourteen days before Court, *exclusive* of the day of service. *Small v. Edrick*, 5 Wend. 137.

481. An inquest at the circuit can regularly be taken out of its order on the calendar only at the opening of the Court in the morning, and previous to the trial of a litigated cause. *Newcomb v. Johnson*, 9 Wend. 451.

(b) *Putting off the trial.*

482. The ordinary affidavit is sufficient to put off a cause at the circuit, unless circumstances of suspicion appear from counter affidavits, or otherwise. *Ogden v. Payne*, 5 Cow. 15.

483. It is not a circumstance of suspicion, requiring more than the ordinary affidavit, that the witness on account of whose absence the defendant applies to put off the cause is the attorney of the plaintiff. *Ibid.*

484. A circuit judge should put off a cause on the usual affidavit of the defendant, of the absence of a material witness, &c., at the first circuit for which the trial is noticed, unless there be a suspicion that the application for that purpose is intended merely for delay. *Hooker v. Rogers*, 6 Cow. 577.

485. The affidavit need not state when the witnesses were subpoenaed, unless this be made ground of objection. *Ibid.*

486. It is, in general, no answer to the application that the defendant should have offered to take the deposition of sick or absent witnesses. *Ibid.*

487. If the judge refuse to put off the trial for proper cause, the verdict will be set aside, though the defendant appear and contest the suit. *Ibid.*

488. Where, on a cause being carried down for trial for the first time, the defendant moves to put off the trial for the absence of a material witness, having used due diligence to obtain his attendance, though such witness reside out of the jurisdiction of the Court, the trial should be postponed. *The People v. Vermilyea*, 7 Cow. 369.

489. It is no answer to the application to admit that the witness required would, if present, testify to the facts supposed in the affidavit on which the motion to postpone is founded. *Ibid.*

490. In all such cases the questions are, 1. Is the witness material? 2. Has the defendant been guilty of *laches*? 3. Can the witness be procured at the next Court? *Ibid.*

The rule as to putting off trials for the

absence of witnesses is the same, both in civil and criminal cases. *Ibid.*

492. A rule that the defendant pay the costs of putting off a trial at the circuit will be granted by this Court on application. *Kirby v. Sisson*, 1 Wend. 83.

493. In a notice for a commission given after receiving notice of trial, the defendant should stipulate to pay the plaintiff's costs of preparing for trial. *La Forge v. Luce*, 2 Wend. 242.

494. Where a party stipulates to try a cause at the next circuit, and there is not sufficient time regularly to notice the cause for trial at the circuit immediately succeeding, the stipulation will be considered as applying to the second circuit. *Jackson v. Phoenix Bank*, 5 Wend. 101.

495. Where an important witness is absent from the country, and will not return until several terms have elapsed, this Court will put off the cause for a reasonable period, notwithstanding the delay may comprehend more than one term. *Smith v. New York Insurance Company*, 1 Hall, 223.

(c) *Preventing and setting aside the inquest.*

496. Motion on affidavit of merits, to set aside an inquest regularly taken, after seven years, denied; though the defendant and his attorney had reason to suppose the cause had never been tried. *Thorp v. Fowler*, 5 Cow. 446.

497. One affidavit of merits to prevent an inquest is sufficient, though the cause be several times noticed for trial and inquest. *Prescott v. Roberts*, 6 Cow. 45.

498. And if filed and served on the plaintiff's attorney, for a circuit in one county, it is sufficient, though the venue be afterwards changed to another county, and the cause be tried in the latter. *Ibid.*

499. Where an inquest was taken in the absence of the defendant's counsel, and the plaintiff refused to reinstate the cause on the offer of the payment of costs, and it appeared also that he would not have lost the circuit, the inquest was set aside, and the costs directed to abide the event of the suit. *Farnam ads. Decpard*, 1 Wend. 287.

500. A plaintiff obtaining an inquest at the circuit is not bound to waive it upon the application of the defendant, though he offer to pay costs, &c., but may put him to his motion. *Smith v. Howard*, 12 Wend. 198.

XXVII. *Nonsuit.*

501. The people cannot be nonsuited. *The People v. Thurman*, 3 Cow. 16.

502. In this respect as well as in many others, they enjoy the prerogatives of the British crown. *Ibid.*

503. The Court will not hear a motion to set aside a nonsuit at the trial, the plaintiff having since died, and the only effect obviously being merely to unsettle the question of costs. *Seymour v. Devo*, 5 Cow. 289.

504. A plaintiff who is nonsuited, though out of Court, may yet appear, and move to set aside the nonsuit. *Packard v. Hill*, 7 Cow. 434.

505. A nonsuit as to one Court is not a nonsuit as to others; and the plaintiff may, not-

withstanding, proceed upon the others in a regular course. *Ibid.*

506. But on a *venire tam quam*, to try an issue as to one count, and assess contingent damages on demurrer to others, if the plaintiff be nonsuited as to the issue, he cannot proceed to assess contingent damages on the counts demurred to. *Ibid.*

507. If a plaintiff proves all that is laid in his declaration, he ought not to be nonsuited. *Safford v. Stevens*, 2 Wend. 158.

508. A nonsuit ordered by the Court below, without the motion of the defendant, for a defect in the proof of one count in a declaration, (when a good and sufficient cause of action is shown under another count, but which is overlooked by the Court in pronouncing judgment,) will not be sustained, although the defendant did not direct the attention of the Court to the cause of action shown under such second count. *Ibid.*

509. It is the duty of a Court to nonsuit a plaintiff, where the Court would set aside the verdict, if found for the plaintiff, as contrary to the evidence. *Stewart v. Simpson*, 1 Wend. 376.

510. A plaintiff has a right to submit to a nonsuit on the coming in of the jury, although they are prepared to certify a balance in favour of the defendant in an action of *assumpsit*, where a notice of set-off has been given. *Woolser v. Burr*, 2 Wend. 295.

511. On a motion to set aside a nonsuit, a defendant may object the loss of the note declared on, being a note payable to bearer, as an answer to the motion; although at *nisi prius* no such objection was taken, and the defendant there sets up a defence on the merits by showing a want of consideration. *Kirby v. Sisson*, 2 Wend. 550.

512. A defendant may move for judgment as in case of nonsuit in a cause which has been referred, notwithstanding that he has stayed the plaintiff's proceedings until security for costs be filed. *Champlin v. Petrie*, 4 Wend. 209.

513. On a *venire tam quam*, a plaintiff cannot regularly be nonsuited, although the evidence against the defendant who appears is not sufficient to entitle the plaintiff to recover. *Beaman v. Blanchard et al.* 4 Wend. 432.

514. Where a plaintiff stipulates to try his cause and to pay the defendant's costs, but neglects on demand to pay, the defendant may apply for judgment as in case of nonsuit, notwithstanding the stipulation. *Chadderton v. Backus*, 6 Wend. 521.

515. Where a motion is made for a judgment as in case of nonsuit, and the plaintiff shows that no cause of as young an issue was tried at the circuit, the motion will be denied. *Hawk v. Taylor*, 10 Wend. 592.

516. Where a demand for damages sustained by a party in consequence of the nonattendance of a witness at the trial of a cause, and the penalty given by statute in such cases, were joined in the same action, and the judge nonsuited the plaintiff, for the reason that the venue was not laid in the proper county, as to the action for the penalty, it being local by statute, the Court refused to set aside the nonsuit, although the action as to the damages was trans-

sitory; holding, that the plaintiff ought to have made his election at the trial to abandon his count for the penalty. *Cogswell v. Meach*, 12 Wend. 147. See also *Rightmeyer v. Raymond*, 12 Wend. 51.

517. Where a plaintiff is nonsuited for a defect of proof, the nonsuit will be set aside on payment of costs, although properly granted by the circuit judge, if the Court have reason to believe that without such relief the cause of action will be lost. *The People v. Barnes et al.* 12 Wend. 492.

518. A variance between the declaration and proof as to the terms of sale is not a ground of nonsuit, if the declaration be amendable. *Boorman v. Jenkins*, 12 Wend. 566.

519. If, upon the trial of the cause, the plaintiff refuse to submit his case to the jury after the testimony is closed, and insist upon being nonsuited, in consequence of the ruling of the presiding judge upon points of evidence, he will not afterwards be permitted to make a case, on which to found a motion for setting the nonsuit aside. *Furber v. Luyster*, 2 Hall, 403.

520. One M'Kibben, having a claim upon a fire insurance company for a loss, put his policy into the hands of the defendant (an attorney and counsel of the Court) for collection, and the defendant gave him a certificate that the policy was in his possession for that purpose. Upon this certificate, M'Kibben made an endorsement, authorizing the defendant to hold the policy subject to the order of Kane, and delivered the same to him. *Hamilton, Administrator of Kane, v. M'Court*, 2 Hall, 523.

521. The defendant then commenced a suit on the policy, recovered and received the sum of \$1400 thereon, and the intestate gave him a written notice of his claims upon M'K., which appeared to be chiefly for certain notes, drawn by him and endorsed by one Hill. *Ibid.*

522. The defendant not deeming it prudent to pay over the money thus received to the administrator of Kane, an action was brought against him by the administrator, to recover the amount collected on the policy. *Ibid.*

523. At the trial, the plaintiff did not produce the notes, and the judge holding that there could be no recovery until the notes were produced or accounted for, nonsuited the plaintiff. Held, that the order made by M'Kibben, with the notice to the defendant of the intestate's claim under that order, created an equitable assignment of M'K.'s cause of action, and that he had a right, *prima facie*, to receive the fund without producing the notes. The nonsuit was therefore set aside. *Ibid.*

XXVIII. Demurrer to evidence.

524. Leave to withdraw a demurrer will be given, notwithstanding a special demurrer has been interposed, if the matter assigned as special cause legitimately arises under the general demurrer. *Bollons v. Lawrence*, 7 Wend. 461.

525. Upon a demurrer to evidence, any fact which a jury would infer from it is admitted. *Wheelwright v. Moore*, 1 Hall, 201.

526. Where there is a demurrer to evidence which is certain, as in the case of documentary

proof, the practice is for the Court to give final judgment, as on a special verdict; but where there is no certainty in the statement of facts proved, the Court may award a *venire de novo*. *Ibid.*

XXIX. Reference: (a) When a cause may be referred.

537. A reference will not be granted, if there be a demurrer in the cause which relates to the whole action, and is undetermined. *Jansen v. Tappan*, 3 Cow. 339.

538. Manner of showing how questions of law will arise so as to oppose motion for a reference. *Shaw v. Ayrs*, 4 Cow. 52.

539. To warrant denying a reference on the ground that questions of law will arise, the Court must be satisfied that they will be questions of real difficulty. *Anonymous*, 5 Cow. 423.

530. The affidavit for a reference need not state where the venue is laid. *Feeter v. Harter*, 7 Cow. 478.

531. Though a cause be, in its nature, the proper subject of reference, it cannot be referred within the statute to any number short of three. *Dodge v. Waterbury*, 8 Cow. 136.

532. If referred to a less number by consent and rule of Court, with power to choose an umpire, the Court cannot interfere to review their proceedings as referees, on motion. *Ibid.*

533. It is a case of mere arbitration. *Ibid.*

534. When both parties move for a reference, the motion of the party first giving notice is entitled to a preference. *Graham et al. v. Wood*, 1 Wend. 15.

535. In cross actions and cross applications for a reference, a joint reference will be made, and the referees authorized to hold their meetings so as to accommodate the parties. *Hart et al. v. Trotter et al.*—*Trotter et al. v. Hart et al.* 4 Wend. 198.

536. An action of *covenant* is not a proper cause for reference, although the claim of the plaintiff consists of various items of damage. A reference is proper only where the matter in controversy arises upon an account existing between the parties. *Thomas v. Reab*, 6 Wend. 503.

537. A reference will not be ordered where there are but four items of an account. *Parker v. Snell*, 10 Wend. 577.

538. Referees may require the payment of costs as a condition to the postponement of a hearing. *Sickles v. Fort*, 12 Wend. 199.

539. In an action upon a policy of insurance against fire, if the defendants admit that they are liable for the loss, and the controversy between the parties relates solely to items of injury, and the amount of loss sustained by the assured, the Court will refer the matter to referees to adjust the amount. *Samble v. The Mechanics' Fire Insurance Company*, 1 Hall, 560.

540. In mixed questions of law and fact, where long accounts are involved, it is the practice of the Court to hear the cause until the questions of law are disposed of, and then refer the accounts to referees. If the referees named are objected to by either party, the Court will remove them from the jury box. *Ibid.*

(b) Proceedings on a reference, and for what a report will be set aside.

541. The party against whom reference is moved may nominate one of the referees, instead of any one named in the notice; but he cannot, by showing cause, entitle himself to a further nomination. If a name is rejected for cause, it lies with the mover to nominate a substitute. So the mover is always entitled to nominate two referees. *Backus v. Smith*, 3 Cow. 344.

542. The facts which appeared before referees appointed pursuant to the statute, (1 R. L. 516, s. 2.) ordered to be entered upon the judgment records, so that the party might review the case on error. *Reid v. The Rensselaer Glass Factory*, 3 Cow. 387.

543. Form of a judgment record, on reference pursuant to the statute (1 R. L. 516.) *Rensselaer Glass Factory v. Reid*, 5 Cow. 587.

544. Courts may compel referees to report the facts before them specially; and a review of their decision upon such a report is preferable to one on motion founded upon affidavit. *Per Spencer, Senator. Ibid.*

545. Where a question of law arises before referees, which is brought before the Supreme Court, and decided, they will order a special entry on the record, so as to present the same question to the Court of Errors. *Gould v. Ogden*, 5 Cow. 52.

546. An order of referees as to the costs, on postponing the hearing before them, is not a foundation for a rule on the subject in the Supreme Court. *Johnson v. Gay*, 6 Cow. 54.

547. Whether they may impose costs as the condition of adjourning? *Quære. Ibid.*

548. The rules of evidence are the same before referees as before a jury. *Per Woodworth and Sutherland, Js. Every v. Merwin*, 6 Cow. 360.

549. Where a motion is regularly pending to set aside a report of referees on the merits, though the party moving agrees that it is right as to part, his adversary cannot move for judgment on the report as security, on the ground of the probable insolvency of the party moving, if there be delay. *Wilson v. White*, 7 Cow. 477.

550. So of a motion to set aside a verdict. *Ibid.*

551. But if one move to be let into such a motion on terms, the Court may order judgment as a condition to the relief. *Ibid.*

552. The Court will not order referees to report specially, with the view that their decision may be revised on the merits. The course is to bring up the case on affidavit. *Cogshall v. Burling*, 8 Cow. 136.

553. When referees neglect to report, a rule to report, or show cause why an attachment should not issue, will be granted. *Stefford v. Heath*, 1 Wend. 71.

554. In a reference, after cause has been submitted and the referees have retired, they may open the cause, and adjourn to receive further testimony. *Cleveland v. Hunter et al.* 1 Wend. 104.

555. Although the evidence produced before referees be set forth in their report entered on



the record, this Court will not review the doings of the referees. If they erred in any matter of fact or law, the proper remedy was by application to the Court below to set aside their report. *Denning v. Smith*, 2 Wend. 303.

556. The Court will not hear a motion to set aside a report in a case of reference where but one referee is appointed. *Rathbone v. Lovensbury*, 2 Wend. 595.

557. Referees will not be ordered in the first instance to return the proceedings and testimony before them, nor their decisions upon the admission of evidence, nor their reasons for their final report. They will not be required to do so, unless in the opinion of the Court, after the coming in of papers on both sides, such proceeding be necessary. *Curtis v. Staring*, 4 Wend. 198.

558. If a cause, though not strictly referrible, has been referred by consent of parties, the Court will hear objections to the report of referees, if the action be of that species in which references are usually ordered. *Armstrong v. Percy*, 5 Wend. 535.

559. Notice of motion to confirm an award of arbitrators is not necessary, if a term has intervened since the publication of the award. If confirmation be asked at the next term after publication, notice must be given. *Anonymous*, 6 Wend. 520.

560. Judgment cannot be signed, and roll filed on the report of referees, until four days after the filing of the report and entry of rule for judgment. *Snyder v. Jenkins*, 6 Wend. 533.

561. To stay a hearing before referees on account of the absence of a material witness, application must be made to this Court, or to the referees; a commissioner has no power to stay the hearing. *Grahams v. Morton*, 6 Wend. 552.

562. Unless the report of referees is clearly against the weight of evidence, it will not be set aside. *Doyle's Administrators v. St. James' Church*, 7 Wend. 178.

563. Referees must reside in the county in which the venue is laid. *Chubb v. Berry*, 7 Wend. 483.

564. Two referees, in the absence of the third, have no power to adjourn the hearing of the cause to a particular day. *Harris v. Norton*, 7 Wend. 534.

565. In an action of covenant, where the plaintiff made an affidavit that the trial of the cause would require the examination of a long account preparatory to a motion of reference, upon which referees were agreed upon by the parties, and a rule entered by consent for their appointment, a hearing had, and report made in favour of the plaintiff; the Court, on a motion to set aside the report, would not permit the plaintiff to allege that the case was not referrible within the statute, although it was doubtful whether they would originally have ordered a reference, had a motion for the appointment of referees been made and opposed. *Bloore v. Potter*, 9 Wend. 480.

566. Where referees make a special report to the Supreme Court, setting forth the testimony on which such report was made, and on an application by the defendant to set aside the report as not warranted by the testimony, the

Court confirms the same, upon which decision a writ of error is taken; the Court for the Correction of Errors will not review the conclusions of the referees and Supreme Court upon the evidence of the case, although the special report of the referees containing the testimony, &c. is incorporated in the record brought up by the writ of error. *Feeler v. Heath*, 11 Wend. 477.

567. A circuit judge has power to enlarge the time to prepare affidavits to found a motion to set aside a report of referees on the merits. *Clark v. Clark*, 12 Wend. 239.

568. Where referees have made a report of the evidence and proceedings had before them on the hearing of the cause, the Court, on motion, may direct a supplementary report; but if the report already made sets forth, substantially, the evidence and proceedings, a supplementary report will not be ordered. *Cafferty v. Keeler*, 12 Wend. 291.

569. A report of referees, or a verdict of a jury, will not be set aside because the amount found for the plaintiff exceeds the sum specified in his bill of particulars, if the evidence upon which the report or verdict is founded was given without objection, and the Court see that he has, in fact, recovered no more than he is justly entitled to. *Dubois v. Delaware and Hudson Canal Company*, 12 Wend. 334.

570. Where a demand, exhibited by a defendant as a set-off, is rejected by the verdict of the jury or the report of referees, such rejection is conclusive upon the defendant, unless it appear that the claim rejected could not have been legally allowed, though fully proved, in which case the verdict or report will be no bar to an action brought for the recovery of the demand. *Beebe v. Bull*, 12 Wend. 504.

571. In a reference, under the statute, on the presentation of a claim to an executor for a debt or demand against the estate which he represents, the agreement to refer must present substantially the issue between the parties; it is a substitute for a declaration and plea. *Woodin v. Bagley*, 13 Wend. 453.

572. A material reduction by the executor of the claim brought against the estate, is such satisfactory evidence that the payment of such claim was not unreasonably resisted or neglected, as to exempt the executor from costs. *Ibid.*

573. Where referees certify to the Court that they have overlooked a circumstance connected with the accounts submitted, and request that the same may be sent back to them for re-examination, the Court will set aside the award, and send back the accounts to the same referees. *Brittingham v. Stevens*, 1 Hall, 379.

XXX. Notices of motion.

574. The notice of motion should not be confined to the specific rule sought, but should also provide for general relief. 1 Cow. 135, note (1).

575. A notice of motion for the "next term" is good, without mentioning any particular day. *Avery v. Cadogan*, 1 Cow. 230.

576. A notice for the "next term," generally, is sufficient; and if it add a particular day for the motion, which is several terms forward, this may be rejected as surplusage. *Jackson, ex dem. Davis, v. Brownson*, 4 Cow. 51.

577. A motion, though on the calendar, must be noticed for the particular term at which it is intended to be made. *Beckman v. Reed*, 6 Cow. 23.

578. A notice of a motion for a particular term, and that if not then made, it will be continued on the calendar, from term to term, until it shall be made, is insufficient. *Ibid.*

579. The excuse for not noticing a motion for the first day of term need not be given in the affidavits served. *Anonymous*, 5 Cow. 423.

580. An order to stay proceedings with the view to a non-enumerated matter is not operative, unless accompanied with notice of a motion by the party or person obtaining it. *Roosevelt v. Fulton*, 5 Cow. 438.

581. But, though notice of motion be not given, if the order be served on the sheriff to stay his proceeding upon an execution, it will be vacated, on motion, with costs; though he may, at his peril, disregard it. *Ibid.*

582. Notice of motion for judgment as in case of nonsuit cannot be given till after the circuit at which the plaintiff is bound to try has passed, though he entirely omit to notice his cause. *Jackson v. Vrooman*, 6 Cow. 392.

583. An excuse for not obtaining affidavits for a motion, till it is too late for noticing the motion for the first day of term, will warrant a notice for a subsequent day in term; but not a short notice. *Wilcox v. Howland*, 6 Cow. 576.

584. A motion by a defendant in a criminal cause, removed by a *certiorari* to and pending in the Supreme Court, should be preceded by notice to the district attorney. *The People v. Vermilyea*, 7 Cow. 108.

585. A party obtaining a rule has no right to wait for notice of it from the adverse party. *Jackson v. Johnson*, 7 Cow. 419.

586. Notice of motion for an attachment for nonpayment of costs pursuant to a rule is not necessary. *Burns v. Burns*, 7 C w. 470.

587. The attachment goes of course, on proving service of a taxed bill, demand and nonpayment. *Ibid.*

588. Where the object of a special motion, of which notice has been given, is attained, and the party moving would have been entitled to the effect of his motion if it had been made, he will not be subjected to costs, though he countermands his notice, and omits to bring on his motion. *Lisher v. Parmelee*, 1 Wend. 32.

589. Where there are not eight days between the adjournment of a circuit and the first day of the next term, the defendant is not bound to give notice of his motion for judgment as in case of nonsuit for a subsequent day in the first week of term, but he may wait until the next term. *Hicks v. Knickerbaker*, 2 Wend. 288.

590. Ignorance of a rule of Court requiring eight days' notice of motions will not be received as an excuse for not giving sufficient notice. *Anonymous*, 2 Wend. 288.

591. Notice of a special motion to be made in the Court of Errors may be given for any Monday during the session of the Legislature; and the motion may be brought on on that day, or on any day subsequent thereto when the Court is in session for the transaction of business. *Murray v. Blatchford*, 2 Wend. 221.

592. Motions for costs for not bringing on motions noticed for first week of term must be made on the first Saturday. In all other cases, on the day succeeding that for which the notice is given. *Anonymous*, 2 Wend. 621, 623 *in nota*.

593. New notice of a rule to plead need not be given after a declaration is amended, as of course. *Anonymous*, 4 Wend. 197.

594. On a motion to confirm an award of arbitrators, and for judgment, notice of the motion must be given to the party sought to be charged. *Anonymous*, 5 Wend. 103.

595. After the commencement of a circuit at which a cause ought to have been noticed for trial, the defendant may give notice of motion for judgment as in case of nonsuit. *Griffith v. Miller*, 7 Wend. 514.

596. A motion must be noticed for the first day of a special term, unless a sufficient excuse appears for noticing for a subsequent day. *Beggs v. Bigelow*, 10 Wend. 547.

597. After the service of a peremptory order for a bill of particulars, a plaintiff has twenty-four hours to furnish it; and if before the expiration of that time the defendant gives notice of motion for judgment of *non pros*, he will be ordered to pay costs. *Harman v. Gleser*, 10 Wend. 617.

598. Where a party by writing admits due service of notice of a motion, he is precluded from objecting the want of full notice, although it be affirmatively shown that he had only seven days' notice. *Tulman v. Barnes*, 12 Wend. 237.

599. A party asking to quash a writ not yet returnable is entitled to a rule to supersede the writ, if his notice was of a motion to quash the writ, or for such other order, &c. *Ferguson v. Jones*, 12 Wend. 241.

XXXI. Stay of proceedings, and certificate of probable cause.

600. That the plaintiff is in the state prison for a term of years, is a ground to stay proceedings till security for costs is filed; and on application for such security, the defendant need not swear to merits. *Anonymous*, 1 Cow. 60.

601. The Court will order a perpetual stay of the *ca. sa.* where the defendant is discharged under the act, (secs. 42, ch. 101.) intermediate the verdict and judgment. *Baker v. Taylor*, 1 Cow. 165.

602. But if the discharge is objected to by the plaintiff, they will open the cause so as to give him a chance to try the question, the judgment standing as security. *Ibid.*

603. Motion to stay proceedings till the costs of a former suit be paid comes too late after judgment perfected. *Fifield v. Brown*, 2 Cow. 503.

604. A circuit judge may grant an order for a stay of proceedings till the further order of this Court, upon a verdict, &c., though before a case settled. *Rose v. Bates*, 3 Cow. 83.

605. An order to stay proceedings upon a case made for the purpose of obtaining a new trial, granted by a commissioner to perform the chamber duties of a judge of the Supreme Court, is not a nullity, but is valid till revoked by the commissioners or set aside by the Court. *Jackson v. Jackson*, 3 Cow. 73.

606. The plaintiff sued in the Common Pleas in an action of covenant, and judgment being against him, on demurrer to the declaration upon certain breaches, he sued in the Supreme Court, upon the same covenant, for the same breaches, and others; though the latter accrued after the action in the Common Pleas commenced, yet *held* the same cause of action as the first, and proceedings stayed till costs of first action paid. *Ripley v. Benedict*, 4 Cow. 19.

607. After judgment, and error brought, no bail being in, the defendant in error sued out a *fi. fa.*; and the plaintiff in error gave him notes for the amount of the judgment, agreeing that it should stand as security; *held*, no ground for setting aside or staying proceedings on the writ of error. *Dyell v. Pendleton*, 4 Cow. 325.

608. The Court will not order proceedings to stay till administration granted, where the plaintiff dies intermediate the verdict and judgment, though the defendant have made a case for a new trial. *Springsted v. Jayne*, 4 Cow. 423.

609. In such case, the cause proceeds the same as if the plaintiff had lived. His death works no change in its course. *Ibid*.

610. If judgment is rendered for him, it relates to the term next after the trial. *Ibid*.

611. An appeal lies from a circuit judge either granting or refusing a certificate of probable cause. *Lyon v. Burtis*, 4 Cow. 539. See also *Wright v. Wright*, 1 Cow. 598.

612. But the Court will not hear an argument upon it. *Ibid*.

613. An order to stay proceedings, with a view to set aside a report of referees on the merits, is properly "till the further order of the Court," and need not be limited to the first four days of the next term. *Wilson v. White*, 7 Cow. 477.

614. An order to stay proceedings against a party will not operate to enlarge a rule to plead or answer taken by them. But after the expiration of the order, the party may enter his default for not pleading or answering, the same as if the order had not been made. *Schermerhorn v. Van Valkenburgh*, 7 Cow. 519.

615. In an action for a tort, (*e. g.* malicious prosecution,) commenced in the Common Pleas, the plaintiff died the day before trial, but after the first day of term. The Court, notwithstanding, proceeded to a trial at the same term, and a verdict was found and judgment rendered for the plaintiff, without regard to his death; though the proceeding was objected to; *held*, no error, but cured by the statute, (1 R. L. 144, sec. 5.) the proceedings relating to the first day of term, and in contemplation of law having taken place on that day. *Morris v. Corson*, 7 Cow. 381.

616. The statute (1 R. L. 144, sec. 5.) applies as well to actions for causes which do not survive as those which do. *Ibid*.

617. An order to stay proceedings is necessary, after a case has been made, to prevent the entering judgment and issuing execution. *Savage v. Hicks*, 2 Wend. 246. *S. P. Outwater v. Marshall*, 12 Wend. 241.

618. A party will not be stayed in the prosecution of his suit, until the costs of an interlocutory order, made in the progress of the suit,

be paid. *Pinney v. Johnson et al.* 2 Wend. 623.

619. Until the *vacatur* of an order to stay proceedings, it is irregular to proceed in the cause. *Duncan v. Sun Fire Insurance Company*, 2 Wend. 635.

620. Application may be made to this Court to vacate an order to stay proceedings, although the motion requires an examination into the merits of the case. *Case v. Turner et al.* 2 Wend. 627.

621. Where an execution issued against two defendants not standing in the relation of principal and surety to each other, is suspended against one of them by the orders of the plaintiffs, the other defendant is not entitled to a stay of proceedings on the execution against him, although he has paid a moiety of the debt, and but for the indulgence of the plaintiff, the other moiety would have been collected from his co-defendant. *Bank of Lansburgh v. Russell et al.* 5 Wend. 128.

622. In an action of slander, where a verdict was rendered for the plaintiff for \$7000, and the defendant obtained an order to stay proceedings on a case made, the order before argument of the case was vacated on the application of the plaintiff, there appearing no mitigating circumstances in the case, and nothing to induce suspicion of prejudice, partiality, or corruption on the part of the jury. *Ryckman v. Parkins*, 9 Wend. 470.

623. In a case of manifest irregularity and no *laches*, it is of course to set aside the proceedings. *Harris v. Mann*, 10 Wend. 569.

624. Where foreign plaintiffs become insolvent after the commencement of a suit, and the \$100 required by the fifty-fifth rule of this Court are deemed an inadequate security for the costs which may accrue, the Court will compel the plaintiff to file proper security for the costs, and will stay proceedings until the security be furnished. *Bomailer v. The National Insurance Company*, 2 Hall, 531.

XXXII. Non-enumerated motions.

625. Motion to prove a will takes preference. *Anonymous*, 1 Cow. 74.

626. On motion for treble damages, &c., under the act, (sess. 36, ch. 56, sec. 29.) the count must be upon the statute; the jury must find for the plaintiff generally; and assess the single value of the bond, &c., in terms. *Livingston v. Plainer*, 1 Cow. 175.

627. Otherwise, the Court will intend that the jury found treble damages, or that the defendant brought himself within the provisions of the act. *Ibid*.

628. Where a motion is taken by default, it may be opened and heard at another day in the same term, of course, and without excuse, provided the counsel who took the default is in Court when the motion is made to open the matter. *Anonymous*, 1 Cow. 197.

629. In trover for a bond, a motion to compel delivery of a copy, to enable the plaintiff to declare accurately, was denied. *Denalow v. Fowler*, 2 Cow. 592.

630. A non-enumerated motion, though granted, may be opened of course at any time during

the progress of the non-enumerated business, the counsel on both sides being in Court. *Jackson v. Eddy*, 2 Cow. 598.

631. But if both are not present, *semble*, cause should be shown upon affidavit. *Ibid.*

632. Papers upon which a motion is made or opposed should be filed by the attorney. It is his duty to file them of course, without any motion for that purpose; and the Court will compel him to do this upon suggestion. *Anonymous*, 5 Cow. 12.

633. It does not lie with the party who made an affidavit to support or oppose a motion, to object that it is sought to be filed with a view to prosecute him for perjury. *Ibid.*

634. A non-enumerated motion will not, in general, be heard after the hearing of non-enumerated motions has been closed for the term, though the cause of the motion arose so late that it could not be noticed four days before such close. *Ex parte Brown*, 5 Cow. 31.

635. A notice of such a motion may be for a day which happens after the close of non-enumerated business; but it is at the peril of the party; and if this business be closed before the day arrive, he cannot make the motion, but must pay costs. *Ibid.*

636. Where the cause of the motion arises thus late, *it seems*, the proper course is to obtain a judge's order to stay proceedings. *Ibid.*

637. But in a case where such an order cannot have any effect, the Court will hear the motion after the non-enumerated business is closed. *Ibid.*

638. A motion for such a rule as a party is entitled to, upon the ground that a copy of the case is not served upon him, according to the practice of the Supreme Court, must be noticed and brought on as a non-enumerated motion. *Wells v. Hatch*, 6 Cow. 609.

639. A plea of the statute of limitations will not be allowed on motion, in place of a plea of payment. *Coit v. Skinner*, 7 Cow. 401.

640. A motion for judgment upon a report of referees, subject to the opinion of the Court, on a case stated by them, is an enumerated motion. *Anonymous*, 7 Cow. 470.

641. A motion to discharge a common bail, after a judge's or commissioner's order to hold to bail, under the third section of the act to abolish imprisonment for debt, &c., (sess. 42, ch. 101.) must be founded on some defect in the proof on which the order was founded; which defect must be shown by the defendant. *Mott v. Jerome*, 7 Cow. 518.

642. Motions in real actions, in the Supreme Court, must be made on non-enumerated days. *Anonymous*, 2 Wend. 241.

643. Motion for judgment *non obstante veredicto* must be on the record, and not on affidavit. *Smith v. Smith*, 2 Wend. 624.

644. If a special motion be not made at as early a day as with ordinary diligence it can be presented, an excuse must be shown for the *laches*, notwithstanding the frequent recurrence of special motion days; and such excuse must be shown by affidavit, and served on the opposite party. *Anonymous*, 5 Wend. 82.

645. The rule of law requiring special motions to be made at the earliest day possible, does not apply to motions for relief affecting the

substantial rights of parties. *Doty v. Russell*, 5 Wend. 129.

646. A motion in arrest of judgment must be made on the circuit roll; it will not be heard on a copy of the declaration served and an affidavit that a trial has been had. *Lee v. Brown*, 5 Wend. 221.

647. A motion for a *peremptory mandamus* on the coming in of a return to an alternative *mandamus*, is a *non-enumerated* motion, if the relator has not formally *demurred*. *The People v. Commissioners, &c. of Hudson*, 6 Wend. 559.

648. It is optional with the relator, whether it shall be considered *enumerated* or *non-enumerated* business, unless the Court specially direct *formal pleadings* to be interposed; if he elect to have it considered *non-enumerated* business, the Court, on the application of the *defendant*, but not of the *relator*, will give leave after its decision of the question to have formal pleadings made up and filed. *Ibid.*

649. Motion to stay waste may be made at a general or special term. *Anonymous*, 7 Wend. 521.

650. Where a conclusive answer is given to a special motion made, the motion will be denied, and will not be continued over to a subsequent term to give the moving party an opportunity of replying; if the answer be untrue, or can be satisfactorily explained, the proper course is, on a new notice, to ask for a *vacatur* of the rule denying the motion. *Standard v. Williams*, 10 Wend. 599.

651. A defendant cannot move for judgment "*non obstante veredicto*." *Phoenix and Whitney v. Stagg*, 1 Hall, 635.

652. Where an order has been granted for a stay of proceedings, after a trial, in order to enable the defendant, against whom a verdict has been obtained, to make a case upon a bill of exceptions, a judge at chambers may, upon cause shown, so far modify the order as to enable the plaintiff to perfect his judgment and issue his execution without a levy, that the same may stand as security. *Garretson v. Hirstead*, 2 Hall, 514.

XXXIII. Cases for argument.

653. The Supreme Court will not order a case to be referred to a circuit judge for settlement as to the evidence, where it has once been settled by him according to the practice of the Court; unless there be a very plain mistake. *Jackson v. Miller*, 6 Cow. 38.

654. Counsel have a right to be heard on settling a case before a judge. *Rood v. King*, 6 Cow. 563.

655. A judge has a right to correct his charge as presented by a case, even though the parties may have agreed upon it. *Ibid.*

656. The Court, on a verdict subject to their opinion upon a case, may draw the same inferences as in their opinion a jury would be warranted in drawing from the facts in the case. *Jackson v. Whilbeck*, 6 Cow. 632.

657. Questions as to the competency of a witness, and the like, cannot be raised in a Court of Error by special verdict, but only by a bill of exceptions; and if they be stated in a special verdict, they will be disregarded. *Peck v. Waters*, 8 Cow. 669.

658. A cause cannot be noticed for argument

previously to the parties having come to an issue on all the pleadings interposed, though an issue of law be joined on one of the pleadings. *Ontario Bank v. Foster*, 2 Wend. 248.

659. A *nisi prius* roll and *postea*, which ought regularly to have been produced at the circuit to admit proof of what transpired on the trial of a former cause, may be brought into Court in bank, and will be received on the argument of a case made at the trial. *Burt v. Place*, 4 Wend. 591.

660. A judgment will not be reversed for clerical errors, or mere matters of form; thus, where a *placita* of a record in the Common Pleas was of a *wrong term*, manifestly by mistake, and where in a judgment on appeal by defendants, costs of the Court below were awarded to the plaintiff, the Court, judicially knowing that there could be no such costs, refused for these causes to reverse the judgment. *Moore v. Tracy*, 7 Wend. 239.

661. Where the defect in a record relates to form, the Court will either disregard it, or suspend giving judgment until application can be regularly made for an amendment. *Ibid.*

662. A case made can never be turned into a special verdict, or bill of exceptions, unless the right to do so is reserved at the trial. *Lewis v. Stevenson*, 2 Hall, 248.

663. Where a verdict has been taken, subject to the opinion of the Court upon a case, with the assent of both parties, and the Court, in deciding on the case, give a judgment founded on facts, rather than questions of law, a new trial will not be granted upon the ground that one of the parties supposed that the case would be decided upon questions of law, and did not, therefore, make his proof as strong before the jury as he might have done. *Ibid.*

XXXIV. Enumerated motions; notice for argument, points and argument.

664. The counsel showing cause against a rule have a right to reply. *Knight v. Carey*, 1 Cow. 39.

665. Where there are several issues in law joined at different times in the same cause, the order on the calendar is determined by the date of the first issue. *Griswold v. Stewart*, 3 Cow. 16.

666. If the party making a case do not serve a copy of it upon the opposite party, at least four days before the term at which it is noticed for argument by the opposite party; on an affidavit of this fact, and of service of notice of argument, the relief sought by the case will be denied. *Honay v. Chesterman*, 5 Cow. 22.

667. The only mode in which to procure the denial or dismissal of an enumerated motion is to notice it for argument, and bring it to a hearing, where there is a proper order to stay proceedings. *Everitt v. Wood*, 7 Cow. 414.

XXXV. Special rules and orders.

668. Rule may be made that the defendant deposit deeds which he relied on in defence of an ejectment brought against him, in the clerk's office of M., to the end that the plaintiff might with witnesses inspect the same; on affidavit

of the lessor of the plaintiff, that he expected thus to be enabled to prove the deeds forgeries. *Jackson v. Jones*, 3 Cow. 17.

669. The Court will not, on motion, compel a third person, no way interested in the suit, to produce a private paper of his own, for the inspection of a party. *Davenport v. M'Kinzie*, 5 Cow. 27. See also *Bank of Ulster v. Hilgard*, 6 Cow. 62.

670. Where the plaintiff took a bill of exceptions at the circuit, and afterwards made a case, the Court made a rule that he should elect one, and that the other should be set aside. *Curtis v. Cummings*, 5 Cow. 415.

671. A judge at chambers has no power to order a party to furnish copies of papers which are evidence in the cause to his adversary. *Clarke v. Spencer*, 6 Cow. 59.

672. Where a rule is granted on condition, it must be performed instantler, *i. e.* within twenty-four hours. *Sabin v. Johnson*, 7 Cow. 421.

673. *E. g.* a rule setting aside a default for not pleading, the defendant paying costs. *Ibid.*

674. A rule to show cause why a plaintiff should not pay the defendant's costs of preparing for trial, where the trial is countermanded, will be granted on application. *Morse v. La Forge*, 2 Wend. 341.

675. Where there are several causes at issue in which the question is the same, and which depend upon the same evidence, the proper course for a plaintiff to avoid the necessity of trying each of the causes, and to prevent motions for judgment as in case of nonsuit in the causes not tried, is to apply to the Court for a rule that one of the causes be tried, and that the others abide the event of such trial. *Brant v. Fowler*, 2 Wend. 284.

676. A rule ordering the prosecution of a sheriff's bond, given on being served with an attachment, will not be granted until the *quarto die post* the return. *Anonymous*, 3 Wend. 423.

677. An attachment will not be allowed against a defendant who neglects to deposit a paper in pursuance of a rule of Court, granted on the application of a plaintiff to obtain a discovery. *Birdsall et al. v. Pixley*, 4 Wend. 196.

678. A rule of the Supreme Court, ordering a discovery of books, papers, and documents, will be granted for the production of all evidence of a documentary character, relating to the merits of a suit or its defence; it being a substitute for a bill of discovery in Chancery. *Twinnend v. Lawrence*, 9 Wend. 458.

679. A motion to vacate or modify an award should regularly be made at a *special term* after the publication of the award, and *before the next regular term*; but if made at such term, although the party will not be allowed to discuss it, it will save his rights. *Smith v. Cutler* 10 Wend. 589.

680. A special motion cannot be renewed without leave of the Court, previously obtained. *Mitchell v. Allen*, 12 Wend. 290.

681. Where a defendant in an action of assault and battery has been held to bail without an affidavit, and without an order of a judge for that purpose, to an amount exceeding \$500, the

Court, upon application, will order the bail to be reduced to that sum. *Ballingall v. Burnie*, 1 Hall, 237.

682. A motion for a retaxation of costs in this case was allowed, with directions that in all cases where the opposite party requires it, the names of the witnesses who attend at a trial, or reference, shall be inserted in the affidavit of attendance; and that no fees be allowed to attorney or counsel for attending at any adjourned meeting of referees, unless such adjournment shall be made on the application of the adverse party, or shall have taken place after a long interval of time, when, from the absence of a referee, or other sufficient cause, no meeting has been held. *Jones v. Van Ranst*, 2 Hall, 530.

XXXVI. Feigned issue.

683. When chancellor should award an issue of *quantum indemnificatus*. *Woodcock v. Bennet*, 1 Cow. 711.

684. Upon a bill for the specific performance of a contract for the sale of lands, and upon exceptions to the master's reports in favour of the title, it appeared that one link in the claim was a deed from L., found among the title papers accompanying the possession; but with respect to which the weight of evidence was, that the deed was not genuine. By excluding that deed, the complainant would be reduced to rely upon adverse possession, which was less than twenty-five years. There was slight evidence that L. was an alien; and if not so, there was no account of his heirs or devisees; held, to be a proper case for an issue at law. *Delancey v. Seymour*, 5 Cow. 714.

685. The Supreme Court will not, in general, hear a motion for a new trial, on a case made upon the trial of a feigned issue ordered by a Circuit Court of equity. *Dot v. Roe*, 6 Cow. 55.

686. The proper course is to move in the Court which ordered the issue. *Ibid*.

687. The Court refused to award a feigned issue to try the fact of payment of a judgment, where the sum in controversy (less than \$50) did not justify the expense. *Brouer v. Felter*, 1 Wend. 18.

688. Where a committee of a lunatic applied for and obtained a feigned issue, to try the question whether or not, at the time of the execution of a bond and warrant, by virtue of which a judgment was entered against the lunatic, he was of unsound mind, and the issue was determined against the committee; a rule was granted that the committee pay to the plaintiff in the judgment, besides the taxable costs of the feigned issue, counsel fees and all other necessary expenditures, it appearing that the bond and warrant were executed to indemnify the plaintiff as an endorser for the lunatic. *Hart v. Deamer*, 6 Wend. 537.

689. The Court decides upon questions of fact, when application is made for the exercise of its equitable powers, if, on an examination of the facts, there be no reasonable doubt as to the truth of the case; but if the testimony be so contradictory as that the truth cannot be discovered with certainty, and it becomes requisite to judge merely on the credibility of wit-

nesses, a feigned issue will be awarded. *McKinstry et al. v. Thurston*, 12 Wend. 223.

XXXVII. When taking a step in a cause cures a previous irregularity of the opposite party.

690. The defendant cannot move to set aside the proceedings for variance between the amount in the *ac etiam* and the declaration. *Mumford v. Stocker*, 1 Cow. 601.

691. Especially, after he has pleaded to the declaration thus varying from the *ac etiam*, though it be afterwards amended, and the same objection exist against the amended declaration. *Ibid*.

692. A plaintiff who, after a decision on a plea in abatement in his favour in a Justice's Court upon an issue of fact, proceeds to adduce testimony on the merits, as if an issue in fact has originally been joined, is estopped from saying that he was entitled to judgment on the determination of the plea in abatement against his adversary. *Columbia Turnpike Road v. Haywood*, 10 Wend. 423.

693. Where a party seeks to set aside the proceedings of his adversary for mere irregularity, he must apply at the first opportunity, or he will not be heard. *Leavitt v. Woods*, 10 Wend. 558.

694. Where a declaration contains two counts for the same cause of action, and the defendant pleads the general issue to both counts and a special plea in bar of the first count, and the plaintiff on the trial proves only one cause of action, which is covered by the first count and the special plea in bar, he cannot abandon the first count, and resort to the second, which is not covered by the special plea, so as to avoid the effect of that plea; but to avail himself of this rule, the defendant must take the objection at the trial, and will not be allowed to rely upon it, upon a writ of error, unless presented by a bill of exceptions. *Briggs v. Rockwell*, 11 Wend. 504.

XXXVIII. Rule for judgment, and entering, filing, and docketing judgments.

695. A judgment of this Court is perfect after four days from the time of entering a rule for judgment, though the record be not filed. *Grant v. Root*, 3 Cow. 354.

696. After this, a commissioner has not the power to order a stay of proceedings, with a view to a motion for a new trial; but where the practice on this head was mistaken by the attorney, the Court set aside the proceedings, and granted liberty to move for a new trial, on payment of costs. *Ibid*.

697. On executing a writ of inquiry, under the statute, (1 R. L. 343, s. 3.) judgment being affirmed on error, and the record being remitted, a new judgment record is not necessary, but the proceedings may be continued at the foot of the original roll. *Jackson v. Rathbone*, 3 Cow. 373.

698. How this is to be done. May be on separate paper, and attached to record, as in assigning breaches, *folies quoties*, &c., after judgment on bond to perform covenants, or Court on motion would allow record on file to be continued, &c. *Ibid*.

699. A judgment on the report of referees being reversed on error, because it was entered in vacation, the Court below may still proceed and render a regular judgment upon the report. *Hopkins v. Flinn*, 6 Cow. 526.

700. It seems, that final judgment in a plea to a declaration on a writing obligatory, should not be for damages as such; but simply for debt and costs. *Hulin v. Rockwell*, 9 Cow. 652.

701. A *remittitur* may be filed in vacation, and the proceedings subsequent to the suing out of a writ of error need not be entered upon the judgment roll. *Dale v. Roosevelt*, 1 Wend. 25.

702. Where there are two avowries, and both are found for the defendant, the plaintiff will not be suffered to take judgment *non obstante veredicto*, although one of the avowries is manifestly bad; but the defendant will have judgment on the good avowry, on remitting the damages on the other. *Pemberton v. Van Rensselaer*, 1 Wend. 307.

703. Where a plaintiff in an action of *assumpsit* recovers a sum not carrying costs, and the defendant is entitled to costs, the defendant cannot, in the first instance, make up the record of judgment. But he should have his costs taxed, and require the plaintiff to insert the same in the record, or if the record be already made up and filed, enter a suggestion on it, stating the taxation of the costs and the amount thereof. *Fobes v. Meigs*, 3 Wend. 308.

704. A defendant cannot ask for judgment *non obstante veredicto*, but where such a motion would be proper for the plaintiff; the defendant must seek for an arrest of judgment. *Schermerhorn v. Schermerhorn*, 5 Wend. 513.

705. On a verdict subject to the opinion of the Court, the party for whom the verdict is found cannot regularly enter a rule for judgment, until the determination of the question. *Jackson v. Fitzsimmons*, 6 Wend. 546.

706. The *postea* in such case should be stayed with the clerk of the circuit until the decision of the question, and a verdict is then entered in conformity to the decision. *Ibid.*

707. On the return of a writ of inquiry, a rule for judgment *nisi* must be entered, and judgment cannot be signed until the expiration of the rule. *Tillepaugh v. Braithwaite*, 6 Wend. 560.

708. A judgment will not be reversed because a plaintiff has remitted the costs found by the jury, and still taxed costs of increase, where it manifestly appears that the remission of the costs was by mistake; nor will it be reversed, although by the record it appears that the jury have passed upon but one of two issues, if, from the bill of exceptions, it appears that the jury did in fact pass upon both issues. *Reed v. Hurd*, 7 Wend. 408.

709. A satisfaction piece is not a record; until entered on the roll, it does not partake of the nature of a record, nor does the statutory provision on the subject directing the mode of its acknowledgment give it that character or effect. *Lownds v. Rensen*, 7 Wend. 35.

710. An entry of satisfaction on the docket of judgments is not equivalent to an entry on the roll. *Ibid.*

711. An entry on the roll will not be presumed, although a satisfaction piece be filed, where it is manifest, if done, it would on application be set aside for fraud. *Ibid.*

712. A party to the record, generally, is responsible for whatever is done in his name; thus the assignor of a judgment is liable, if execution be issued on the judgment after the same is satisfied. *Brown v. Peeter*, 7 Wend. 301.

713. Where there is a general verdict and judgment on several counts, some good and some bad, the judgment will be reversed, although the presumption is that the damages were assessed under the good counts only; but in such case, costs of the writ of error will not be adjudged to the defendant, and a venire *de novo* will be awarded; the plaintiff, however, will be required to pay the costs of the former trial. *Garr v. Gomez*, 9 Wend. 650.

714. A clerk of this Court, absent from the county where his office is situated, has no right to tax costs and sign judgments. *Conley v. Turner*, 10 Wend. 572.

715. Records of judgment delivered to the clerk to be filed before the hour of nine o'clock in the morning, will be considered as filed at the hour of nine. No preference can be gained by taking a record to the clerk's office before that hour. *Wardell et al. v. Mason*, 10 Wend. 573.

716. Where a cause is referred on an agreement, according to the statute, between a claimant and the executor of a deceased person, and a report is made, and the claimant dies after the report and before judgment actually entered, the Court, on motion at a special term, will give leave to have judgment entered in the names of the original parties, at any time within two terms after the report; the rule for confirmation and judgment to be entered at a general term. *Burhans v. Burhans*, 10 Wend. 601.

717. Where after verdict, and before the decision of the Court on a case made for a new trial, one of the two defendants dies, the plaintiff is permitted, if a new trial be refused, to enter judgment against both defendants as of a term preceding the death of the party; such leave will be granted at a special term of the Court, on an *ex parte* application. *Ryghtmyre v. Durham et al.* 12 Wend. 245.

718. Where one of several issues is found for a defendant, but such issue does not go to the merits of the cause, judgment will be rendered for the plaintiff *non obstante veredicto*, if the other issues are found for him. *The People v. Haddock*, 12 Wend. 475.

719. The omission of a county judge to add the title of his office to his signature, when signing a judgment, does not vitiate the record; the omission may be supplied by proof. *Elliot v. Cronk's Administrators*, 13 Wend. 38.

720. In making up a record of judgment in the Common Pleas, in a case where a justice's judgment has been reversed, an entry should be made in the record of judgment, specifying on what ground the judgment was reversed, whether for error of fact or law, and if for the latter cause, then stating the point decided. *Anonymous*, 13 Wend. 99.

731. It is not necessary, in a record of judgment in the Common Pleas, to enter continuances from term to term in a *certiorari* case. *Cook v. Mosely*, 13 Wend. 377.

732. On a writ of error, the judgment of a Court of Common Pleas in a *certiorari* case will not be reversed for the omission of setting forth in the record of judgment the *certiorari* issued to the justice. Nor on a writ of error can it be objected that the officer who signed the judgment had no authority to affix his name to the record. *Ibid*.

XXXIX. *Petitions and suggestions.*

723. A case which becomes settled by lapse of time after the amendments are served, or by arrangement between the parties, must be drawn out, copied, and served at or before giving notice of argument. *Jackson, ex dem. Loop, v. Harrington*, 4 Cow. 537.

723*. A party in interest, though not a party to the record, may question the regularity of the proceedings in a suit. *Barkeydt v. Adams*, 1 Wend. 101.

724. Where a plaintiff declares in the Common Pleas, in an action of trespass originally commenced before a justice, whose jurisdiction is taken away by plea of title, the defendant may file a suggestion, stating the manner in which the case was brought into the Common Pleas; it seems, however, that a suggestion in the plea would be more correct. *Wilcox v. Wood*, 9 Wend. 345.

725. A petition for a discovery, under the provisions of the revised statutes, (vol. 2, p. 199.) must present a proper case for the equitable interposition of the Court, or it will be denied. And where the petitioner can have all the relief the nature of his case requires, by pursuing the ordinary practice of the Courts of law, the power of compelling a discovery, conferred by the statute, will not be exercised. *M'Keon v. Lane*, 2 Hall, 526.

XL. *Verdict.*

726. In an action in form *ex delicto*, one may be found guilty, and the other acquitted. *Lockwood v. Bull*, 1 Cow. 332.

727. The separation of the jury, after agreeing upon their verdict, is not a cause for setting aside the verdict. *Horton v. Horton*, 2 Cow. 589.

728. *Aliter*, if there is the slightest suspicion that their separation was abused, to the injury of the party. *Ibid*.

729. The Court will not, on affidavit, amend a special verdict agreed upon by the parties without trial. *Jackson v. Cannon*, 2 Cow. 615.

730. But if there appear to have been a mistake as to a material fact, by either party, in framing the verdict, they will order it to be vacated on payment of costs. *Ibid*.

731. A case cannot be turned into a special verdict, unless there be a stipulation to this effect at the trial. *Woolsey v. Camp*, 3 Cow. 358.

732. If a verdict be irregular, the party should move to set it aside the next term after it is rendered. *Ibid*.

733. On a verdict for the plaintiff, subject to the opinion of the Court on a case, and a stipulation that either party may turn it into a special verdict or bill of exceptions, the party at whom judgment is rendered is entitled reasonable time to elect, under the stipula-

tion, and make up and settle the verdict or bill. The party in whose favour the judgment is rendered should, at least, give notice, therefore, to the opposite party, and wait a reasonable time for him to make his election, or should apply to the Court for leave to proceed, &c. *Jackson, ex dem. Field, v. Sinclair*, 4 Cow. 43.

734. A special verdict, to enable a Court of Error to act upon it, must find facts, not merely state the evidence. *Seward v. Jackson*, 4 Cow. 406.

735. Where a defendant, by the mistake of his attorney, pleads a plea which does not cover his defence; and, on trial, a verdict is therefore against him, the Supreme Court will not, for that reason, grant a new trial. *M'Neish v. Stewart*, 7 Cow. 474.

736. But, *semble*, equity will give relief. *Ibid*.

737. On a case made, if it appear that a plaintiff ought not to have recovered, on an objection, which, if it had been specifically taken at the trial, could not have been obviated, the verdict will be set aside. *Rich et al. v. Penfield*, 1 Wend. 390.

738. In a suit against several defendants, in a representative character, upon the contract of him whom they are alleged to represent, the plaintiff is entitled to a verdict against such of the defendants whom he proves to be chargeable, although he fails to show the liability of all. *Judsons v. Gibbons*, 5 Wend. 224.

739. Where a verdict is set aside on the ground of the admission of evidence not warranted by the pleadings, leave will be given to amend on payment of all costs subsequent to the pleading allowed to be amended. *The People v. Holmes et al.* 5 Wend. 191.

740. A verdict will not be set aside for a variance in the amount of a note declared on between the declaration served and the circuit roll, unless the defendant alleges surprise, or that he was prevented by the error in the declaration served from making due preparation for his defence. *Kimball v. Huntington*, 7 Wend. 472.

741. A verdict will not be set aside in an action on the case for a false representation, as against evidence, unless it be clearly and manifestly so. *Culver v. Avery*, 7 Wend. 281. S. P. *Jackson v. Loomis*, 19 Wend. 27; and *Smith et al. v. Hicks*, 5 Wend. 48.

742. A verdict will not be set aside on a case made, for the cause that improper evidence was received, if the Court perceive, beyond the possibility of a doubt, that such evidence could not have had any influence upon the verdict. *Benjamin v. Smith*, 12 Wend. 404.

743. Where, in submitting a cause to a jury, the judge instructed them that they may find a verdict for the defendant upon either of two distinct grounds, and the charge upon one of the questions is erroneous in point of law, a verdict for the defendant will be set aside, as for aught appearing it may be based on an untenable ground. *Sayre v. Throness*, 15 Wend. 647.

744. The plaintiff was the bail of one Windsor, and, for the purpose of surrendering him, deputed one Carr to arrest W. at Newport, R. I., and bring him to New York. Carr arrested W., and, without the captain's knowledge, put

alm on board the steamboat Chancellor Livingston, in order to bring him to New York. The defendant, Coggeshall, (who was the master of the boat,) aided in some measure by Northam, (a part owner and passenger,) after the boat left the wharf, and when he discovered that W. was on board the boat against his will, put him and Carr on shore together, and refused to permit W. to be carried to New York. In an action against the master and Northam for a rescue, it was held, that the proof did not support the declaration; and the jury having found a verdict for the defendants, the Court refused to set it aside. *Dow v. Northam and Coggeshall*, 1 Hall, 398.

745. The defendant offered to show what articles enter into the composition of a "complete steam-engine," and that many of those embraced in the plaintiff's bill were not of that description. This evidence was excluded by the presiding judge, and his decision was held to be correct. *Birkbeck v. Burrows*, 2 Hall, 51.

746. The judge charged the jury that the award was conclusive as to every thing which had been submitted; and left them to say whether the items of the present claim had been before the arbitrator or not. If they had, then that their verdict should be for the defendant; but if they had not, then that their verdict would be for the plaintiff. That by the agreement between the parties, the plaintiff was bound to make good all damages to the steam-engine, arising from ordinary wear, for the space of sixty days; and that if any of the present charges were of that kind, they were to be excluded from the account. Held, that the charge and ruling of the judge were in all respects correct; but the jury having found a verdict for \$925.49, in favour of the plaintiff, it was set aside, (on payment of costs by the defendant,) upon the ground that substantial justice had not been done to the defendant. *Ibid.*

747. Where matters in controversy between parties have once been put in issue by them before a Court of competent authority, and passed upon by that tribunal, in an action brought by the present defendant against the present plaintiff, the same matters cannot again be drawn into controversy in another action, in a different Court, brought by the former defendant against the former plaintiff. *Smith v. Kelly*, 2 Hall, 217.

748. The defendant in the former action, by submitting to the decision of the Court in which it was brought, becomes bound by it; and he cannot cause the decision to be collaterally reviewed, by bringing an action against the former plaintiff. *Ibid.*

749. If the defendant in the first action feels himself aggrieved by the decision of the first tribunal, his course is to except to the opinion of the judge, and cause his decision to be reviewed by a competent tribunal. If he acquiesces, however, in the decision, by not excepting to it, he is bound by it. *Ibid.*

750. The judge, at the trial of the cause, without the consent of the defendants, and notwithstanding objections interposed by them, directed the jury, if they found for the plain-

tiffs, to find a nominal sum, sufficient to cover their demand, subject to a reference, to liquidate the accounts and ascertain the balance. Held, that the judge had no power, without the consent of parties, to direct such a verdict, and that it must be set aside for irregularity. *Bellden v. Davies*, 2 Hall, 433.

751. To an action upon a policy of insurance, the defendant pleaded the general issue, and three special pleas in bar. The plaintiffs took issue upon the three first pleas, but demurred to the fourth. Upon the argument of the demurrer, the Court gave judgment in favour of the defendants, with leave to the plaintiffs to withdraw their demurrer and take issue upon the plea. The plaintiffs, however, under the advice of counsel, went to trial upon the issue joined upon the three first pleas, taking no notice of the fourth plea, and the defendants entered up the judgment in their favour upon the demurrer. *Rogers v. The Niagara Insurance Company*, 2 Hall, 569.

752. At the trial of the cause upon the issues under the three first pleas, the presiding judge decided that the fourth plea covered the whole cause of action exhibited in the first count of the declaration, and as that plea had been decided to be good, and the plaintiffs had permitted the defendants to enter up their judgment upon it, he excluded all the testimony offered to support the count, and the plaintiffs were compelled to submit to a verdict against them. *Ibid.*

753. Upon application to the Court, setting forth that all the proceedings in the case had been under the advice of counsel, who supposed that the plaintiffs could proceed to trial under the other issues, without any embarrassment from the fourth plea, and the determination of the demurrer to it; the Court, notwithstanding the intervention of three terms between the rendition of the judgment on the demurrer and the verdict, set the verdict aside, upon the condition that the plaintiffs should pay all the costs which had accrued, and take issue upon the fourth plea without delay. *Ibid.*

PRINCIPAL AND AGENT.

- I. *Authority of agents; how far the authority of an agent, general or special, express or implied, extends to affect or bind his principal.*
- II. *Rights of agents in regard to their principals.*
- III. *Liability of agents: (a) Conduct of an agent, how regarded, and his general liability; (b) Liability of an agent to his principal, and when that liability is discharged by the assent or acquiescence of his principal; (c) Liability to a third person, either on his special undertaking, or where he exceeds his authority, or where he has received money to which his principal was not entitled.*
- IV. *Agents of government; when personally liable.*

V. *Mercantile agents, factors, and assignees:*

(a) *Authority of a factor*; (b) *Liability of a factor*; (c) *Liability of the principal to his factor*; (d) *Hire or commission of a factor*.

I. *Authority of agent; how far the authority of an agent, general or special, express or implied, extends to affect or bind his principal.*

1. An agent or bailee cannot maintain an action for the property of his principal or bailor, on the ground that it is exempt from execution by statute. (Sess. 38, ch. 227.) *Mickles v. Trustley*, 1 Cow. 114.

2. The defendants, by their agent, exchanged their vessel for the plaintiffs' vessel; and the plaintiffs agreed to take, as the difference, \$6500, and to receive therefor the promissory notes of the agent and his partner, at four, six, and eight months. The notes were given accordingly, but not being paid; *held*, that there not being an agreement to receive these notes in payment, the defendants were liable. *Porter v. Talcott*, 1 Cow. 359.

3. And this, though they had at the time of the contract, and to the time when and after the notes fell due, and up to the time when their agent, one of the makers, became insolvent, funds in his hands more than sufficient to pay the notes. *Ibid*.

4. Where an agent buys goods for his principal, and gives his own notes, they are considered, so far as the question whether they operate as payment is concerned, as the notes of the principal himself. *Ibid*.

5. The note of the defendant given at the time of the sale is no payment, unless there be an express agreement to receive it as such. So also of his agent's note. *Ibid*.

6. The question is the same whether the note be given for a precedent or contemporary debt; and this, whether it be the note of the party, or a third person. Being in each of these cases, whether it was agreed to be received as payment. *Ibid*.

7. An agent or broker having power to sell goods, without any express restriction as to the mode, may sell by sample, or with warranty. *Andrews v. Kneeland*, 6 Cow. 354.

8. And it makes no difference with his authority, whether the principal reside in the same city with him, or reside abroad. *Ibid*.

9. The authority of a broker is not always confined to the power which the principal intends to confer on him; but may extend to that with which he is apparently clothed in respect to the subject-matter of sale. *Ibid*.

10. The principal is bound by the acts of a general agent, provided they are within the scope of his authority. But an agent constituted for a particular purpose, and under a limited and circumscribed power, cannot bind his principal by an act beyond his authority. *Ibid*.

11. Where an agent for the purpose of a single act is not limited as to the manner of doing it, the principal may be bound by his acts, though exceeding the authority intended to be ren. *Ibid*.

12. A power of attorney to add one's name as

surety to a pre-existing note, describing the note correctly as to the parties, the sum, and the time when payable, though it omit to mention that the note bears interest before due, is sufficient to sustain a verdict upon it against the one whose name was put there under the power. *Cape Fear Bank v. Gomez*, 6 Cow. 435.

13. The question whether the particular note was intended is one of identity; and may properly be submitted for determination to the jury. *Ibid*.

14. Under a contract to sell cattle for a proper reward, and to account for and pay over the proceeds, the agent will be justified under the exercise of a sound discretion to sell the cattle upon a reasonable credit. *Leland et al. vs. Douglass*, 1 Wend. 490.

15. Where such a contract was stated in the declaration, and the proof was, that the agent was instructed to sell for cash; *it was held*, that there was a variance between the proof and the declaration, and that the plaintiff ought to have been nonsuited at the trial. *Ibid*.

16. Where the course of business between a merchant in the country and a merchant in town is such, that the country merchant transmits to his correspondent in town his produce, and such other articles as he has to sell, and the merchant in town, in return, supplies him with such articles of merchandise as he deals in, and fills up his orders by procuring from other merchants on credit such articles as he does not deal in, and charges them to the merchant in the country, the latter is not liable to the sellers for any articles thus procured, although he directs the purchase of articles in which he knows his correspondent does not deal, and the sellers are informed at the time of the purchases for whom they are made, if the merchant in the country had money in the hands of his correspondent, and has never authorized him to pledge his credit on the purchase of any articles thus ordered, nor recognised such act. *Jacques et al. v. Todd*, 3 Wend. 83.

17. *Assumpsit* is the proper form of action against the principals, although the agent affix his seal to his name. *Dubois v. Delaware and Hudson Canal Company*, 4 Wend. 285.

18. Where a person is employed by an agent, he may call upon the principal for payment for the services rendered; and he may do so, although he knows that the agent has charged the demand to the principal, and received the amount, unless he has agreed to discharge the principal, and rely upon the responsibility of the agent. *Lincoln v. Battelle*, 6 Wend. 475.

19. Authority by a husband to his wife to give notes will not subject him to the payment of a note given by the wife in her own name, without reference to the husband either in the body of the note or in the signature. A note to be binding in such case must purport on its face to have been given by the wife as the agent of the husband. *Minard v. Reed*, 7 Wend. 68.

20. An agent authorized to bargain and sell lands has no right under such power to grant a license to the purchaser, previous to a conveyance, to enter and cut timber, although such license be given with a *bona fide* intent to effect

the sale of the lands. *Hubbard v. Elmer*, 7 Wend. 446.

21. The admissions of an agent, made subsequent to the time of entering into a contract, in reference to the subject-matter of the contract, are inadmissible in evidence. *Ibid.*

22. A power of attorney to collect debts, to execute deeds of lands, to make a complete adjustment of all concerns of the constituent in a particular place, and to do all other acts which the constituent could do in person, does not authorize the giving of a note by the attorney in the name of the principal. *Rossiter v. Rossiter*, 8 Wend. 494.

23. The acts of a special agent do not bind the principal, unless strictly within the authority conferred. *Ibid.*

24. Where the drawer of a note affixes his signature as the agent of another, in an action against him personally, if he claims to have had authority to sign as he did, he is bound to show such authority existing at the time of the making of the note, and is not permitted to show a subsequent ratification by his principal. *Ibid.*

25. The master of a steamboat employed in the transportation of passengers, like the master of a merchant vessel, is answerable for the negligence of those to whom is intrusted the management of his vessel; and it was accordingly held, that he was liable for an injury done by running a steamboat navigated by him against another vessel and sinking her, although the pilot, who received his appointment directly from the owners, was at the wheel steering the boat, and had the exclusive control of her course at the time of the accident. *Denison v. Seymour*, 9 Wend. 1.

26. Where A., by writing, *not under seal*, authorized an agent to make a contract for the purchase of a quantity of timber, and the agent entered into a contract *under seal* for such purchase; it was held, on the principle that an agent cannot bind his principal by deed unless he has authority by deed so to do, that an action of covenant would not lie against A., although a counterpart of the contract, executed in like form, was delivered to, received, and acknowledged by him as the evidence of the contract, and although the timber was received by him, and payments made by him on account of the contract. *Hanford v. M'Nair*, 9 Wend. 51.

27. A party is not bound by a contract entered into by another, as his agent, by writing under seal, unless the agent has authority under seal to enter into such contract; nor will a subsequent *parol* ratification of such act render the contract obligatory upon the principal. *Blood v. Goodrich*, 9 Wend. 68.

28. A contract, to be obligatory upon a principal when made by an agent, must be made in the name of the principal; if the agent contract in his own name, describing himself as agent or attorney for his principal, the contract is the contract of the attorney, and not of the principal. *Spencer v. Field*, 10 Wend. 87.

29. If it be intended to bind the principal, the contract, when entered into by an attorney, should be in this form: "articles of agreement

made and concluded this first day, &c., between A. B. by C. D., his attorney of the first part, and E. F. of the second part." If it be entered into by C. D., attorney for A. B., it is not the contract of the principal, but of the attorney, and the addition annexed to his name is mere description. *Ibid.*

30. Where the contract is made by A. B. as attorney for C. D., and he agrees to convey the land of his principal, the contract is void; but where the covenant is that the principal shall convey, the contract is valid, such covenant being a good consideration, and sufficient to support the agreement of the opposite party to pay the purchase money. *Ibid.*

31. Where a factor sells the goods of his principal, without disclosing his agency, and takes the note of the purchaser payable to himself or bearer at a future day, and before maturity transfers the note to his principal, payment by the purchaser to the factor, after such transfer, and before the note falls due, is no bar to a recovery in an action by the principal as endorsee against the purchaser as maker of the note. *Mitchell v. Bristol et al.* 10 Wend. 492.

32. It seems, had there been an existing demand due from the factor to the purchaser at the time of the transfer of the note, that such demand might have been set off in an action by the principal. *Ibid.*

33. It seems, also, that in an action by the principal, to recover for goods sold by the factor, in his own name, without disclosing his agency, the purchaser may set off any demand he may have against the factor. *Ibid.*

34. Where a joint stock company appoint a treasurer, who deposits the funds of the association in a bank, and from time to time as such treasurer draws his checks, which are paid when presented, the members of the association are liable to the bank for moneys overdrawn by the treasurer beyond the amount of the deposits. *Traders' Bank v. Astor et al.* 11 Wend. 87.

35. A principal is liable for the acts of a general agent, although the agent disregards particular instructions relative to his agency; it is otherwise in the case of a special agent. *Ibid.*

36. Where goods are purchased by an agent, and the principal would be liable to the vendor for the purchase money, the principal may maintain an action in his own name against the vendor for a breach of warranty. *Beebe v. Robert*, 12 Wend. 413.

37. A *parol* acknowledgment by a principal, that an agent had authority *under seal* to enter into a *sealed* contract obligatory upon his principal, is competent evidence of such authority; but if at the time of entering into a *sealed* contract, the agent had in fact no authority *under seal* to enter into the contract, the subsequent *parol* acknowledgment of authority, and ratification of the contract, by the principal, will not bind the principal. *Blood v. Goodrich et al.* 12 Wend. 525.

38. Where the master of a vessel in which goods are shipped is the consignee of the cargo, he stands in the relation of agent to two distinct principals; as to the stowage of the cargo,

its safe conveyance and delivery, he is the agent of the ship owner; but as to the sale of the cargo, and the accounting for its proceeds, he is the agent of the consignor; and in such case, where the owner receives only the freight, and the master commissions upon the sales, and the master neglects to account for the proceeds, an action will not lie against the owner for such neglect. *Williams v. Nichols et al.* 13 Wend. 58.

39. Where an agent is authorized to sell a flock of sheep, and sells a portion of the flock with the knowledge that the sheep are diseased, without communicating the fact to the purchaser, the owner of the sheep, although ignorant of the fraud, is liable to the purchaser for the damages sustained by him, though exceeding the value of the sheep sold. *Jeffrey v. Bigelow et al.* 13 Wend. 518.

40. Where an order is given for the purchase and transmission of a cargo of merchandise, a substantial compliance with the order on the part of the factor will charge the principal. *Parkhill v. Inlay*, 15 Wend. 431.

41. The omission of the factor to acknowledge the receipt of the order, and to signify his acceptance of the commission, will not discharge the principal, where the order is complied with, and advice thereof given within a reasonable time. *Ibid.*

42. What will be deemed reasonable time depends upon the course of the particular trade, and the peculiar circumstances of the case; it is not a question of law, but of fact, to be submitted to and passed upon by a jury. *Ibid.*

43. The taking of the note of an agent, at an extended credit, for goods furnished for the benefit of the principal, does not discharge the principal, unless it is affirmatively shown, on his part, that on the supposition that the debt was paid, or the personal responsibility of the agent accepted for it, he dealt differently with the agent than he would have done, had the note not been taken and the extended credit given. *Rathbone v. Tucker*, 15 Wend. 498.

44. It is a general principle, that if one person pay money to another, under a mistake of fact, without any legal obligation to do so, and without the means of ascertaining the truth; or if he be induced to pay it under false representations, he may recover back the money thus paid, in an action of *assumpsit*; as where the defendants, merchants in England, and the correspondents of the plaintiffs, merchants in America, received orders from the latter to purchase a quantity of goods, on their account, and pay for them by drawing bills on S. Williams, (a banker in London, with whom the plaintiffs had placed funds for that purpose,) at sixty and ninety days' date. The defendants purchased the goods, and drew upon Williams for the amount; but made one of the bills for £500, payable at four months. Williams failed before this bill came to maturity, having considerable funds in his hands belonging to the plaintiffs. W. H. R., an agent of the plaintiff's in England, not knowing that the bill was drawn at four months contrary to orders, but believing that the plaintiffs were bound to provide for it, defendants having threatened to attach the

goods and funds of the plaintiffs in England, if it were not paid,) took up the bill without the knowledge, orders, or consent of the plaintiffs. The plaintiffs, as soon as the facts of the case came to their knowledge, protested against the conduct of the defendants, and afterwards brought an action of *assumpsit*, to recover back the amount of the bill. *Held*, that they were entitled to recover. *Potter v. Everett*, 3 Hall, 252.

45. The plaintiff, with one M'D., entered into an agreement, under seal, with the New York Hydraulic Manufacturing and Bridge Company, (a private association under that name,) to construct two bulkheads, connected with a canal, which the company was about to make. This agreement was executed by the defendant, Campbell, as president of that company, and by Rhinelander, as treasurer; and was declared to have been entered into "agreeably to their articles of association." In addition to the work which was done under the contract, the plaintiff, by the direction of Campbell and Rhinelander, performed other labour in excavating the canal, for which he brought an action of *assumpsit* against all the associates. The company was formed under certain articles of association, which provided that persons having dealings with the company should not have recourse for their debts against the separate property of its members, but should be considered as giving credit to their joint funds solely; and that the trustees or agents of the company should have no authority to bind it by any contract, unless it contained a restriction to the effect aforesaid. *Sullivan v. Campbell et al.* 3 Hall, 371.

46. The defendants insisted, that the reference in the agreement to the articles of association was sufficient to charge the plaintiff with notice of their articles, and that he could not, under any circumstances, recover a judgment against the defendants jointly, as they were not partners, and as Campbell and Rhinelander had no power to bind them. *Ibid.*

47. *Held*, that the plaintiff having performed labour for the benefit of the associates, might maintain an action upon a *quantum meruit*, either against the agents, as having made themselves personally liable, or against the individuals composing the association; and the plaintiff had judgment against all the defendants. *Ibid.*

II. Rights of agents in regard to their principals.

48. Where merchants in this country gave a written engagement to their agents at the Havana to save them harmless from all costs, damages, and expenses which might arise in consequence of any law suit which then was or might be brought against them for the recovery of freight or average on the cargo of a certain ship; it was held, that the agents were entitled to recover for moneys which they were obliged to pay in consequence of legal proceedings on an award made previous to obtaining the written engagement, the award being made in February, and the engagement in August, 1815. *Hill v. Packard*, 5 Wend. 375.

49. Where a factor was sued for the breach of warranty as to the quality of cotton sold by him, and his principals, after issue joined in such suit, on his refusal to pay over to them a balance of the proceeds of such sale until indemnified against the costs and damages to which he might be subjected in consequence of such suit, addressed a note in writing to third persons, in which, after stating the existence of the suit that the sale was made on their account, that they were of course liable for any damages that might be recovered, and were desirous of providing a full indemnity to their factor, they authorized and requested the persons to whom the note was addressed to pay to their factor all such sums of money as he might be required to pay, as well for any damages that should happen to be recovered against him in the suit, or otherwise, in relation to the sale of the cotton, as also all costs and charges to which he might necessarily be put in that behalf, the advances to be made from time to time as occasion might require, or otherwise at the election of the factor, charging such advances to the account of the principals, and the persons to whom the note was addressed, endorsed thereon, and signed an engagement in this form, "We will promptly comply with the request of Messrs. L. M. and Sons, as contained in the within order," which was delivered to and accepted by the factor, and upon the receipt of which he paid over the balance due to his principals; *it was held*, that the promise of such third persons was valid within the statute of frauds; that the implied agreement on the part of the factor to continue the defence of the suit, and make the necessary advances in the progress of the same, was a good and sufficient consideration to render the promise of such third persons binding; and that the consideration being necessarily to be implied from the terms of the instrument, must be considered as in writing within the meaning of the statute. *Rogers v. Kneeland*, 10 Wend. 218.

III. *Liability of agents: (a) Conduct of an agent, how regarded, and his general liability.*

50. *Semle*, that an attorney appointed under a power of substitution is the attorney of the principal; and the original attorney is not liable for his acts, or on his receipt of money. *Foster v. Preston*, 8 Cow. 198.

51. But if the original attorney give instructions to his substitute different from those given the former by the principal, in following which a loss accrues, the original attorney thereby makes the substitute his own agent, *quoad hoc*, and is solely accountable. *Ibid.*

52. *E. g.*, P. gave a letter of attorney to F. to procure and remit money, with power of substitution; P. directing the money to be remitted by draft. F. made a substitute, and directed a remittance by mail in money, which was accordingly sent by letter, and lost; *held*, that the substitute was F.'s agent, *quoad hoc*, not the agent of the principal; and that the receipt and remittance of the money by the substitute, in this manner, was equivalent to a receipt by the original attorney, who was liable to his principal as for money had and received to his use. *Ibid.*

53. Where one is entitled to money in right, *e. g.* in right of his wife or his ward, and another receives it for him under his authority, he may sue his agent, and recover the money in his own name, without notice of the character in which he originally claimed it. *Ibid.*

54. If a servant or agent commits a trespass ignorantly, upon an express promise of indemnity, the promise may be enforced; but if the wrong-doer knows the act to be unlawful, he can never enforce the promise. *Pierson v. Thompson*, 1 Edw. 212.

55. Whether a party shall be considered as acting in his own right or as the agent of another, depends not upon the fact that he contracted in his own name without disclosing his agency, but upon the facts and circumstances of the case. *Collins v. Butts*, 10 Wend. 399.

(b) *Liability of an agent to his principal, and when that liability is discharged by the assent or acquiescence of his principal.*

56. To exonerate a deputy from responsibility, the directions must be so definite and specific as to debar him from the exercise of all discretion in the matter. *Tuttle v. Cook*, 15 Wend. 274.

(c) *Liability to a third person, either on his special undertaking, or where he exceeds his authority, or where he has received money to which his principal was not entitled.*

57. Where money is paid to an agent to be paid over to his principal, which is accordingly paid over without notice not to do so, no suit will lie against the agent to recover it back; but the money must be paid with the intent to pass it to the credit of the principal. *Frye v. Lockwood*, 4 Cow. 454.

58. And the rule does not extend to an agent who obtains money illegally by compulsion or extortion; and especially where a suit brought to recover it of the agent is defended at the risk and expense of the principal. *Ibid.*

59. Thus where a deputy marshal of the United States, upon a warrant, demanded money, as due for a fine imposed by a pretended Court Martial of the United States, whose proceedings were *coram non judice* and void, which money was paid on demand, paid over to the marshal without notice not to do it, and a suit was brought against the deputy to recover it back, and the suit was defended by the marshal or secretary at war; *held*, that the action lay against the deputy. *Ibid.*

60. Such a payment is not voluntary within the meaning of the rule, that a voluntary payment of money will not constitute a ground of action. *Ibid.*

61. Where one enters into a covenant, though he describe himself as agent of another, and covenant as such agent, but sign and seal in his own name, he is liable personally. *Stone v. Wood*, 7 Cow. 453.

62. When an attorney or agent contracts for his principal, he must do it in the name of the principal, or the latter is not bound. *Ibid.*

63. Where one received rent belonging to three infants, tenants in common, lawfully, as agent for the guardian of two, but without authority as to the other; *held*, that the only

remedy for the other against him was by action of account or bill in equity. *Sherman v. Ballou*, 8 Cow. 304.

64. Where an attorney received a large sum of money for his client, (who was not entitled to it,) and disposed of the whole sum according to her instructions, reserving a portion of it for his costs and fees, and finally settled his accounts with her by taking her receipt in full; *it was held*, that the portion so reserved could not be recovered from the attorney by those who mispaid it. *Mowatt et al. v. M'Clellan*, 1 Wend. 173.

65. If money be mispaid to an agent expressly for the use of his principal, and the agent has paid it over, he is not liable in an action by the person who mispaid it. *Ibid.*

66. A contract made by an agent in the name of his principals, he having authority to do the act, is not binding on him individually. *Dubois v. Delaware and Hudson Canal Company*, 4 Wend. 285.

67. Where the agent of an insolvent transportation company induced a creditor of the company to part with the possession of property upon which he would have had a lien for his debt had it remained with him, on the promise to place other property in his possession, with the right to retain the same until his debt was paid; *it was held*, in an action against him for the nonperformance of such promise, that the question was properly submitted to the jury to determine whether his promise was individual and personal, or whether it was made as the agent of the company; and the jury having found that it was a personal contract, the Court refused to set aside the verdict. *Cunningham v. Soules*, 7 Wend. 106.

68. An agent renders himself personally responsible where he makes a contract upon terms which he knows he has no authority to agree to, although the contract be made in the line of his business as agent. *Meech v. Smith*, 7 Wend. 315.

69. If an agent in making a contract exceeds his authority, the person with whom he contracts may hold him personally responsible for the whole amount due on the contract, although the agent may have the right to claim of his principal remuneration to the extent of the price he was authorized to give. *Ibid.*

IV. Agents of government, when personally liable.

70. Public agents striking a balance and promising to pay in writing, adding their character of agent, are not personally liable. *For v. Drake*, 8 Cow. 191.

71. E. g., commissioners appointed under the statute (sess. 35, ch. 75, sec. 9, 10.) to superintend building the Court-house in Tioga county. Otherwise, if they have public funds in their hands. *Ibid.*

72. These are not personally liable on the ground that they have made payments on contracts entered into subsequent to the one on which the action is brought, thus exhausting their funds. *Ibid.*

73. They have a discretion in applying the public funds, which is not controlled by the

order of time in which they have made their contracts. *Ibid.*

74. A superintendent of the Erie canal is not personally responsible for work done or materials found, at his request, for the repair of the canal, or works connected therewith, unless there is evidence to show that he intended to bind himself personally. *Osborne v. Kerr*, 13 Wend. 179.

V. Mercantile agents, factors, and consignees: (a) Authority of a factor.

75. A factor need not obey instructions to remit unless good bills can be obtained. *Leerick v. Meigs*, 1 Cow. 645.

76. When a factor's powers are limited and specific, he must, in general, pursue them literally. *Ibid.*

77. And where a factor at Savannah was directed by his principal at New York to remit bills at short sight on some good house in New York; *held*, that he was bound at his peril to see that the drawee was in good credit. *Ibid.*

78. The nature and effect of a commission *del credere* considered. *Ibid.*

79. It is where a factor, for a premium beyond the usual commission for the sale, becomes bound to pay the price at all events. *Ibid.*

80. The factor may be debited by the vendor as the vendee of the goods. *Ibid.*

81. As between the factor and the actual vendee, the former is considered the sole owner of the goods. *Ibid.*

82. Rights of set-off between these two considered. *Ibid.*

83. The original vendor may, before payment, remit to the actual vendee as the collateral security of the factor, and may stop the payment to the latter. *Ibid.*

84. Where a factor sold the goods of his principal, and took a bond to himself for the amount, including a debt of his own; *held*, by the United States Circuit Court, that he was liable to his principal as for money had and received. *Jackson v. Baker*, 6 Cow. 183, note (a).

85. Where principals have acknowledged their liability for damages that might be recovered against their factor, after possessing the means of ascertaining the grounds upon which damages were claimed from him, the parties who, at the request of the principal, had undertaken to pay such damages are precluded in a suit on their promise from proving that the factor acted without authority, and contrary to instructions; although the sale made by the factor had been shown to have been contrary to instructions, the acknowledgment of liability by the principals, and their procurement of an indemnity, under the circumstances of the case, would have been a ratification of such sale. *Rogers v. Kneeland*, 10 Wend. 318.

86. It is a general principle, applicable to all instruments or agreements, that whatever may be fairly implied from the terms or language of an instrument is, in judgment of law, contained in it. *Ibid.*

87. Where there are two instruments, one full and explicit as to the intent and meaning of the parties, and the other general, but referring to and adopting the stipulations contained in the

former, in giving a construction to the agreement of the parties, both instruments will be considered as forming one agreement. *Ibid.*

88. The memorandum of a contract of sale by an auctioneer must be made in a *sale-book* at the *time* and *place* of sale, or the contract cannot be enforced. But an entry in the *sale-book* of the name of an agent, factor, consignee, or of any person having legal authority to sell, is a compliance with the requirement of the statute that "the name of the person on whose account the sale is made" shall be entered. *Hicks et al. Whitmore*, 19 Wend. 548.

89. An action upon such a contract may be maintained by the owners of the property, although their names be not mentioned in the entry of the memorandum of the contract. *Ibid.*

90. A commission merchant is, to all intents, the owner of the goods in his possession, as to all the world except his principal, and has a right to insure them to their full value in his own name. *De Forest v. The Fulton Insurance Company*, 1 Hall, 84.

(b) *Liability of a factor.*

91. A factor under a general power will not be responsible for losses, if he appear to have acted to the best of his ability, without breach of orders, gross negligence, or fraud. *Leverick v. Meigs*, 1 Cow. 645.

92. If there be a loss by his giving credit on a sale or making remittance, &c., he is responsible, unless it appear that he used ordinary diligence to ascertain the discredit or insolvency of the party whose failure occasioned the loss. *Ibid.*

93. When directed to remit, however, he need not in general inquire into the credit of the drawee. *Ibid.*

94. But if circumstances of suspicion appear against the drawer, sufficient to put a man of ordinary prudence on his guard, he will be accountable. *Ibid.*

95. If the bill be drawn by a partnership, he must show the good credit of all the members of the firm. *Ibid.*

96. A factor not liable to pay till the purchase money becomes due to him; but when due, the principal may call on him without first looking to the actual vendee; so that his engagement is a guarantee of the sale. *Ibid.*

97. The only difference between an ordinary factor and a factor under a commission *del credere*, arises from this guarantee. *Ibid.*

98. But this guarantee of the sale or commission *del credere* does not imply a guarantee of the remittance: this obligation would apply only to a real purchaser. *Ibid.*

99. Whereas the factor, under the commission, still retains his character of ordinary factor as to the remittance. *Ibid.*

100. A guarantee of the remittance depends on the principle that a bill or note does not discharge a precedent debt, unless it prove good. *Ibid.*

101. Letters of instruction from a merchant to his consignee and factor, not expressly mentioning a price below which goods consigned for sale shall not be sold, but merely communicating a belief that the excellent quality of the

goods will command a certain price, and expressing it as the sum confidently expected to be realized on a sale, will not be construed as fixing the minimum price at which the goods shall be sold; and a sale for a less sum by the factor, in good faith and without negligence, will not be deemed a breach of instructions, nor render the factor liable in damages. *Vianna v. Barclay*, 3 Cow. 281.

102. Though a factor disregard his instructions, the principal, after advice of this fact, ought to dissent, and give notice of his dissent in a reasonable time; otherwise his assent to his factor's acts will be presumed. *Ibid.*

103. The payment of a balance of account by a factor, or commission merchant, to his principal, after the sales made, and for the purpose of closing the accounts between the parties, is an assumption of the outstanding debts; and consequently the principal is no longer accountable, or bound to refund advances, though the debtors finally fail to pay for goods sold on commission, the proceeds of which were looked to for reimbursement. *Oakley v. Crenshaw*, 4 Cow. 260.

104. Where a commission merchant sold goods on a credit, and then settled with his principal, giving him a note for the balance, which he stated was to accommodate him; and for that reason he made it payable a few days after the note of the vendee fell due; *held*, that this was not an assumption of the vendee's debt; but that, to throw this upon the commission merchant, a clear intention to assume it should have been shown. *Robertson v. Livingston*, 5 Cow. 473.

105. The sale of several parcels of goods by a factor, belonging to several of his principals respectively, on a credit to one person, and taking one note from the vendee for the whole, payable to himself, will not, *per se*, render him liable to his principals. *Corlies v. Widdifield*, 6 Cow. 181.

106. The note does not extinguish the demand for goods sold, but leaves each principal to his usual remedy. *Ibid.*

107. Nor will the factor's giving up the note, and taking others payable earlier, or at the same time with the first, render him liable, provided he still retain the name of the vendee either as maker or endorser. *Ibid.*

108. If a factor, who purchases goods for his principal, violates the instructions of the latter, the goods purchased become the factor's; and if destroyed by fire before they reach the hands of the principal, the loss will fall upon the factor. *Williams et al. v. Littlefield*, 12 Wend. 362.

109. Whether a factor has or has not a lien upon goods purchased by him for his principal, until reimbursed his advances or secured his responsibilities; and whether, where the factor in such case asserts his right of lien, and the goods are consumed by fire before coming to the actual possession of the principal, the loss falls upon the principal or the factor? *Quære. Ibid.*

110. Though a sale by a factor may have been contrary to his instructions, the acknowledgment of liability, for a warranty on such sale, by the principal, and his procurement of

an indemnity for his factor from the consequences of such warranty, would be a ratification of the sale, and the surety in the agreement to indemnity cannot dispute the validity of such sale. *Rogers et al. v. Kneeland*, 13 Wend. 114.

(c) *Liability of the principal to his factor.*

111. A factor advancing money, and having goods in his hands, is not confined in his remedy for his advances to the mere fund deposited, but gives a joint credit to the fund and the person of his principal. Yet, from the nature of the contract, resort must first be had to the fund, if it can be made available. *Corties v. Widdifield*, 6 Cow. 181.

(d) *Hire or commission of a factor.*

112. A forwarding merchant is entitled to charge interest on his account, where his customer knows that such is his ordinary usage. *Meech v. Smith*, 7 Wend. 315.

PRINCIPAL AND SURETY.

- I. *Liability of a surety: (a) Of sureties, and the extent of their liability; (b) What will discharge their liability.*
- II. *When a surety may call on his principal or co-surety.*

I. *Liability of a surety: (a) Of sureties, and the extent of their liability.*

1. A surety is not liable beyond the penalty of his bond. *Clark v. Bush*, 3 Cow. 151.

2. The rule seems to be the same as to the principal. *Ibid.*

3. A surety is not liable beyond the penalty of his bond. *Fairlie v. Lawson*, 5 Cow. 424.

4. A promise to indemnify against a trespass is valid, unless the promisor show that the promisee knew the act to be a trespass and illegal. *Stone v. Hooker*, 9 Cow. 154.

5. A promise to indemnify one against a trespass includes an authority to the promisee to employ and indemnify agents; and if he is compelled to pay such agent's damages recovered against them for the trespass, he may recover over against his promisor, the same as for damages paid by the promisee directly to the person trespassed upon. *Ibid.*

6. When such agents were severally sued by the person trespassed upon, the original promisor having notice, one of them after trial and recovery against another gave a *cognovit* in his own suit, and paid, and his promisor paid him; *held*, the agent appearing to have acted in good faith, that the original promisee might recover the amount of what he thus paid. *Ibid.*

7. One promises to indemnify another against a trespass. On suit for the trespass, the latter gives a *cognovit*. The burden lies with him to prove his *cognovit* was not for too much. So if the agent of the latter give a *cognovit* for a sum which his principal pays. *Ibid.*

8. It is no answer for the sureties in an action on a bond by a deputy sheriff, given to the sheriff for the faithful performance of the duty of the deputy, &c. that before the alleged de-

fault of the deputy, he had become insolvent, in consequence of which the sureties requested the sheriff to remove him from his office. *Andrus v. Bealls*, 9 Cow. 693.

9. It is no defence for sureties in an action on their bond of indemnity, that the obligee neglected to defend the suit against him, by which he was damaged within the terms of the bond. *Ibid.*

10. Thus, where a deputy sheriff collected money on a *f. fa.* and neglected to pay it over; and the sheriff, being attached for not returning the writ, paid the money voluntarily, without defending the attachment suit; yet *held*, that the sureties in the bond of indemnity given by the deputy to the sheriff were liable. *Ibid.*

11. A guarantee was endorsed on a promissory note, in these words, "I guaranty the collection of this note to G. Z." *It was held*, that the guarantor was not liable, until after the holder has endeavoured to collect the money from the makers. *Cusington v. Mc'Nair*, 1 Wend. 457.

12. Where there are several sureties to a note, though one has signed subsequently to the others, they must all be considered co-sureties, unless a state of facts be shown to the Court from which it shall appear positively or by legal intendment that the other sureties intended, as to the subsequent signer, to stand in the character of principals. *Warner v. Price et al.* 3 Wend. 397.

13. The admission by one of the original sureties, that the subsequent signer became surety for all the makers of the note, will not bind his co-sureties, no partnership being shown to exist between them. *Ibid.*

14. Where A. signed a note for the benefit of B. after such note had been signed by B. C. D., and when it fell due, A. was compelled to pay it; *it was held*, that an action brought by A. against the three others to recover the money thus paid could not be maintained, and that C. D. were co-sureties with A., and were liable only for their *aliquot* proportion of the money paid, to be recovered in a separate action against each. *Beaman v. Blanchard et al.* 4 Wend. 432.

15. A surety cannot ask the use of the securities and remedies of the creditor to enforce payment against the principal, without tendering an indemnity against all costs and expenses; and where he has been offered by the principal the benefit of the remedies he possessed, he is without excuse. *Beardsley v. Warner*, 6 Wend. 114.

16. Where an agreement between two persons, perfect in all respects as between them as the *sole contracting parties*, was signed by them, and a third person, who added the words "as security" to his name; and in the agreement was contained a clause, "we bind ourselves," &c.; *it was held*, that the third person, being the second signer, was the surety of the first signer, and was jointly bound with him to perform the stipulations of the contract. *Thomas v. Guisner*, 7 Wend. 43.

17. A *parol* agreement to pay the debt of a third person, if it arises out of some new and original consideration of benefit or harm between

the newly contracting parties, is not a contract within the statute of frauds. *Meech v. Smith*, 7 Wend. 315.

18. A fulfilment of such contract may be enforced against the agent in an action of *assumpsit*. *Ibid*.

19. Where it was agreed that A. should become the surety of B. in the purchase of a sloop, to be the property of A., and under his control, until B. should pay the purchase money, when, and not before, it should become the property of B., and B. took a bill of sale of the vessel in his own name, and took possession thereof, and subsequently assigned the bill of sale to A., retaining possession of the vessel, the money for which A. had become bound remaining unpaid by B., and the original agreement as to the eventual ownership continuing; it was held, that the continuance of the possession of the vessel by B., after the assignment, was, under the circumstances, sufficiently explained, and that the case was taken out of the rule of law, that possession by a vendor is *prima facie* evidence of fraud. *Hall v. Tuttle*, 8 Wend. 375.

20. Where a party has an indemnity against any liability for damages and expenses, he need not wait to commence his suit until he has actually paid such damages; his right of action is complete when he becomes legally liable for them. *Chace v. Hinman*, 8 Wend. 452.

21. A request to a creditor by a surety to prosecute his principal, who at the time is able to pay, and subsequently becomes insolvent, discharges the surety. *Manchester Iron Manufacturing Company v. Sweeting*, 10 Wend. 162.

22. The neglect of the creditor after such request is tantamount to an agreement not to sue the surety, and the defence may be given in evidence under the general issue. *Ibid*.

23. In the case of a guarantee, a suit at law against the principal debtor is not necessary to sustain an action against the guarantor, unless such suit is required by the very terms of the contract, or necessarily implied from the terms used. *Morris v. Wadsworth*, 11 Wend. 100.

24. Ordinarily, a demand of payment from the person who in the first instance was to be looked to, ought to be shown; but where such person, from the time his liability occurred until his death, was wholly insolvent, such demand need not be made. *Ibid*.

25. In an action upon such guarantee, the question of due diligence in the attempt to collect the money of the principal debtor, being a mixed question of law and fact, should be submitted to the jury. *Backus v. Shepherd*, 11 Wend. 629.

26. "Due course of law," when applied to the prosecution of a demand in a Court of record, means no more than a timely and regular proceeding to judgment and execution. *Ibid*.

27. A judgment and execution are *prima facie* evidence of an attempt to collect the money of the principal debtor by due course of law; if beyond this there has been negligence or omission on the part of the assignee, of what might reasonably be required to effect the collection of the money, and a loss ensues,

the burden of proving such loss is cast upon the defendant. *Ibid*.

28. The omission to file a transcript of a justice's judgment will not discharge the guarantor, unless the defendant had real estate upon which the judgment, when recorded in the county clerk's office, would be a lien. *Ibid*.

29. The undertaking of A. that he will guaranty and become security for any amount in silver, not exceeding a certain sum, which B. may from time to time, during two years, put into the hands of C. for the purpose of being manufactured into work, and that if C. refuses, he will pay any deficiency, is a good and valid agreement within the statute of frauds, the consideration (the delivery of the silver to C. for the purpose expressed) sufficiently appearing on the face of the agreement. *Marquand v. Hipper*, 12 Wend. 520.

30. Where a party guaranties the collection of a note, and the maker, before it falls due, removes from the state, the holder is not bound to pursue the maker, but may resort to his action on the warranty; in such case, however, the holder must show that he has availed himself of the remedies afforded by the laws of the state to recover the money of the maker, such as the suing out of an attachment, under the *absent debtor* act. *White v. Case*, 13 Wend. 543.

31. Where a party by bond guaranties that a third person shall pay a certain sum of money by a given day, as secured by the obligation of such third person, the guarantor, in an action against him, is not at liberty to show that the obligation of the third person was assigned to the plaintiff by an insurance company in contemplation of insolvency; none but creditors and stockholders of such institution can avail themselves of the statute provided for such cases. *Mann v. Eckford's Executors*, 15 Wend. 502.

32. Nor can a defendant in such case show that the obligation of the third person is invalid on the ground of usury. *Ibid*.

33. Nor can he, on the trial of the cause, require the production of the obligation of such third person. *Ibid*.

34. The plaintiff in such case must assign the nonpayment of the money as a breach of the condition of the bond sued upon; but he is not bound to give evidence of the extent of his damages; the condition of the bond showing the amount he is entitled to recover, the jury are warranted in giving the whole sum claimed, provided it do not exceed the amount specified in the condition. *Ibid*.

35. Nor is it incumbent upon the plaintiff to prove a demand of performance upon the principal debtor, and notice of nonpayment to the guarantor, where the engagement of the latter is absolute and unconditional, that the former shall pay at a given day. *Ibid*.

36. If the engagement be such as to require a previous demand and notice, the defendant cannot on the trial require proof of the facts, where there is no averment in the declaration under which the proof can properly be given; the remedy is by motion in arrest, or by writ of error. *Ibid*.

37. But if there be such averment, the plain-

tiff is not bound to prove it, where the defendant only pleads *non est factum*; such plea puts in issue only the execution of the bond. *Ibid.*

38. The defendant executed the following instrument of guarantee in favour of the plaintiff: "New York, December 5th, 1827.

"Whereas, Noah Scovell, of the city of New York, has this day passed to John Wheelwright, of the said city, his three promissory notes, of which the following are correct copies;" (setting forth the same;) "amounting together to \$10,590 and 80 cents; now in pursuance of the understanding and agreement between the said John Wheelwright and the said Noah Scovell, I do hereby guaranty the just and full payment of the said notes, to the said John Wheelwright, or his order, and should any default of payment thereof be made by the said Scovell, I bind myself for the full amount of such default."

39. The plaintiff proved that Scovell, on the 25th of November, 1827, came to him for the purpose of purchasing a quantity of barilla, and offered the defendant as a surety. That he accepted the terms, sold the barilla to Scovell, and on the 4th of December following, delivered a part of it to him. Scovell gave his notes to the plaintiff for the amount of the barilla, and about three hours after they were given, the notes and guarantee were presented to the defendant, who immediately executed the guarantee, and delivered it to the plaintiff. *Held*, that this was all one original and entire transaction, and that the sale and delivery of the goods to Scovell supported the promise of the defendant, as well as the promise of Scovell, and formed a good consideration for both. *Held*, also, that the declaration, (which counted on the promise as a collateral one,) being according to the facts of the case, was correct in its form, and in all respects sufficient. *Wheelwright v. Moore*, 2 Hall, 143.

40. The defendant executed and delivered to the plaintiffs a guarantee; in the following words: "New York, 30th April, 1828. I hereby guaranty the payment of any bill or bills of merchandise Mrs. P. has purchased, or may purchase of E. P. C. & Co., the said Mrs. P. having the privilege of ninety days' credit on the purchases made by her, the amount of this guarantee not exceeding \$200, and this guarantee to expire at the end of one year from this date." *Held*, that this instrument was a continuing guarantee, and applicable to any goods delivered under it, not exceeding the specified amount, during the period limited. *Clark and Clark v. Burdett*, 2 Hall, 197.

41. *Held*, also, that a demand of the purchaser, and notice to the defendant, were not necessary as conditions precedent to the plaintiff's right of action. *Ibid.*

42. In an action for goods sold and delivered, it appeared that the defendant introduced one Mrs. C. to the plaintiff, and directed him to let her have what goods she should at any time want, and charge the same to him, and he would see the plaintiff paid. Goods were delivered accordingly, from time to time, which were charged to the defendant; and Mrs. C. made payments, which were credited to the

account; but a balance having accrued, this action was brought to recover its amount. The judge charged the jury, that if the plaintiff gave credit to Mrs. C., or if the defendant limited his responsibility to the first purchase, the verdict ought to be for the defendant. But if they believed that the credit was given originally to the defendant, if it was unlimited in point of time, and had not been countermanded, their verdict should be for the plaintiff. The jury having found for the plaintiff, the charge of the judge was held to be correct; that the case was not within the statute of frauds, and the plaintiff could recover upon the common counts, for goods sold and delivered. *Graham v. O'Neil*, 2 Hall, 474.

(b) *What will discharge their liability.*

43. Where the holder of a note drawn by A. and two others, as sureties of A., enlarges the time of payment by an agreement without consideration with A., the sureties are not discharged. A promise to pay interest during the time of forbearance forms no consideration for the agreement to forbear, if the debtor be bound to pay interest without such agreement. *Reynolds v. Ward et al.* 5 Wend. 501.

44. To discharge a surety on the ground of the omission of the creditor to proceed against the principal debtor, when requested so to do, it must appear that the principal was solvent at the time of the request, *within the jurisdiction* of the state in which the suit against the surety is instituted, and that the creditor, without any reasonable excuse, neglected or refused to proceed until the principal debtor became insolvent and unable to pay. *Warner v. Beardsley*, 8 Wend. 194.

45. Even a Court of equity will not interfere with the legal rights of the creditor, unless the proceedings against the surety be unconscientious, or deprive him of some equitable benefit. The mere fact of the creditor holding other securities against the principal debtor is no cause for delaying the collection of the debt against the surety, if the creditor be willing to make substitution. *Ibid.*

46. Where a guarantee was executed, whereby the guarantor engaged to be accountable to any one who would advance to A. B. any sum less than \$200, at nine or twelve months, and A. B. delivered the instrument to a creditor in payment of a debt then due for goods sold, amounting to \$102, and in consideration of the engagement of the creditor to furnish him with more goods and to advance cash, which advances were subsequently made, so that the whole indebtedness of A. B. exceeded \$200; it was held, in an action against the guarantor, that the appropriation of the guarantee to the discharge of the previous debt, and the delivery of goods instead of money, was a departure from the terms of the guarantee, and that the guarantor was not liable. *Wright v. Johnson*, 8 Wend. 512.

47. Giving time by a valid and binding agreement by the creditor to the debtor, without the assent of the surety, operates to discharge him, both at law and in equity, not only whether any loss has thereby happened to him

or not, but even if it has been an actual benefit, but to give such effect to such agreement, it must appear to be founded upon a sufficient consideration. *Gahn v. Niemcewicz*, 11 Wend. 312.

48. In order to discharge a surety in consequence of a variation of the contract, or by a deprivation of his equitable rights and remedies, not only the fact of suretiship must exist, but it must be known to the creditors at the time of the act complained of; and if such fact does not appear on the face of the security itself, the surety will be holden to strict proof, and is bound to bring home the knowledge of it to the creditors clearly and satisfactorily. *Ibid.*

49. Where interest had accumulated on a bond of a principal debtor, secured by the mortgage of a surety, and the creditor accepted the promissory note not negotiable of the principal debtor for such interest, payable in thirty days; *it was held*, that the acceptance of such note did not discharge the surety, because, 1. An agreement to give time on the bond and mortgage could not be implied from the postponed day of payment specified in the note; 2. There was no agreement to give time; 3. That if the acceptance of the note could be regarded as an agreement to give time, the agreement was invalid for want of consideration; and, 4. The surety was not prevented from coercing payment of the principal due on the bond and mortgage, and long before judgment the interest would become due on the note. *Ibid.*

50. What effect the acceptance of a negotiable note would have had in the above case? *Quære. Ibid.*

51. An agreement for a valid consideration, extending to a principal the time of payment of a debt, discharges the surety, although the principal at the time of such agreement is actually insolvent. *Huffman v. Hubert*, 13 Wend. 375.

52. A request by a surety to the creditor to sue the principal is unavailing as a defence, unless it be shown that the principal at the time of the request was solvent, and subsequently became insolvent; and on proof of the solvency at the time of the request to sue, it must satisfactorily appear the debt was then collectable, by due course of law, out of the property of the principal, and not merely that, if hard pressed, the principal might have paid, had he chosen to do so. *Ibid.* 13 Wend. 377.

53. The obligees of a bond given for the faithful discharge of the duties of a treasurer of a corporation, are under no legal obligation to watch over the conduct of their officer, to examine into his accounts at stated periods, and in case of default on the part of the officer, to adopt measures calculated to relieve his sureties. The fact that at the time of the giving of the bond there was a standing by-law of the corporation, that the treasurer should account at the end of every six months, does not help the sureties; such by-law being *held* to be a mere private regulation, forming no part of the contract with the sureties. *Albany Dutch Church v. Pedder*, 14 Wend. 165.

54. The sureties to such bond are discharged if, without any reasonable excuse, the obligees

neglect to prosecute after request, where the party for whom the sureties are bound, subsequent to such request, becomes insolvent, whereby the sureties are prejudiced. *Ibid.*

55. A guarantee that an auctioneer shall duly account for all merchandise placed in his hands for sale, is discharged from liability, if the persons from whom the auctioneer received goods take his notes, and give him an extended credit for the payment. *Coleman v. Lamb*, 15 Wend. 329.

56. An agreement for delay, without consideration, made between the principal debtor and his creditor, will not discharge his surety. An agreement, to have that effect, must be a binding agreement, or one to the prejudice of the surety. *Hall and Montross v. Constant*, 2 Hall, 185.

57. A negotiation for delay upon terms not finally accepted does not discharge the surety, though there is actual delay, there being no binding contract to prevent a suit against the principal at any time. *Ibid.*

II. When a surety may call on his principal or co-surety.

58. Joint sureties paying the money for their principal should yet sue him severally for the money paid. *Gould v. Gould*, 8 Cow. 168.

59. B. and G. were sureties. B. died, and his executor was a partner in business with G.; and the two partners paid the debt of the principal out of their joint funds as partners; yet *held*, that they should sever in their action against the principal. *Ibid.*

60. Where partners pay money on a business foreign to the partnership concern, though with their joint funds, this is, *pro tanto*, a severance of their funds; and if paid as sureties, the law implies a promise from the principal to each, according to his several interest. *Ibid.*

61. A surety extinguishing a debt by the payment of only one-half its amount is not entitled to recover more from his principal than the amount actually paid. *Bonney v. Seeley*, 2 Wend. 481.

62. Where a surety to a note is subjected to costs in consequence of its nonpayment by the principal, and there is an agreement in writing to save the surety harmless, he is entitled to recover the costs so paid by him in an action against the principal. *Ibid.*

63. Where one of two co-sureties paid the debt of their principal, and obtained an assignment of a mortgage pledged by the principal to the creditor, (having previously proposed to his co-surety to pay the original debt, and take an assignment for his own benefit, or that each should pay half of the debt, take an assignment jointly, sell the mortgaged premises, and divide the proceeds, and after the rejection of these offers by his co-surety,) foreclosed the mortgage, and purchased the premises himself; *it was held*, that he hold the same absolutely, and not as a trust estate in which his co-surety has an interest; and that the utmost that the co-surety could claim was, that when the mortgaged premises were sold for a nominal sum, their fair cash value at the day of sale should be credited on the original debt. *Livingston v. Van Rensselaer*, 6 Wend. 63.

64. The delivery of a chattel by a purchaser to one who has become his surety for the payment of the purchase money, is a valid and legal transaction, and the continuance of the possession and use of the property by the purchaser does not invalidate the right of the surety to control the property upon the happening of the event which, by the agreement of the parties, was to render his interest absolute. *Ferguson v. Union Furnace Company*, 9 Wend. 345.

65. Where a party signs a note as the surety of another, and subsequently a third person also affixes his name as a maker, adding to his signature the words, *surety for the above parties*, the first surety, although he pays the note, cannot compel contribution against the second surety, unless it is made satisfactorily to appear that the second surety intended to place himself in the relation of co-surety with the first surety. *Harris v. Warner*, 13 Wend. 400.

66. It seems, that notwithstanding the declaration attached to his name, had the second surety been obliged to pay the note to the payees, that he could not have called upon the first surety as principal, without showing a contract establishing as between them the relation of principal and surety. *Ibid.*

PRISONER.

1. Delivering a *ca. sa.* to the sheriff is good cause against a *supersedeas* under the statute, (1 R. L. 353, sec. 12.) but if it appear to have been returned *non est inventus*, a *supersedeas* will be granted, unless it be followed up by an *alias*. *Gray v. Thornber*, 5 Cow. 378.

2. The Court may, under special circumstances, give time to issue an *alias*. *Ibid.*

PROMISSORY NOTE.

1. W. purchased a note of M., who endorsed it in blank, before due; W. sold it to another before due, who charged the endorser by demand and notice, &c.; and after it was due, W. repurchased it, and sold it to I.; held, that I. might maintain an action on the note against the endorser in his (I.'s) own name. *Williams v. Matthews*, 3 Cow. 262.

2. A note is endorsed and dishonoured, and the endorser charged by demand and notice. This is no objection to a further negotiation of the note, and any subsequent holder may sue, in his own name, either the maker or the endorser who has been so charged, and the original demand of the maker and notice to the endorser enure to the benefit of all subsequent holders. *Ibid.*

3. The only difference between negotiable paper which has been dishonoured, and that which is not yet due, is, that the former must be taken subject to all the equities existing between those who were parties before the paper became due. *Ibid.*

4. The holder of a note endorsed in blank may fill it up, before or at the trial, with what

name he pleases. Other parties to the note (e. g. a prior endorser) have no concern with this question. *Ibid.*

5. A count by endorsee against endorser, averring a demand of payment, and notice of nonpayment in the usual form, is satisfied by proving a state of facts which dispenses with actual demand, &c. The facts need not be specially stated in pleading. *Ibid.*

6. A demand of payment and notice of nonpayment should be made and given by the holder of a note or his agent. *Ibid.*

7. Where the third day of grace is Saturday, notice of nonpayment need not be given till Monday. *Ibid.*

8. The acceptance of the note of a third person, on the sale of a chattel, for the consideration money, is payment. *Reo v. Barber*, 3 Cow. 272.

9. It is equivalent to the payment of money; and on a failure of title, an action lies for money had and received, to recover the amount of the consideration money and interest. *Ibid.*

10. An action at law cannot be sustained on a negotiable promissory note payable to bearer by the holder, on his proving that the note was lost, though he show that he lost it after it became due. *Rivoley v. Ball*, 3 Cow. 363.

11. His only remedy is in a Court of equity, which alone can afford the defendant adequate protection against future liability. *Ibid.*

12. But if he show that the note was in fact destroyed, he may recover in a Court of law. *Ibid.*

13. So if the note be not negotiable, or if negotiable, and it appear not to have been negotiated. *Ibid.*

14. What is sufficient proof of the execution of a lost note. *Ibid.*

15. What is a reasonable time, within which a note payable on demand should be presented for payment, in order to charge an endorser, depends on all the facts of the case, to be proved at the trial. *Bank of Utica v. Smedes*, 3 Cow. 662.

16. The essential qualities of a bill of exchange or promissory note are, that it be payable at all events, not dependent on any contingency, nor payable out of a particular fund; and that it be for the payment of money only, and not for the performance of any other act; or in the alternative. *Cook v. Satterlee*, 6 Cow. 108.

17. An instrument in writing by which A. directs B. to pay G. or bearer four hundred dollars, and take up A.'s note of that amount, though the instrument be accepted by B., is not a bill of exchange. *Ibid.*

18. An intermediate endorser of a promissory note, though he did not hold the note when it became due, yet must in an action against a prior endorser, for the money paid by him (the intermediate endorser) to a subsequent endorsee, to take up the note, prove a regular demand of payment and notice to the defendant, the same as in an ordinary action against an endorser. *Wilbur v. Seiden*, 6 Cow. 162.

19. The register of a deceased notary is not evidence of demand and notice on a promissory note, where the entries were made by his clerk,

who is still alive, though he gone out of the jurisdiction of the Court, and cannot be found on diligent inquiry. *Ibid.*

20. An intermediate endorser of a note may sue a previous endorser without showing actual payment by such intermediate endorser, to any subsequent endorsee, by a receipt; and without showing an endorsement back to such intermediate endorser. Possession of the note and producing it in Court are *prima facie* sufficient evidence of payment, and he may recover though his name still remain on the note. *Norris v. Badger*, 6 Cow. 449.

21. It seems that a note given by a devisee in his lifetime to secure a devisee in a will against the alteration or revocation of the will, is without consideration and void. *Winchell v. Latham*, 6 Cow. 689.

22. A holder of a promissory note giving time to the maker, to the prejudice of the endorser, discharges the latter. *Wood v. Jefferson County Bank*, 9 Cow. 194.

23. An agreement with the maker to prosecute the endorser, and if the debt cannot be collected, then to receive security from the maker at two years, does not suspend the right to sue the maker at any time before the suit against, and failure to collect of the endorser. *Ibid.*

24. Whether a cashier of a bank holding a note has power to make an agreement to suspend the payment of the note without the consent of the directors? *Quere. Ibid.*

25. Where a bill, endorsed for the accommodation of its drawers and drawees, is pledged by them for less than its face, and the holder transfers it and receives its full value, which the accommodation endorser is subsequently compelled to pay to the person to whom the note has been transferred, such endorser cannot maintain an action against the person to whom the note was pledged, for its surplus over the sum for which it was pledged. *Gregory et al. v. Burrall et al.* 2 Wend. 391.

26. Where a person for a series of years forged the name of his friend as the endorser of his notes and bills, with the knowledge of his friend, who, although judgments were obtained and executions issued against him in suits on such forged endorsements, never disavowed such acts until the person committing the forgeries had absconded and fled from justice; it was held, in a case where the endorser was sued and suffered a default, and attempted no defence until after the escape of the maker of the notes, that proof of these facts was admissible in evidence, and that from it the jury might imply an authority from the endorser to the maker thus to use his name. *Weed et al. v. Carpenter*, 4 Wend. 219.

27. If it appears that the holder of a negotiable note is not the legal owner, he cannot recover thereon, unless he shows that he gave value for it, or received it in the ordinary course of business, or with the assent of the owner. *McLaughlin v. Waite et al.* 5 Wend. 404.

28. The fact of an unsealed note being recognised by a sealed instrument does not change its character, and give it the effect of a sealed instrument. *Jackson v. Sackett*, 7 Wend. 94.

29. A bond of indemnity is only necessary
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where a suit is brought upon a lost negotiable note; and its negotiability will not be presumed, but must be proved. *Blade v. Noland*, 12 Wend. 173.

30. Where a note drawn by several makers, payable to bearer, is subscribed by the holder, as a maker, under the other signatures, and then transferred to a third person, and the holder who so subscribed the note is obliged to pay it when due, he is remitted to his former rights, and may either maintain an action upon it or transfer it to a third person. *Mutr v. Demaree*, 12 Wend. 468.

31. One of several administrators may bring a suit in his own name on a note payable to his intestate or bearer, and is not bound to prosecute in his representative character, nor to join his co-administrator as a plaintiff. The nonjoinder of a co-administrator can be taken advantage of only by plea in abatement. *Packer v. Williams*, 15 Wend. 343.

32. Illegality of consideration (except in particular cases arising under certain statutes) does not avoid a note in the hands of a bona fide holder without notice. *City Bank v. Barnard and Macy*, 1 Hall, 70.

33. Certain directors of the City Bank of New York, for the purpose of controlling the election of its officers, entered into an arrangement for the purchase upon the account of the bank of a large amount of its stock, (then held by a certain individual,) at a premium of seven per cent. above its par value. To effect this object, they paid for the stock with the funds of the bank, to the amount of its par value, and transferred the same in trust for the bank. For the purpose of paying the amount of the premium, each director borrowed \$3500 of the bank by causing his own promissory note regularly endorsed to be discounted at the bank. In an action brought by the bank upon one of these notes against the endorser thereof, they were not allowed to set up the illegality of the original transaction as a defence against the note. *Ibid.*

34. Where the holder of a promissory note has obtained possession of it by fraud, he cannot maintain an action upon the note against any of the parties to it. *Talman v. Gibson*, 1 Hall, 308.

35. Possession is *prima facie* evidence of a transfer to the holder; yet, if the defendant can show that the plaintiff obtained the note by his own fraudulent act, he has a right to defeat the action on that ground, although he may be liable to pay the note to the true owner. *Ibid.*

36. The consideration merely on which the note was received by the holder is not to be questioned; but the defendant may show that no consideration was paid by the holder, as one step toward the proof of fraud on his part in obtaining the note. *Ibid.*

37. Where the maker of a promissory note endorsed the same for his own benefit in the payee's name, by virtue of a parol authority for that purpose communicated to him by the payee; it was held to be well endorsed, and that the payee was liable upon such endorsement in the same manner as if it had been made by himself with his own hand. *Turnbull and Phylfe v. Trout*, 1 Hall, 336.

38. The engagement of an endorser of a pro

missory note is not a collateral undertaking to answer for or pay the debt of another person, within the meaning of the statute of frauds. *Ibid.*

39. The subsequent assent of the defendant to the endorsement is a waiver, *it seems*, of any exception which might otherwise be taken to the sufficiency of the authority by which the note was endorsed. *Ibid.*

40. Where a negotiable promissory note, endorsed in blank by the payee, has been fraudulently or feloniously taken from the true owner, and that fact is shown at the trial, the person into whose hands it passes cannot recover upon it against the maker, unless he show himself to be an innocent man, and *bona fide* holder for a valuable consideration. *The Fulton Bank v. The Phoenix Bank*, 1 Hall, 569.

41. The Phoenix Bank of the city of New York issued a post note payable sixty days after date to J. G. or order, on demand. The note, being endorsed by J. G., was put into the mail at Charleston in the state of South Carolina, to be transmitted to New York; but the mail being robbed, it never reached the hands of the true owners, but passed into the possession of Prime, Ward, King and Co., who deposited it in the Fulton Bank, and received credit for a like amount in account with that bank. The plaintiffs presented the note to the Phoenix Bank for payment, and it was refused upon the ground that the note had been stolen from the true owners, who had requested the defendant not to pay it. The amount of the note, although passed to the credit of P., W., K. and Co. by the Fulton Bank, had never been drawn out by them; and upon an action brought by the Fulton Bank against the makers to recover the amount of the note, *it was held*, that the mere act of giving credit to P., W., K. and Co., for that amount, by the Fulton Bank, upon their books, did not constitute them *bona fide* holders of the note for a valuable consideration. *Ibid.*

42. Bank post notes, over due, are not to be regarded as subject to all the rules applicable to ordinary notes, but they become assimilated in their character to ordinary bank notes. *Ibid.*

43. The holder of a promissory note, who receives and endorses it for the sake of collection only, although a mere agent, is to be considered as the *real* holder, for the purpose of receiving and transmitting notices. *Ogden et al. v. Dobbin and Evans*, 2 Hall, 112.

44. When a note has been presented for payment, and payment is refused, the holder acts with reasonable diligence, if he gives notice by the regular course of mail to the endorser from whom he received it, that *he* may transmit notice to his immediate endorser, who may take the same course as to the prior endorsers. And if the endorsers, in due season, adopt the regular course of the mail for transmitting notices from one to the other, and by that means the route to the *first* endorser is made circuitous, it is no want of diligence on their part; and he cannot set up the manner of the giving of the notice, and the delay occasioned by it, as a defence. *Ibid.*

45. When a note is made payable at a particular place, it must be presented at that place

for payment. But when it is made payable at a bank, and the note is placed in the hands of the cashier of that bank for collection, there is no necessity for his making a specific or clamorous demand. The legal requirements as to presentment and demand are complied with, if the note was in the bank at the time it fell due, in the hands of the cashier, who was ready to receive the money. *Ibid.*

46. The defendant endorsed a promissory note, payable *on demand*, made to secure the payment of a sum of money loaned to one of the makers, by the plaintiff. The note was not made for commercial purposes, nor was it ever negotiated, and the holder resided out of the state of New York. At the end of nineteen months from its date, demand of payment was made, which being refused, notice was given to the endorser, who claimed to be discharged by the *laches* of the holder; *held*, that the rule requiring promissory notes, payable *on demand*, to be presented within a "reasonable time," is applicable chiefly to those which are made for commercial purposes; that the present was to be likened to a case of guarantee or suretyship, and that the defendant was liable on his endorsement. *Vreeland v. Hyde*, 2 Hall, 429.

47. Where a note is payable to bearer, or endorsed in blank, an action on it may be maintained in the name of any person, without the plaintiff's being required to show that he has an interest in it, unless he possesses the note under suspicious circumstances. If any question as to *mala fide* possession arise, that is a matter of fact, to be raised by the defendant, and submitted to a jury. *Ogilby v. Wallace*, 2 Hall, 553.

48. Where, therefore, in an action upon a promissory note, payable to order and endorsed in blank, the plaintiff upon the record was a *fictitious* person, and the judge for that reason nonsuited him at the trial, although the note appeared to be the property of a real party, whose name was disclosed; the Court directed the nonsuit to be set aside, that the questions of fact connected with the possession and prosecution of the note might be submitted to a jury. *Ibid.*
See BILLS OF EXCHANGE.

QUO WARRANTO.

1. On filing an information in nature of a *quo warranto*, the Court granted a rule that the defendant appear and plead in twenty days after service of a copy of the information and notice of the rule, or that the attorney-general have leave to enter an appearance for him, and take judgment by *nihil dicit*. *People v. Richardson*, 3 Cow. 357.

2. But on the question coming again before the Court, this case was reconsidered, and it was *held* that process should issue. *Ibid.* *Post*, 4 Cow. S. C.

3. The general rules of the Court, in relation to pleading, amending, &c., are, applicable to proceedings upon an information in nature of a *quo warranto*. *The People v. Clark*, 4 Cow. 95.

4. The process, upon an information in nature of a *quo warranto*, is either a *tenere facias* and

distingus, or a *subpoena* and attachment. *The People v. Richardson*, 4 Cow. 97.

5. It is irregular to proceed against the defendant by a rule to appear. *Ibid.*

6. Cases in which an information in nature of a *quo warranto* lies. 4 Cow. 101, note (a).

7. In what Courts. 4 Cow. 102, note (a).

8. Nature of the proceeding. *Ibid.*

9. When leave to file the information will be granted. *Ibid.*

10. When not. 4 Cow. 103, note (a).

11. Of the affidavits on which the motion for leave, &c. is founded. 4 Cow. 105, note (a).

12. Rule thereupon. 4 Cow. 106, note (a).

13. Rule to inspect books. *Ibid.*

14. Of the affidavits on showing cause. *Ibid.*

15. Showing cause. *Ibid.*

16. The information. References to books of precedents, and various precedents given. 4 Cow. 106—108.

17. Its nature and form, and what it should contain, who may apply for it, and who may move to file it, and against whom it may be filed, &c. 4 Cow. 108, 109, note (a).

18. Consolidation. 4 Cow. 109, note (a).

19. Of quashing the information. *Ibid.*

20. Of the process. 4 Cow. 109—111.

21. How the defendant shall be named. 4 Cow. 111, note (a).

22. Tests and return of process. *Ibid.*

23. Of issues upon the *distingus*. *Ibid.*

24. Of the seizure *nomine districtionis*, for nonappearance. *Ibid.*

25. Whether the defendant can be pursued to outlawry. 4 Cow. 112, note (a).

26. Who may defend. *Ibid.*

27. Time to plead. *Ibid.*

28. Imparlance. 4 Cow. 113, note (a).

29. Of the plea, with a recital of forms and reference to books of precedents. 4 Cow. 113—117, note (a).

30. What the defendant should show in his plea, with its form. 4 Cow. 118, note (a).

31. Of the replication and demurrer. 4 Cow. 148, 9, note (a).

32. Of the rejoinder and joinder in demurrer. 4 Cow. 119, note (a).

33. Of the surrejoinder. *Ibid.*

34. Of the rules to plead, reply, &c. *Ibid.*

35. Suggestion of sheriff's interest, &c. *Ibid.*

36. Of amending the pleadings and other proceedings. *Ibid.*

37. Of the trial and evidence. *Ibid.*

38. Bill of exceptions. 4 Cow. 120, note (a).

39. Postea. *Ibid.*

40. Repleader. *Ibid.*

41. Of the judgment, its nature and form. 4 Cow. 120—122, note (a).

42. Judgment rolls complete. 4 Cow. 122, note (a).

43. Costs. *Ibid.*

44. Execution. *Ibid.*

45. Writ of error. *Ibid.*

46. Return. *Ibid.*

47. Abstract of the late act concerning proceedings upon *quo warranto*, &c. in certain cases. 4 Cow. 123, 3.

48. An information in nature of a *quo warranto* lies against one intruding into the office of sheriff, in consequence of an unlawful deci-

sion of the county board of canvassers in his favour, convened pursuant to the tenth section of the act for regulating elections, passed April 17th, 1822. (Sess. 45, ch. 250.) *The People v. Van Slyck*, 4 Cow. 297.

49. The duties of the board are ministerial, not judicial. A *certiorari*, therefore, is not the proper remedy. *Ibid.*

50. The act does not require that one of the town inspectors be appointed to preside at the election. *Ibid.*

51. All the inspectors attending equally preside, and have equal powers. *Ibid.*

52. Some one of these must be appointed by a majority of those who preside, to deliver the statement of the town vote to the county clerk, and attend the county board of canvassers as a member. *Ibid.*

53. This appointment may be written, or parol. A written appointment is preferable. *Ibid.*

54. If the statement of the town votes be delivered to the county clerk by a town inspector, and the fact of his being so is not questioned by the canvassers, he ought not to be excluded; for the delivery of the statement, and his attendance to perform the duties of a canvasser, are *prima facie* evidence that he was regularly appointed. *Ibid.*

55. The certificate of appointment, if in writing, is good evidence, though not signed by a majority of the town inspectors full after the town poll closed. *Ibid.*

56. The inspector appointed may be one of the appointers of himself, and sign the certificate. *Ibid.*

57. If the votes of a town are improperly excluded, by which a majority of votes are canvassed and allowed to a candidate for the office of sheriff, who receives a certificate, takes the oath of office, &c., and acts as sheriff, judgment of ouster will be given against him, on an information in nature of a *quo warranto* being filed *ex relatione* the one who had the actual majority of votes. *Ibid.*

58. A special verdict in an information in nature of a *quo warranto* allowed a preference in argument on the calendar. *Ibid.*

59. Pleadings in an information in nature of a *quo warranto*, against one who unlawfully intruded into the office of sheriff, viz. The information; plea, setting forth the defendant's title under the act regulating elections, (sess. 45, ch. 250.) replications and issues, at length. *Ibid.*

60. The remedy by information in nature of a *quo warranto* lies against persons who have usurped or intruded into the office of directors of an insurance company, or any other corporation. *The People v. Tibbits*, 4 Cow. 358.

61. So against persons who intrude into any office or offices created for the government of a corporation. *Ibid.*

62. So it lies against persons who usurp the right to be a corporation. To be a corporation is a franchise. *Ibid.*

63. The Court will not deny leave to file an information in nature of a *quo warranto* against persons who unlawfully intrude into offices, on the ground that the offices are merely annual;

and that, therefore, it is doubtful whether, according to the course of the Court, a trial can be had before the office expires; provided the application for leave to file the information be made the earliest opportunity after the offence complained of is committed. *Ibid.*

64. The act incorporating the Franklin Fire Insurance Company gave a vote for each share of stock; but provided that no share should entitle the holder to vote unless the stock should have been held by him at least sixty days next and immediately preceding an election; and that the major part of the directors should constitute a board, and have power to make such by-laws, rules, and regulations, as to them should appear needful and proper respecting the election, &c.; and they passed a by-law, requiring a transfer of stock to be registered, in order to be effectual. And about a month preceding the annual election, they passed another by-law, reciting that it might happen that stock might be sold within sixty days next immediately preceding an election, but not transferred on the books of the company at the time of the election; and that the seller in whose name it might stand might offer to vote upon it, though he might have no beneficial interest in it; and enacting that such voting would be a violation of the act of incorporation; and that it should be the duty of the inspectors of the election, whenever they should or might suspect that the stock proposed to be voted upon had been sold or bargained for, or contracted to be sold within the sixty days, but not transferred on the books, to require the person proposing to vote to adduce satisfactory proof to the inspectors, either by his own oath or affirmation taken before some competent officer, or other proof, that the stock had not been sold, or the beneficial interest, or any part of it, parted with by any bargain, or contract of sale, within the sixty days; and, in default of such proof, to reject the vote. *Held*, that this by-law was void; that the vendor might vote, notwithstanding the transfer within the sixty days, the same being unregistered; and it appearing that certain candidates for the office of directors were elected in consequence of this by-law being enforced, the Court allowed an information in nature of a *quo warranto* to be filed against them. *Ibid.*

65. A corporation have no power, by a by-law, to demand an oath of a stockholder in its frauds, in order to test his qualifications as a voter. *Ibid.*

66. The tenth section of the act to prevent fraudulent bankruptcies by incorporated companies, and to facilitate proceedings against them, &c., passed April 21st, 1835, (sess. 48, ch. 324.) applies to an information in nature of a *quo warranto* which the attorney-general had moved to file before the passage of the act, but which the Court did not give leave to file till after its passage. *The People v. Tibbitts*, 4 Cow. 384.

67. A statute altering the mode of proceeding in point of form in a suit pending when the act passed, so as to prevent a delay, and hasten the time of trial, is not unconstitutional.

68. Such an act will be construed liberally; and general words, not expressly prospective, will be applied to a pending proceeding. *Ibid.*

69. The rule, that a statute should not be so construed as to affect vested rights, does not apply to a statute which alters the form of the remedy merely. *Ibid.*

70. Under the tenth section of the act to prevent fraudulent bankruptcies by incorporated companies, and to facilitate proceedings against them, &c., (sess. 48, ch. 324.) the Court will make a rule for the defendant to appear as well as to plead, &c.; within a certain time, without process, on giving leave to file an information in nature of a *quo warranto*, under the ninth section of that act. *Ibid.*

71. Form of the rule to appear, plead, &c., under the tenth section. *Ibid.*

72. Whether a suit by information in nature of a *quo warranto* shall be considered as commenced on moving to file the information, and before it is actually filed? *Quere. Ibid.*

73. The Court will construe a statute strictly to prevent its interfering with vested rights. *Ibid.*

74. Forms;—of information in nature of a *quo warranto* against an incorporated bank, for exercising banking privileges without warrant; of plea, setting forth its act of incorporation, and organization under it; of three several replications; 1. That on, &c., the debts due by the bank, over and above the amount of their specie deposits, exceeded three times the sum of the capital stock subscribed and paid in; *rejoinder and issue thereon*; 2. That they refused to redeem, &c., in specie, &c., and yet did not wholly discontinue their banking operations; *rejoinder and issue thereon*; 3. That they became insolvent, by fraud, neglect, or mismanagement of them, or of some or all of their officers or agents, stopped payment, and discontinued and closed their banking operations for several years. *Rejoinder* to the last replication admitting its truth, but saying that the bank, on, &c., resumed payment, and continued it ever since that time. *Demurrer and joinder. Held*, that the rejoinder was sufficient. *People v. Niagara Bank*, 6 Cow. 196.

75. An information in nature of a *quo warranto* against a corporation, for a forfeiture of its franchises, may be filed against it by its corporate name; may charge it generally with usurpation; and on the defendant's setting forth the act of incorporation, and justifying under it, the attorney-general may reply the causes of forfeiture specially; such a replication is not a departure. *Ibid.*

76. An information in nature of a *quo warranto* against an incorporated company, seeking to deprive it of its franchises, on the ground of forfeiture by nonuser, &c., may be against the company in its corporate name. *People v. Hudson Bank*, 6 Cow. 217.

77. The judgment is a judgment of seizure. *Ibid.*

78. Corporate rights may be forfeited by nonuser or misuser. *Ibid.*

79. Suffering an act to be done which destroys the end and object for which a corpora-

tion was instituted, is equivalent to a surrender of its corporate rights. *Ibid.*

80. As where an incorporated bank becomes insolvent, and assigns so much of its property to trustees, for the purpose of paying its debts, as to prevent its resumption of banking business. *Ibid.*

81. And the attorney-general may, on information in nature of a *quo warranto*, reply such assignment in general terms; without saying in particular how much was assigned, or its value; or how much, or what value was necessary to disable the bank from resuming its operations. *Ibid.*

82. The form of a judgment of ouster on *quo warranto* against a corporation. *Utica Insurance Company v. Scott*, 8 Cow. 709.

83. It determines as the right for ever as to all persons; and may be given in evidence without being pleaded by parties and all others, on an issue involving the rights upon which it has passed. Authorities to this point. Per *Calden*, Senator. *Ibid.*

84. An information in the nature of a *quo warranto*, filed under the revised statutes against a corporation by its corporate name, admits the existence of the corporation, or that it once had a legal existence. *The People v. Rensselaer and Saratoga Rail Road Company*, 15 Wend. 113.

85. *It seems*, that previous to those statutes, it would have been sufficient, in a plea to an information against a corporation by its corporate name, to set forth the charter, and to allege acts of user under it, without showing a compliance with the requirements of the charter authorizing corporate acts; and if there had been a neglect to comply with any of the requirements, it must have been shown by replication. *Ibid.*

RECOGNISANCE.

1. Practice as to taking bail on recognisance upon arrest by attachment for contempt. *The People v. Telft*, 3 Cow. 340.

2. A defendant being arrested by attachment for a contempt merely technical, and offering to give bail for his appearance, but the sheriff declining to go with him before a judge for this purpose, and having appeared and answered interrogatories, was discharged on payment of costs, not including the sheriff's fees for attendance upon the attachment. *Ibid.*

3. What the sheriff should do on arrest. Party's own recognisance to be taken, or plaintiff may demand bail. *Ibid.*

4. On a verdict of acquittal, if the defendant be in prison, he is immediately discharged; and if out on bail, his recognisance is, *ipso facto*, discharged without any further entry. *Mills v. M' Coy*, 4 Cow. 406.

5. Proceedings on the defendant's removing an indictment for a misdemeanour by *certiorari*. *The People v. Winchell*, 7 Cow. 160.

6. Construction of the terms of his recogni-

sance upon the statute. (1 R. L. 141, s. 4.) *Ibid.*

7. Both parties should go to trial according to the terms of the recognisance, of course, and whether the defendant give notice or not. *Ibid.*

8. No rule need be taken on the part of the people. *Ibid.*

9. A defendant omitted to appear and try at the circuit, because he could not procure certain material testimony. On motion to estreat his recognisance, ordered that the motion be granted, unless within thirty days he should give a new recognisance to appear and try at the next circuit. *Ibid.*

10. Whether the first recognisance continued in force? *Quære. Ibid.*

11. Where the condition either of a bond or recognisance becomes impossible of performance by the act of God, or of the law, or the obligee or counsel, performance is excused. *The People v. Manning*, 8 Cow. 297.

12. *E. g.* a sheriff's recognisance to appear on an attachment, where he is sick at the day, and afterwards dies. *Ibid.*

13. The district attorney may remove a criminal cause to the Supreme Court by *certiorari*, as a matter of course, and of right. *The People v. Vermilyea*, 7 Cow. 109.

14. Form of a recognisance for the appearance of a defendant who has removed a criminal cause by *certiorari*, for error in his conviction; and upon which the Supreme Court ordered him to be tried at the circuit. *Ibid.*

15. Sureties for the defendant's appearance to answer an indictment, &c., must justify, if this be required by the district attorney. *Ibid.*

16. An action may be sustained in the Supreme Court upon a criminal recognisance taken in the Court of Oyer and Terminer. *The People v. Van Eps*, 4 Wend. 387.

17. A recognisance must be filed or made a record of a Court to sustain a suit, and must be so averred in the declaration. It should also be averred that the default in not complying with the condition of the recognisance was entered of record. *Ibid.*

18. A party bound to appear at a Court of criminal jurisdiction, and answer what shall be objected against him, forfeits his recognisance if he departs without leave; it is no answer to a suit on the recognisance, that he appeared and was ready to answer, if at a subsequent day of the Court, he did not appear when demanded. *The People v. Stager*, 10 Wend. 431.

19. The clause, "that he shall not depart until discharged," is not necessary to be inserted in the recognisance, in respect to the charge upon which the recognisance is entered into; its use is to detain the party upon other charges that may be exhibited against him; and if such other charges are presented, and the party is convicted, and refuses to appear after personal notice, the recognisance is forfeited. *Ibid.*

20. If, however, after a recognisance is entered into, the party charged is arrested on a bench warrant, issued upon an indictment for the same offence, and he subsequently escapes, his bail are discharged. *Ibid.*

21. After such arrest, the proper course, it seems, would be for the public prosecutor to require new bail, or move for the commitment of the defendant. *Ibid.*

22. A recognisance taken before two justices of the peace, for the appearance of a party indicted in a Court of General Sessions of a misdemeanour, is good and valid. *The People v. Huggins*, 10 Wend. 464.

23. After indictment, any one justice of the peace has power to admit to bail a party indicted in the Court of General Sessions of an offence triable in that Court; and before indictment, he may let to bail a person charged with an offence under the degree of grand larceny. *Ibid.*

24. So also, two justices may, before indictment, let to bail prisoners arrested and in jail, charged on suspicion of felony. *Ibid.*

25. The statute requiring recognisances to be signed only requires the signature of the cognisor. *Ibid.*

26. It need not be positively averred in a suit on the recognisance, that the recognisance was filed in, or made a record of the Court in which it was returnable; it is sufficient on general demurrer, that the declaration refer to it as a record of the Court. *Ibid.*

27. An averment that the principal, although called, did not appear, is equivalent to an averment that his default for not appearing was entered of record, and supersedes the necessity of an allegation that the bail did not produce the principal. *Ibid.*

28. On an attachment against the sheriff for not returning a *fi. fa.*, ruled that the recognisance be in double the amount of the *fi. fa.*, and that the sheriff should answer such interrogatories as should be regularly exhibited. *The People v. Lowndes*, 1 Hall, 225.

REDEMPTION OF LANDS.

1. One who comes to redeem from a judgment creditor under the act, (sess. 3, ch. 184, s. 3.) may pay the money either to the sheriff or the creditor. *Ex parte C. Board*, 4 Cow. 420.

2. The sheriff may receive current bank bills, even against the express directions of the creditor. *Ibid.*

3. So he may allow an assignee to redeem, *de bene esse*, without demanding present evidence of the assignment. *Ibid.*

4. A creditor upon a judgment obtained by attachment before a justice may redeem lands sold on *fi. fa.* upon a previous judgment. *Ex parte Carmichael*, 5 Cow. 17.

5. A judgment upon attachment before a justice has the same force with any other, except as to the defendant's right of set-off. *Ibid.*

6. H. obtained judgment, then K., and then P. against the same defendant, on whose land the judgments were liens. This land was sold on H.'s *fi. fa.* to K. for \$20. P. redeemed from K. by paying the \$20 and ten per cent.; and after fifteen months took a deed from the sheriff. K. insisting that P.'s redemption was not good, his (K.'s) intermediate judgment not

being paid, the sheriff afterwards gave him a deed, and he brought ejectment against P.'s tenant. *Held*, that the second deed was void; P.'s right having become perfect by lapse of time. *Jackson v. Budd*, 7 Cow. 658.

7. *Held*, that K. should have redeemed of P., which he might have done on simply paying the redemption money paid by P.; and was not bound to pay P.'s judgment. *Ibid.*

8. A senior judgment creditor may redeem from a junior judgment creditor, who has redeemed from a sale on a judgment senior to both, without paying the youngest judgment. *Ibid.*

9. A junior judgment creditor may redeem from a sale on a senior judgment, without paying intermediate judgment; and if an intermediate judgment creditor suffer the fifteen months to elapse without himself redeeming, his rights are gone. *Ibid.*

10. A purchaser of land at, or one who redeems from a sheriff's sale upon a junior judgment, or upon a judgment whose lien has expired by the lapse of ten years, acquires all the interest of the judgment debtor, becomes in effect his grantee, and may redeem as such within twelve months after sheriff's sale upon a senior judgment. *Ex parte The Peru Iron Company*, 7 Cow. 540.

11. A sale of land upon execution does not carry a title, but only a lien till after fifteen months. *Ibid.*

12. One who acquires title to the land of a judgment debtor by purchase, at a sheriff's sale, being considered a grantee; on his redeeming within twelve months from a sale upon a senior judgment, the latter sale becomes void. *Ibid.*

13. *Seem*, that one having purchased land at sheriff's sale acquires at first a mere lien, which he may release or discharge without the consent of junior judgment creditors. *Ibid.*

14. A junior judgment creditor pays a purchaser under a senior judgment which he owes his purchase money with ten per cent., and take an acknowledgment of the payment, an assignment of the judgment, and all the purchaser's interest in the land, with an order on the sheriff to convey to the person paying. *Held*, that the person paying is to be considered a redeeming creditor, not a mere assignee. *Ibid.*

15. When one comes to redeem land sold on execution, from one who has before redeemed; and the latter claims to have an increased payment to him as assignee of a judgment in virtue of which he redeemed, he must furnish proof of his right to such judgment; and it is not enough to furnish a mere memorandum, and give notice of the assignment. *Ibid.*

16. Though a judgment creditor has once redeemed upon his judgment and taken a title, it is not a satisfaction; and he may redeem again in virtue of the same judgment, especially from a sale on a judgment senior to his own, and the one from which he first redeemed. *Ibid.*

17. A tender by one judgment creditor to another does not discharge the lien of the latter. *Ibid.*

18. A short payment on attempting to redeem is a fatal omission, and renders the redemption

void, though it be by mistake of the sheriff to whom the money is paid, and he assume upon himself to make it up to the purchaser from whom the redemption is sought to be made. *Ibid.*

19. Where a party is entitled to redeem, the proper decree is for a foreclosure, if the appellant does not redeem within a specified time, and not that the bill be dismissed. The latter decree would, after a hearing upon the merits, operate as a bar to any future claim to redeem. *Dunham v. Jackson*, 6 Wend. 22.

RELEASE.

1. A release without consideration, and not under seal, is void. *Jackson v. Stackhouse*, 1 Cow. 122.

2. A covenant not to sue shall be construed a release, so as to prevent circuity of action. *Ibid.*

3. Where there are general words alone in a release, they shall be taken most strongly against the releasor; but where there is a particular recital, and the general words follow, these shall be qualified by the recital. *Ibid.*

4. Where a release acknowledged the receipt of one dollar, in full of a certain judgment, (describing it,) and also in full of all debts, demands, judgments, executions, and accounts whatsoever; held, that it was restrained by the particular words to the judgment only, and did not operate upon a mortgage between the parties. *Ibid.*

5. A bond or covenant by the creditor, to save harmless and indemnify the debtor against the debt, operates as a release of the debt. *Clark v. Bush*, 3 Cow. 151.

6. A. and B. gave a note to C. of \$2000; and then B. and C. became bound in the penalty of \$3000 to indemnify A. against all the partnership debts due from A. and B., the \$2000 debt due to C. being one of them, and C. paid under this bond to the amount of the penalty, by way of indemnifying A. against other debts due from the firm of A. and B., and then brought his action against A. upon the note to C. Held, that he should recover; for he shall not be holden to pay beyond the penalty of his bond, more especially as he was a mere surety; and the bond shall not operate as a release of a debt which he could not be called upon to pay. *Ibid.*

7. A bond, or other specialty, may be discharged or released by a parol agreement between the parties. *Dearborn v. Cross*, 7 Cow. 48.

8. And especially where such parol agreement is executed. *Ibid.*

9. Thus, where D. bound himself by bond to sell land to C., who gave his notes for the consideration money, and took possession; but afterwards, it was, in pursuance of a parol agreement, surrendered to D., who finally sold it, though the bond was not cancelled or surrendered; yet held, that it was discharged, and that no action would lie on the notes, the whole contract of sale being discharged by the new parol executed agreement. *Ibid.*

10. A levy on sufficient property to satisfy a judgment, and a release of the property, will not operate to discharge the debtor where he procures the release by his own act; as by pretending that the property is owned by others. *Ontario Bank v. Hallett*, 8 Cow. 192.

11. An agreement or covenant not to sue one of several promisors is no release of the others, though made upon good consideration. *Catskill Bank v. Messenger*, 9 Cow. 37.

12. Otherwise of technical release. *Ibid.*

13. An instrument containing mutual releases, and a covenant by one party with the other to pay the half of what might be recovered in a suit then pending, brought by the covenantor against a third party, will not be set aside on the allegation that the accounts between the parties were at the time open and unsettled, and that it had been since discovered that a large balance was due to the party covenanting. Nor will the accounts be examined for the purpose of showing that the covenant was without consideration, and therefore void. *Wood v. Young*, 5 Wend. 620.

14. A power of attorney executed on the dissolution of a firm by two partners, to a third, authorizing him to ask, demand, and receive the debts of the firm, and declaring the appointment irrevocable, does not transfer such debts to the member thus authorized, and consequently does not render inoperative a release subsequently executed by one of the other members of the firm, to one of its debtors. *Napier v. M'Leod*, 9 Wend. 120.

15. The mere fact of the appointment being declared to be irrevocable is not enough to give the instrument the character of an assignment. *Ibid.*

16. A release of one of several covenantors will not discharge his co-covenantors, unless it be a technical release under seal; a parol agreement to release will not have that effect. *De Zeng v. Bailey*, 9 Wend. 336.

17. A sealed executory contract cannot be released or rescinded by a parol agreement; thus, where a landlord covenanted to make certain alterations and improvements in a store, and by the same instrument let the store so to be altered to a tenant for a term of years at a stipulated rent, and by reason of the decay of the building, the landlord was forced to change his plan, and accordingly took down the old building and erected a new one, in which he fitted up a store for the tenant, to which change of plan the tenant gave a parol assent; it was held, in an action by the tenant against the landlord for the nonperformance of the original covenants, that the evidence of assent was incompetent and inadmissible. *Delacroix v. Bulkley*, 13 Wend. 71.

18. After a breach of a sealed contract, the right of action may be waived or released by a new parol contract relative to the same subject-matter, or by any valid parol executed contract. *Ibid.*

19. To an action of *assumpsit*, to recover the balance of an account, the defendants pleaded a release, under the seal of the plaintiffs. The plaintiffs replied, that the release was obtained from them by the fraud and covin of the defend-

ants, on which issue was joined. At the trial, the plaintiffs, to support this issue, offered to show fraud, on the part of the defendants, in the consideration on which the release was founded. The defendants contended, that the proof ought to be confined to the fraud in the execution of it only, and that if such fraud was not shown, the release was a flat bar at law. *Held*, that the position of the defendants' counsel was fully supported by the decisions of our own Courts. *Belden v. Davies*, 2 Hall, 433.

RELIGIOUS MEETINGS.

1. In proceedings against a disturber of religious meetings, it is not necessary that process should actually issue; it is competent to a defendant voluntarily to appear and answer to the complaint. *Foster v. Smith*, 10 Wend. 377.

RENT.

1. The devise of an estate which is subject to a lease will pass to the devisee right to the rent payable under the lease. *Provost v. Calder*, 9 Wend. 517.

2. A plea to an avowry for rent that the landlord holds under a title, which in law amounts to a mortgage, which has not been recorded, and that the plaintiff holds under the same person from whom the landlord derives his title, by a *bona fide* purchase for a valuable consideration, is good, and a complete answer to the avowry. *Brown v. Dean et al.* 3 Wend. 208.

3. Nor does such a plea amount to a disseisin, as it shows the relation of landlord and tenant does not exist. *Ibid.*

4. Where a sheriff received an execution, and went with it in his pocket to the house of the defendant, but took no inventory, and did not act to enforce the execution for eleven months afterwards, not even appraising the defendant that he had come to make a levy; *it was held*, that no such levy had been made as would debar the landlord of the house from claiming the rent due to him which accrued subsequent to the pretended levy. *Beckman v. Lansing*, 3 Wend. 446.

5. Notice of the rent due may be given to the sheriff even after sale under an execution, so that it be before the money is paid over to the plaintiff. *Ibid.*

6. Where rent in kind is payable by the terms of the lease at such place in a market town as the lessor shall appoint, if no appointment is made, it is the duty of the lessee to seek the lessor, to ascertain the place of payment, and there to deliver his rent. If the landlord could not be found, a delivery at any place in the market town, *it seems*, would be sufficient. *Lush v. Druce*, 4 Wend. 313.

7. A tenant cannot set off damage sustained by the breach of his landlord's agreement to finish or repair a house, against a demand for rent. *Allen v. Pell et al.* 4 Wend. 505.

8. A plea of *nonleture*, to an avowry for rent setting forth *seisin* in A. B., and deducing title from him to the avowant, and also showing a *reversionary interest* in the avowant after the termination of the demise under which the distress was made, *admits* the *seisin* and the *demise* to the avowant from the tenant to the freehold; it only puts in issue the demise under which the distress was taken. *Blumer v. Juhl*, 8 Wend. 448.

9. *Ricns in arrears* is *quasi* a general issue when pleaded in bar of an avowry. The general issue, strictly speaking, puts in issue every material averment; not so the plea of *ricns in arrears*; it admits the title of the defendant as stated in the avowry, which, therefore, need not be proved, unless the plea be accompanied by a plea of *nonleture*. *Ibid.*

10. Where A. and B. let certain premises *habendum* to the tenants for five years, in consideration of the payment of the nett annual rent of \$600; *it was held*, that both lessors might join in an action for the nonpayment of the rent, although after the *habendum* there was a covenant on the part of the lessees to pay to the lessors, "to each an equal half or moiety of the rent," and that the lessees had a joint interest in the rent, until severed by a several payment. *Tyler et al. v. M'Lean et al.* 10 Wend. 373.

11. Where a contract is made under seal and *inter partes*, the parties to the covenant must be parties to the suit to enforce that contract. *Ibid.*

12. A notice of a claim for rent from a landlord to a sheriff is good, and sufficient to justify him in retaining the sum claimed as rent, although the time during which the rent accrued is not stated in the notice. *Miller v. Johnson*, 12 Wend. 197.

13. Whether the sheriff for such defect might not disregard the rent? *Quære. Ibid.*

14. The failure of a lessor to perform certain covenants contained in the lease, which if performed would render the demised premises more valuable, is no bar to the lessor's claim for rent; the remedy of the lessee is by action to recover damages for the breach of the covenants. *Eldridge v. Osborn*, 12 Wend. 529.

15. The omission of the landlord to perform his covenants does not amount to an eviction. *Ibid.*

16. The property of a third person upon demised premises may be taken under a distress warrant for rent. *Spencer v. M'Gowan et al.* 13 Wend. 256.

17. Where a tenant under a lease enters upon the demised premises, and continues in the possession thereof for the period of nine years, the landlord may, by one distress, distrain for the rent accrued during the whole time; and if the property be taken from his possession by a writ of replevin, he may, in an avowry, acknowledge the taking for the whole nine years, as upon one entire lease. *Sherwood v. Phillips*, 13 Wend. 479.

18. In summary proceedings under the statute against tenants for the nonpayment of rent, the fact that satisfaction of the rent cannot be obtained by distress may be shown by affidavit; it is not necessary to resort to actual distress for the purpose. *Rogers v. Lynds*, 14 Wend. 173.

19. The affidavit should name the person of whom the rent is demanded; but though defective in this particular, if stated that demand was made upon the land, it is sufficient to give jurisdiction to the officer, and the defect cannot be objected to collaterally; the remedy, if any, is by *certiorari*. *Ibid*.

20. A demand of rent may be made of the tenant in possession, and it seems, that the notice requiring payment or a surrender of the premises may be served upon him, although he be not the lessee or assignee. *Ibid*.

21. It is not necessary that there should be both a demand of rent, and a notice requiring payment or a surrender. *Ibid*.

22. The grantee of demised premises cannot maintain an action in his own name upon a guarantee for the payment of the rent reserved in the lease given to his grantor by a third person; the suit must be in the name of his grantor. The revised statutes have not changed the law in this respect. *Harbeck v. Sylvestre et al* 13 Wend. 608.

23. A mortgagee of a term, who has not taken possession of the demised premises, is not liable for rent. The law in this respect is different here from what it is in England. *Wallon v. Cronly's Administrator*, 14 Wend. 63.

24. The affidavit accompanying a warrant of distress for rent must state the time for, or during which the rent accrued; it is not enough to state the amount of rent, and the time up to which it is claimed. *Marquissee v. Ormiston*, 15 Wend. 368.

25. Where the affidavit is defective, the landlord fails to show a right to distrain, and is liable to an action of trespass for property taken under the warrant. *Ibid*.

26. Where there is a mere irregularity, the remedy is by action on the case. *Ibid*.

REPLEVIN.

1. The defendant may *non pros* the plaintiff in replevin, though the plaintiff has not been returned, especially where it is withdrawn by the plaintiff from the sheriff's hands. *Ex parte Fort*, 6 Cow. 43.

2. And to support the proceedings, even after error brought, the Court may allow the defendant to file a plaintiff *nunc pro tunc*. *Ibid*.

3. A defendant in replevin, whether sued by plaintiff or writ, may *non pros* the plaintiff. *Fort v. Smalley*, 6 Cow. 439.

4. But it is error, if it appear on the record that the *non pros* was of the same term with the return of the process. *Ibid*.

5. A writ of replevin, tested at one term, and returnable at the next term but one, (an entire term intervening,) is voidable. *Cayward v. Dookittle*, 6 Cow. 602.

6. *Semble*, it may be amended, but not unless the defect appear to have arisen from mistake, and all suspicion be removed that the long return day was a trick to postpone the trial. *Ibid*.

7. Where in replevin, the jury found for the plaintiff, but omitted to find costs or damages, the circuit judge, after they separated, allowed

"six cents" to be added by the clerk, and referred it to the Supreme Court, whether it might be amended as to the damages. That Court allowed "six cents damages" to be added to the verdict, and *held*, that the amendment was rightly allowed by the circuit judge. *Beekman v. Bemus*, 7 Cow. 29.

8. The sheriff received a plaint in replevin, on which he delivered the property, but omitted to summon the defendant till after the next term. The Common Pleas set aside the summons as irregular, ordering an alias summons to issue; and *holden well*. *Ex parte Johnson*, 7 Cow. 424.

9. Where one enters and ousts the owner of land, continuing in possession, and occupying it, and cutting and removing off the crops, though they were sown by the owner, yet replevin will not lie for the crops so removed. The only remedy is by action of trespass *quare clausum fregit*, after regaining possession by ejectment, or *semble*, by re-entry without ejectment. *De Mills v. Hagerman*, 8 Cow. 220.

10. Replevin lies for goods taken in execution; they not being at the time in possession of the debtor in the execution; otherwise, if in his possession. *Judd v. Fur*, 9 Cow. 259.

11. Replevin will not lie for an illegal detention of property, where the party comes to the possession by delivery from a person having a special property in the goods. The action will lie in all cases where trespass *de bonis asportatis* can be maintained. But if the bailee of goods have delivered them to a stranger, the bailor cannot maintain this action, because the general property in the goods is changed by the delivery of a person who had a special property therein; the appropriate remedy is detinue or trover. *Marshall v. Davis*, 1 Wend. 109.

12. On a plaint in replevin, after a claim of property is made by the defendant, and notice thereof given to the sheriff, he cannot proceed and take the property into his possession, or dispossess the defendant thereof, before the claim of property is inquired into, or tried according to the statute. *Lisher v. Pierson*, 2 Wend. 345.

13. Where a sloop has been levied on as the property of a person in whose possession it was at the time of the levy, but who afterwards delivered the vessel into the actual possession of her owner, and the sheriff subsequently retakes her, the owner may maintain replevin against him for the recovery of the property. *Hall v. Tuttle*, 2 Wend. 475.

14. In an action on a replevin bond, it is not necessary to allege the title or estate of the defendant in the action of replevin, in and to the premises for the rent of which the distress was made; nor to aver the making of an affidavit previous to a distress for rent in the city of New York; nor to state the avowry or cognisance. *Gould et al. v. Warner*, 3 Wend. 54.

15. Although a defendant in a replevin suit takes judgment for a return of the goods, he is entitled to an assignment of the replevin bond, even if such defendant be not an avowant or cognisor. *Ibid*.

16. The condition of the bond, that the party shall prosecute his suit with effect, is broken when judgment passes against him, and a return

of the goods to the sheriff is no answer to the action. The return required by the bond is a return, in pursuance of the judgment of the Court, to the party from whom the goods were taken. *Ibid.*

17. Replevin bonds are not within the meaning of the act requiring an assignment of breaches, and an assessment of damages. The judgment is entered for the penalty. *Ibid.*

18. Fraud in the sale of a chattel cannot be set up in bar of a recovery of a note given on such sale, unless the vendee, on the discovery of the fraud, returns the article purchased to the vendor, or shows it to be valueless. *Barton v. Stewart et al.* 3 Wend. 236.

19. An action of replevin will not lie against a receiver of goods taken under an execution. *Ibid.*

20. Where goods taken under an execution are received by one as the agent of the officer, at the request or by the consent of the defendant in the execution, an action of replevin will not lie against such receiver, though it be such a case as would sustain the action against the officer. *Chapman v. Andrews*, 3 Wend. 240.

21. A person having the property in goods, and having the right to reduce them to actual possession, may bring replevin against an officer who takes them by virtue of an execution out of the possession of the defendant in the execution. *Dunkan v. Wyckoff*, 3 Wend. 280.

22. The principle that goods taken in execution are in the custody of the law, and cannot be taken out of such custody, when the officer has found them in and taken them out of the possession of the defendant in the execution, applies only as between such defendant and the officer. *Ibid.*

23. In replevin, where a plea of property is interposed as well as a plea of *non cepit*, a verdict for the latter plea determines nothing between the parties except the taking, and the plaintiff is not entitled to recover, unless the other issue be also found for him. *Bemis v. Beckman*, 3 Wend. 667.

24. Where the jury found for the plaintiff on the plea of *non cepit*, but assessed no damages, and on the plea of property found that it was not in the defendant, but did not find it in the plaintiff; it was held, that the verdict was defective in substance, and that the Court was not authorized to amend it by adding nominal damages to the finding of the jury. *Ibid.*

25. Under the issue of *non cepit*, the taking of the property is alone in question. *Ibid.*

26. Where a defendant in replevin pleads property in himself, with a formal traverse as to the plaintiff's right to the property, no issue can be taken on an allegation that it belongs to the defendant; such allegation being but a substitute for an avowry to obtain a return of the property. *Ibid.*

27. Where judgment is rendered against a plaintiff in replevin, and there is no other plea than *non cepit*, the defendant is not entitled to judgment *pro retorno habendo*. *The People v. Niagara Common Pleas*, 4 Wend. 217.

28. *Non cepit* is a plea in bar, not involving the merits of the action. *Ibid.*

29. A replevin bond is assignable only in the place where the goods replevied were taken as

a distress for rent, and such fact must be averred in a declaration by assignees, or it will be bad. *Knapp et al. v. Colburn et al.* 4 Wend. 616.

30. Where goods not taken as a distress for rent are replevied, the sheriff is not bound to take a bond; the nature and form of the security in such case is left to his discretion, and is not assignable, so that the defendant in replevin may sustain an action upon it in his own name. *Ibid.*

31. In an action on the bond, it is not necessary to aver the issuing of a writ of *retorno habendo* and a return of *elongata*; in an action against the sheriff, under the fourth section of the replevin act for taking insufficient security, such averments are necessary. *Ibid.*

32. In replevin, where the defendant in his avowry averred that the plaintiff, as his tenant, held and enjoyed certain premises for the space of seven years and six months, and by the evidence it appeared that the premises were held by the plaintiff only six years and six months, the variance was adjudged to be fatal. *Fitz v. Norton*, 4 Wend. 663.

33. A writ of replevin issued by a defendant to obtain a redelivery of the property taken from him by virtue of a writ of replevin issued against him, is irregular, and will be superseded with costs, on motion made before the return of the writ. *Morris v. De Witt*, 5 Wend. 71.

34. Affidavits showing title in the defendant to the property in question will not be regarded on such motion. *Ibid.*

35. Where, on the trial of an action of replevin in the Common Pleas, it appears that the process was executed out of the jurisdiction of the Court, the plaintiff will be nonsuited. *Williams v. Welch*, 5 Wend. 290.

36. The plea of *cepit in alio loco* does not admit the taking as laid in the declaration, and the plaintiff is bound to show his right to recover in the same manner as if the plea of *non cepit* had been interposed. *Ibid.*

37. Where, after the sale of a horse, replevin was brought for him by a third person against the vendee, and the plaintiff recovered, the vendee is entitled to recover from the vendor, who had notice of the suit, on the implied warranty, the price paid, together with interest, and the costs adjudged against the vendee in the replevin suit, but not the costs of his defence. *Armstrong v. Percy*, 5 Wend. 635.

38. Leave will be given to the officer to amend, notwithstanding a verdict for the plaintiff, on the plea of *non cepit*, where the cause is brought to trial by the plaintiff in an action of replevin. *Cleveland v. Rogers*, 6 Wend. 438.

39. The general provisions of the statute giving leave to a plaintiff to reply, and to a defendant to rejoin, several matters, with leave of the Court, are not applicable to the action of replevin. *Calvin v. La Forge*, 6 Wend. 505.

40. A default for not declaring will be set aside in replevin as in other actions. *Colburn v. Chute*, 6 Wend. 540.

41. Replevin will not lie for property taken by virtue of a warrant for the collection of any tax, assessment, or fine, in pursuance of any statute of the state. *The People v. Albany Common Pleas*, 7 Wend. 485.

42. Although the warrant may have issued erroneously or irregularly, if on its face it gives authority to the officer to collect the fine, &c., replevin cannot be sustained. *Ibid.*

43. A defendant in replevin may interpose a claim of property in the thing of which deliverance is sought, although he be not the possessor thereof. *Mitchell v. Hinman*, 8 Wend. 667.

44. A party having a special property in the thing, and in possession of the same, is equally with the general owner entitled to interpose such claim. *Ibid.*

45. The possession of a receptor is the possession of the officer who intrusted the property to his charge. *Ibid.*

46. The sheriff has no discretion whether he will or will not regard a claim of property made by the defendant in the replevin, or by the possessor; if the claim be made, he must desist from making deliverance until it be inquired into by a jury, under a writ *de proprietate probando*. *Ibid.*

47. A sheriff is not authorized to make deliverance until after summons of the defendant in replevin; and a claim of property interposed at the time of summons is in season. *Ibid.*

48. In an action of replevin, where the defendant put in five cognisances, acknowledging the taking of the goods as a distress for rent, three of which were good, and two bad, and a general judgment of *retorno habendo* was entered on the default of the plaintiff to plead, the judgment was reversed on account of the defective pleadings. *Pike v. Gandall*, 9 Wend. 149.

49. In a replevin suit, where a replevin bond has been executed, the defendant is not entitled to security for costs, although the plaintiff be a nonresident. *Rogers v. Hitchcock*, 9 Wend. 462.

50. A defendant in replevin cannot move for judgment as in case of nonsuit; where the plaintiff notices the cause and neglects to bring it to trial; he may, however, move for costs for not proceeding to trial pursuant to the notice. *Poltz v. Curtis*, 9 Wend. 497.

51. It is only when neither party notices the cause for trial, that the defendant can move for judgment as in case of nonsuit. *Ibid.*

52. An action on a replevin bond cannot be maintained, unless previous to the suit on the bond a writ of *retorno habendo* has been returned unsatisfied, in whole or in part; the issuing and return of such writ is, however, mere matter of proof, and need not be averred in the declaration. *Croden v. Pease*, 10 Wend. 333.

53. Replevin lies against a plaintiff in an execution, by whose direction the execution is levied upon specific articles of property, which do not belong to the defendant in the execution, but are the property of a third person. *Allen v. Cray*, 10 Wend. 349.

54. In general, replevin will lie where an action of trespass *de bonis asportatis* can be sustained. *Ibid.*

55. A replevin bond to prosecute a suit in replevin in another state will not be considered as a replevin bond within any of the provisions of our statutes. *Livingston v. Superior Court of New York*, 10 Wend. 546.

56. Where, on such a bond, the plaintiff took judgment for the penalty, nominal damages, and

costs, and the defendant paid the nominal damages and costs, and applied to a subordinate Court for an order that satisfaction be entered, this Court refused a *mandamus* to compel the entry of satisfaction, leaving the defendant to his remedy by writ of error. *Ibid.*

57. In replevin, where the writ is for the taking and unjust detention of property, a plaintiff cannot declare for a wrongful detention only; the declaration must conform to the writ. *Nichols v. Nichols*, 10 Wend. 629.

58. Previous to the amendment of the statute relative to replevins, the sheriff, on a writ or plaint in replevin, had no right to take possession of the goods where a claim of property was interposed, until after a trial of such claim, on a writ *de proprietate probando*; now he may do so, but he must within two days summon a jury to try the validity of such claim. *Lisher v. Pierson*, 11 Wend. 58.

59. Where, therefore, the sheriff on a plaint in replevin, after a claim of property and before trial of such claim, removed goods from the store of the defendant to an adjoining store belonging to other persons; it was held, notwithstanding the removal, no deliverance having been made, that the claim was in season, and that on interposing it, the defendant was entitled to the possession of the property until the claim was tried and found against him; and that the sheriff was liable as a trespasser. *Ibid.*

60. Where a sheriff, by virtue of an execution against one of several partners, takes the partnership property, and removes it to a place of safe deposit, replevin will not lie, at the suit of the other partners against the sheriff. *Scrugham et al. v. Carter et al.*, 12 Wend. 131.

61. If the demand of a defendant in a replevin suit is equal to, or exceeds the value of the property replevied, the whole amount of the value of the property should be given to the defendant as damages; otherwise not; for if the value of the property exceeds his demand, and he takes a verdict for such value, he is liable to the plaintiff for the excess. *Ibid.*

62. In an action on a replevin bond, the plaintiff is bound to prove a writ of *retorno habendo*, or other execution in his favour, returned unsatisfied in whole or in part, or he will fail in his suit. *Conrad v. Stanton*, 12 Wend. 120.

63. And such proof must be given, although the plea of *non est factum* only be interposed, where it is not averred that the execution was returned unsatisfied. *Ibid.*

64. In replevin, where there is a plea of property as well as the plea of *non cepit*, and the jury find only the taking, and assess the damages for the plaintiff, leaving the issue upon the plea of property undisposed of, a *venire de novo* will be awarded. *Sprague et al. v. Kneeland*, 12 Wend. 161.

65. Where one constable seizes property under an attachment issued by a constable, and another constable levies upon the same property by virtue of an execution in the attachment suit, the possession of the two officers is sufficiently simultaneous to subject them to an action as joint trespassers; and consequently replevin lies against them jointly. *Ibid.*

66. A sheriff or coroner has no power to take the affidavit of a plaintiff in replevin as to the ownership of the property specified in the writ. *Berrien v. Waterwell*, 19 Wend. 194.

67. In replevin, where the declaration contained only one count for a variety of articles, and a plea of property was interposed by the defendant, and the jury found the property of a portion of the articles to be in the plaintiff, and the property of the residue in the defendant; it was held, that each party was entitled to recover costs against the other. *Seymour v. Billings*, 19 Wend. 285. *S. P. Rogers v. Arnold et al.* 19 Wend. 288, *in nota*.

68. A public officer, sued for an act done by him by virtue of his office, has in the action of replevin, under the plea of the general issue without notice, the same rights, and is entitled to the same judgment, which a defendant, not an officer, is entitled to under a plea of the general issue with notice of the special matter. *Seymour v. Billings*, 19 Wend. 285.

69. But where a public officer, in an action against him, has not judgment on the whole record; although he recover costs, he can only recover single costs. *Ibid*.

70. Where, in replevin, there are several avowries, all substantially presenting the same defence, and the defendant succeeds upon one avowry, and judgment is rendered upon the whole record in his favour, leaving the issue upon the other avowries undisposed of, the judgment will not for such cause be reversed, if it be manifest that had such other issues been tried and found for the plaintiff, the Court would have given for the defendant, *non obstante veredicto*. *Jack v. Makin*, 19 Wend. 311.

71. Where the property taken by virtue of a writ of replevin is a living animal, and there is judgment of *retorno habendo*, in an action on the replevin bond for a breach of its condition, it is a good plea in bar, that before the judgment in the replevin suit, the animal died without the default of the plaintiff in such suit. *Carpenter v. Stevens et al.* 12 Wend. 389.

72. The owner of personal property left in the possession of a third person may, by his own act, repossess himself of such property, although it be taken from such third person by virtue of a writ of replevin. *Spencer v. McGowan et al.* 13 Wend. 256.

73. Where two persons are partners in the carrying on of a trade, and by the terms of their partnership, one finds stock and the other does the work, the partner finding the stock may maintain an action of replevin for it, in his own name, against a third person who takes it from the possession of the working partner before he has begun to work it up, especially where property in the working partner is not pleaded by the defendant. *Boydton v. Page*, 13 Wend. 425.

74. Where, besides the plea of *non cepit*, in an action of replevin, the defendant pleads property in a third person and prays a return, the jury must pass upon all the issues; and where in such a case, it appeared from the record brought up by a writ of error, that the jury had passed only upon the plea of *non cepit*, finding a verdict for the plaintiff, and had omitted to

pass upon the plea of property, the judgment below was reversed, although, from the bill of exceptions attached to the record, it appeared that all the issues were found for the plaintiff. *Ibid*.

75. On a writ of replevin for about four hundred tons of bog ore, the sheriff is not authorized to deliver to the plaintiff seven hundred and twenty tons; but where the writ was so executed, and the defendants obtained judgment of return, and executed a writ of inquiry to assess the value of the property, and the damages for its detention; it was held, that it was competent for the plaintiff to show, in mitigation, that shortly after the delivery of the property to him, the defendants repossessed themselves of the greater part thereof. *De Witt v. Morris et al.* 13 Wend. 496.

76. It seems, that the sheriff would have been justifiable in refusing to execute a writ thus vaguely describing the property. *Ibid*.

77. Where in replevin there are several avowries, all substantially presenting the same defence, upon some of which issues of law are joined, and upon others issues of fact, and the defendant succeeds upon the issues of law, and judgment is rendered upon the whole record in his favour, leaving the issues of fact undisposed of, the judgment will not, for the omission to dispose of such latter issues, be reversed, where it is manifest, that had such issues of fact been tried and found for the plaintiff, the Court would have given judgment for the defendant, *non obstante veredicto*. *Jack v. Martin*, 14 Wend. 507.

78. Where all the proceedings upon a writ or plaint in replevin, subsequent to the issuing of the process, are set aside by the order of the Court whence it issued, the plaintiff in such process cannot protect himself under it, in an action brought for the property delivered to him by virtue thereof. *Smith v. Snyder*, 15 Wend. 324.

79. Under the plea of the general issue in replevin, the defendant cannot prove property in himself, unless he submits notice of such defence to his plea. *Ibid*.

80. An action for the penalty given by statute against an officer who makes deliverance of property, under a writ of replevin, before trying the validity of a claim of property interposed, must be brought in the names of the persons making the claim, if more than one person makes such claim; and it was accordingly held, where a claim was interposed by two persons, that the action must be brought in the names of both, although one was a landlord and the other his bailiff in making a distress for rent, against whom a joint action of replevin was brought. *Cotton v. Mott*, 15 Wend. 619.

81. In a case of this kind, the defendant need not plead the nonjoinder of the proper plaintiff in abatement, but may avail himself of the objection at that trial. *Ibid*.

82. A levy upon property, the taking of an inventory, and requiring a receiptor to prevent its removal, is sufficient evidence of taking to sustain the action of replevin. *Fonda v. Van Horne*, 15 Wend. 631.

RES JUDICATA.

1. The judgment of a Court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another Court. *Burt v. Sternburgh*, 4 Cow. 559.

2. Thus, where B. brought trespass *quare clausum fregit*, in May, 1816, laying the trespass with a *continuando* between 1st November, 1814, and the 24th November, 1815, and recovered; and then brought trespass against the same defendant for a subsequent injury to the premises in question in the former suit; *held*, that the record in the former suit, followed by parol evidence that the premises in question were the same in both, was conclusive evidence of the plaintiff's title in the second action; that it operated against the defendant by way of estoppel, whether it was pleaded, or given in evidence in the second suit. *Ibid*.

3. But *held*, also, that the defendant might, in the second suit, have shown title in himself by alienation, or adverse possession, acquired since the time in question in the former suit. *Ibid*.

RESTRAINING ACT.

1. An incorporated banking company, whose charter is granted by a sister state, is within the operations of the restraining act of this state, forbidding all persons, associations, and bodies corporate from carrying on banking business, unless thereunto specially authorized by law; and it was accordingly *held*, that a foreign banking company who violated this act could not recover the amount of a check discounted by them. *Pennington v. Townsend*, 7 Wend. 376.

2. The plaintiffs loaned to J. L. \$500, upon his check for the same sum, collaterally secured by the deposit of a promissory note, endorsed by the defendant. The sum advanced to L. consisted of small checks, drawn by the plaintiffs on the Tradersmen's Bank, having the general appearance of bank notes, and being intended to circulate as such. They were not redeemed at the bank on which they were drawn, but by the plaintiffs themselves, at their own office. L. having failed to repay the loan, the plaintiffs brought an action on the note, to which the endorsers set up the illegality of the transaction, under the restraining act, as a defence. *Held*, that the giving of the checks, under the circumstances of the case, was not a banking transaction, nor against the restraining act, and that the plaintiffs were entitled to recover. *Utica Insurance Company v. Pardow*, 2 Hall, 515.

RIVERS.

1. Where a party is authorized by an act of the Legislature to erect and maintain a dam in a public river, and provision is made by the act

for the assessment of damages in case the lands of others are injured by the flowing of the river occasioned by such dam, the rule of damages is not the value of the land, but the annual value thereof from the time that the injury commenced until the assessment of the damages. *Baldwin v. Calkins*, 10 Wend. 167.

2. If a party waits ten years before having his damages assessed, he is entitled to the value of the use of the land for only six years, in analogy to the statute of limitations fixing the period for which a party can recover damages by action in such cases. *Ibid*.

3. The cause of action is continuing, and although more than six years have elapsed since the first erection of the dam, the party injured is entitled to recover for six years immediately preceding his application for redress. *Ibid*.

4. The remedy given to a party whose lands are overflowed, if *seems*, is not assignable. *Ibid*.

5. Where a claim is made for injury to lands which have been overflowed for twenty years, for a portion of which time the party causing the damage is justified, and for part not, and damages are assessed for the whole time, the assessment will be set aside. *Ibid*.

6. Where the water of a river is divided by an island, so that only one-fourth of the stream descends on one side of the island and the residue on the other, the owner of the shore where the largest quantity of water flows is entitled to the use of all the water flowing there; and the owner of the other shore has no right to place obstructions at the head of the island to cause one-half of the stream to descend on his side of the river. *Crooker v. Bragg*, 10 Wend. 260.

7. Nor can the owner of the shore where the smallest quantity flows require the other, in the use of the water for hydraulic purposes, to keep up a tight and secure dam; if such other can avail himself of the natural advantages afforded by his site, without any dam, or by an imperfect dam, he is at liberty to do so. *Ibid*.

8. A stream of water cannot be directed from its natural course without the consent of the owner over or by whose land it passes; although such owner may not require the whole or any part of it for the use of machinery. *Ibid*.

9. Where a spring of water rises upon the land of one owner, and from it runs a stream to the land of another, the owner of the land upon which is the spring has no right to divert the stream from its natural channel, although the waters of the stream are not more than sufficient for his domestic uses, his cattle, and the irrigation of his land. *Arnold v. Foot*, 12 Wend. 330.

RULES OF COURT.

1. Rule to bring in the body. *The People v. Marsh*, 3 Cow. 493.

2. Origin and history of this rule. 3 Cow. 477, note (a).

3. Rule for attachment for not bringing in the body. *Ibid*.

4. The sheriff must have full twenty days' notice of the rule to bring in the body, exclusive of the first day of term. *Ibid*.

5. On the sheriff becoming fixed for not bringing in the body, the general rule is that he must pay the whole debt. *People v. Adgate*, 2 Cow. 604.

6. But if the defendant has been insolvent from the beginning, so that the plaintiff could have lost nothing, the Court will order a perpetual stay of proceedings against the sheriff, as to the debt, allowing the plaintiff to proceed and collect all costs, &c. *Ibid.*

7. And this was done where the sheriff had neglected to appear upon his recognisance taken upon the attachment, by reason whereof there was judgment against him and his bail. *Ibid.*

8. The Court will order the defendant to allow the plaintiff to take a copy of a paper in his possession on which the suit is founded, though the plaintiff once had a counterpart, which is lost. *Wallis v. Murray*, 4 Cow. 399.

9. It is not necessary to show that it was delivered to the defendant to hold as trustee of the plaintiff. *Ibid.*

10. The Supreme Court will grant this rule, as to such a paper, in all cases where Chancery would entertain a bill of discovery. *Ibid.*

11. On appeal, or writ of error, if the reasons of the Court below are not furnished and annexed to the case, it cannot be heard, unless the omission be excused. *Reg. Gen.* 4 Cow. 713.

12. The Court adopted as a rule to admit to examination, at the customary time of examination, all candidates for admission as attorneys, whose period of clerkship expires at any time during the term at which the application is made. *Reg. Gen. S. C., July, 1834.*

See PRACTICE, VII. XXXV.

SAG HARBOUR.

1. The trustees of Sag Harbour have authority to institute and conduct proceedings relative to encroachments upon highways within the bounds of the district of Sag Harbour, notwithstanding the repealing clause in the act of 1830, entitled an act for regulating highways and bridges in the counties of Norfolk, Queen's, and King's. *Mitchell v. Halsey*, 15 Wend. 241.

2. It seems, that where upon the trustees of a local corporation are conferred, by law, the powers of certain officers, as defined by a general act of the Legislature, and such general act is subsequently revised and re-enacted, though with alterations, repealing the former act, the powers of such trustees do not cease; on the contrary thereof, they possess all the powers conferred, and are subject to all the duties enjoined, by the revised act, upon the class of officers in reference to whose powers and duties their own were originally declared, as far as the same are applicable to the corporation they represent. *Ibid.*

SALE OF CHATTELS.

I. *What constitutes a sale, and what title vests in the vendee.*

Delivery of goods sold.

III. *Stoppage in transitu.*

IV. *Fraud and warranty: (a) Express warranty as to the soundness of the goods, and fraud; (b) Implied warranty of title.*

I. *What constitutes a sale, and what title vests in the vendee.*

1. If the vendee leave goods with the vendor after contract of sale executed, the law implies a promise by the vendee to pay the expense of keeping them. *Roe v. Martin*, 2 Cow. 417.

2. On a cash sale of goods, the vendee is not entitled to possession till he pays the price. *Clarkson v. Carter*, 3 Cow. 84.

3. Rights of vendor and vendee in this respect considered, where earnest has or has not been paid. *Ibid.*

4. On a sale of goods, where there is any thing to be done by the vendor, in order to ascertain the value, quantity, or quality of the goods, the delivery is not complete, so as to bind the bargain within the statute of frauds. *Outwater v. Dodge*, 7 Cow. 85.

5. Where a contract to deliver goods is unexecuted by a delivery, the vendor, in a suit for the price, must declare on the special contract, and cannot recover upon a general count for goods sold and delivered. *Ibid.*

6. To warrant a recovery upon a special contract to pay for goods, to be delivered within a certain time, and at a certain place, they must all be delivered or tendered within that time, and at that place. A part delivery and acceptance, some before and some after the time, will not maintain the action. *Davenport v. Wheeler*, 7 Cow. 231.

7. D. and B. owed W. and B. for goods, the price of which was not liquidated by the agreement of parties. The former paid part, and finally stated an account, and drew a check for the balance, and sent it by a messenger to W. and B., one of whom objected to the messenger that the balance was too small; but received the check, and obtained the money. In an action by the vendors, brought several months afterwards; held, that they were, by this transaction, concluded as to the amount of the goods; that it was equivalent to an *involuntum computat*; and that, therefore, the vendors could not recover. *Ibid.*

8. An order drawn on a depositary of goods by the owner, to deliver them to a third person, and accepted by the depositary, is a sale of goods, according to the terms of the order by the drawer to the deliverer. *Bailey v. Johnston*, 9 Cow. 115.

9. An order on a depositary to deliver goods is valid without saying for value received, or proving value received, especially if accepted by the drawer. It will be intended that the deliverer is beneficially interested, and not a mere agent of the drawer. *Ibid.*

10. When there is doubt as to the terms of the order in the hands of the party sought to be charged by it, and he refuses to produce it, putting his antagonist to parol proof, the presumption shall be against him, that the order is in the terms insisted on by his antagonist. *Ibid.*

11. A parol acceptance of an order from the owner of goods by his depositary, is valid and binding on the depositary, according to the terms of the order. *Ibid.*

12. An endorsement by a deliverer, and a delivery of an order for goods, with intent to assign it, operates as a valid assignment. *Ibid.*

13. An endorsement and delivery, with intent to assign, by the deliverer, of an order for goods, drawn in his favour by the owner on his depositary, who accepts the order, is a sale of the goods, and such a sale is a good consideration for a promise. *Ibid.*

14. A sale of chattels where the possession is continued in the vendor, without any agreement as to such continuance, is fraudulent and void as against creditors, except in special cases and for special reasons, to be shown to and approved of by the Court. *Jennings v. Carter et al.* 2 Wend. 446. *S. P. Archer v. Hubbell*, 4 Wend. 514.

15. Though such sale be of cattle, it is not sufficient to destroy the presumption of fraud to show that the vendee had no farm or forage for them. *Ibid.*

16. Fraud is a question of law, where the testimony is uncontradicted. *Ibid.*

17. The assent of the sheriff to a sale, by the defendant, of goods levied upon by execution, will not divest the title of a purchaser under a previous sale by the defendant, though such sale is void as against the execution. *Frost v. Hill*, 3 Wend. 386.

18. The naked possession of goods for a short time, and the exercise of acts of ownership over it, will not authorize a jury to find a transfer of property, where there is no proof of acquiescence or recognition by the former owner of such possession. *Tumpkins v. Haile*, 3 Wend. 406.

19. Where goods are sold, for which notes are to be given, and the property is subsequently delivered by the vendor, without at the time requiring the notes, or annexing any condition to the delivery, such delivery is a waiver of the obligation, which otherwise the vendee must have complied with before he could have demanded the goods, and the vendee becomes the absolute owner. *Lupin v. Marie*, 6 Wend. 77.

20. Where goods to a large amount were sold to a merchant in full credit, who was reputed and considered himself perfectly solvent, but who eleven days afterwards discovered himself to be bankrupt; it was held, that the mistake or error in the ability of the purchaser to pay would not invalidate the contract of sale, nor furnish ground for relief in equity. *Ibid.*

21. A vendor of personal property has not a lien upon the property sold. *Ibid.*

22. A delivery of property to the vendee, to be put in marketable condition, and to be paid for thereafter by weight to be subsequently ascertained, is a conditional delivery, and does not pass the right of property to the vendee. So held, where one contracted with a butcher to sell to him a pair of fat cattle at a given price per quarter, the butcher to take the cattle, prepare them for slaughtering, slaughter them, take the quarters to market, weigh them, and pay for the cattle the amount the quarters would

come to, at \$7.50 per cwt., which cattle were seized by a creditor of the butcher, under an execution for an antecedent debt. *Ward v. Shaw*, 7 Wend. 404.

23. In the sale of personal property, where any thing remains to be done to render the sale complete, whether on the part of the vendor or vendee, as between them, the right of property does not pass, although the property be in possession of the vendee. *Ibid.*

24. Possession by a vendor of personal property after a transfer by bill of sale or assignment, though the conveyance be absolute in its terms, or possession by a mortgagor after forfeiture, is only *prima facie* evidence of fraud, and not conclusive; the possession may be explained, and if the transaction be shown to have been upon sufficient consideration, and *bona fide*, without intent to delay or defraud, the conveyance is valid. *Hall v. Tuttle*, 8 Wend. 375.

25. Orders for goods, in the hands of the drawee, are *prima facie* evidence of goods sold to the drawer, delivered to the payee at his request; not so with orders for money; they are presumed to be drawn, nothing appearing to the contrary, upon funds in the hands of the drawee, and if paid, give no cause of action against the drawer, unless that presumption is rebutted by other evidence. *Abord v. Baker*, 9 Wend. 323. See also *Cook v. Ferral's Administrators*, 13 Wend. 285.

26. A general purchaser of personal property is not protected against the claim of the true owner, although he purchase in good faith and for a valuable consideration, if the vendor has no title or authority to sell. *Williams et al. v. Merle*, 11 Wend. 80. See also *Hawley v. Cramer*, 4 Cow. 717.

27. Nor is a broker protected against such claim, although he purchase in the regular course of his business, in good faith, for a fair price, and disposes of the property, pursuant to the instructions of his principal, before suit brought. *Ibid.*

28. In such case the maxim *casus est implor* applies, and the purchaser must look to the seller for indemnity. *Ibid.*

29. A plea that on the sale of a chattel, the vendor took a mortgage of the same, and on the mortgage becoming forfeited, took possession of the chattel to dispose of it, and that he might have disposed of it, and out of the avails retained the amount due, is a good answer to a suit for the recovery of the price of the chattel. *Case v. Boughton*, 11 Wend. 106.

30. Taking possession of the chattel after failure to perform the condition of the mortgage is a satisfaction of the debt, provided the chattel be of sufficient value for that purpose; if taken possession of, and upon a fair sale, less than the amount of the debt be realized, the balance may be demanded by the mortgagee. *Ibid.*

31. Where, by the terms of an auction sale, the purchaser is to give approved endorsed notes at six months; it seems, that the vendor is not in fault for not approving and accepting notes offered him by the vendee, unless he knows the notes to be good, or is furnished with the means of ascertaining them to be so. *Hicks v. Whitmore*, 12 Wend. 548.

32. A contract made as well for the sale of real as of personal property, which is entire, founded upon one and the same consideration, and is not reduced to writing, is void, as well in respect to the personal as the real property, the subject of the contract. *Thayer v. Rock*, 13 Wend. 53.

33. Where a party went to a carpet store, and agreed for the purchase of a quantity of carpeting, for which he was to pay cash, and the carpeting, according to the course of trade, was sent to the house of the purchaser in the roll, so that as much as should be required might be cut off, and the residue returned, and payment made for what was taken; and the carpets were made up and laid down in the house of the purchaser, where they remained three weeks, before the remnant of the roll of carpeting was returned; and in the mean time the purchaser pawned them to an auctioneer, whom he employed to sell his furniture, and who in good faith made an advance to him upon the carpets, and then the purchaser absconded; and it was conclusively shown that he had obtained the goods by false pretences; it was held, that the property of the original owner was not divested, that the auctioneer acquired no title by the transfer from the purchaser, and that the owner was entitled to reclaim his goods. *Andrews v. Dietrich*, 14 Wend. 31.

34. In England, if property be taken feloniously, no title passes from the felon to a bona fide purchaser, unless the property be sold in market overt; we have no markets overt, consequently no title passes here to a purchaser who buys property which has been feloniously taken. *Ibid.*

35. By the revised statutes, the obtaining goods by false pretences is a felony; the law, therefore, is changed from what it was when the case of *Mowry v. Walsh*, 8 Cow. 238, was decided; wherein it was held, that when the owner of goods parted with them to a fraudulent vendee, intending thereby to divest himself absolutely of his interest or property in the goods, the fraudulent purchaser was not guilty of felony; but now the obtaining goods by false pretences being declared a felony, the owner is not divested of his property in the goods, but may reclaim them even after a transfer to a bona fide purchaser. *Ibid.*

36. A fraudulent purchaser acquires no title as against the vendor; but where a vendor delivers possession of his goods, with the intent not only that the possession, but the property shall pass, a bona fide purchaser from a fraudulent vendee holds the goods in preference to the original owner. *Ibid.* *S. P. Root v. French*, 13 Wend. 570.

37. In questions of fraudulent purchase of goods, where there is a manual tradition to the vendee, the point submitted to the jury should be, whether the vendor, in parting with the possession, intended also to transfer his interest in the article sold. *Ibid.*

38. If there is any thing to be done by the parties preparatory to ascertaining the price of goods sold, when the sale is for cash, a delivery of the article does not divest the title of the vendor until the price be ascertained and paid. *Ibid.*

39. Where a purchase of merchandise is made, the goods selected, put in a box, and the name of the purchaser and his place of residence marked thereon, and the box containing the goods sent by the vendor, and put on board a steamboat designated by the purchaser, to be forwarded to his residence, the sale is complete, and the goods become the property of the purchaser. *The People v. Haynes*, 14 Wend. 546.

40. Where an agreement was made for the sale of an ark load of lumber, a portion landed, and the landing of the residue suspended until an inspector could be procured to measure it, and the vendor, after waiting a day for an inspector, reloaded the portion landed, and went away with the lumber; held, that an action did not lie against him at the suit of the vendee. *Fitch v. Beach*, 15 Wend. 231.

II. Delivery of goods sold.

41. A bill of sale or assignment of goods, declaring that the object is to secure the vendee as surety for the vendor, and that in case the vendee shall become liable, that he may turn the goods out on execution, or that they should be at his disposal at private sale, accounting to the vendor for the proceeds, is in nature of a mortgage, the possession of the vendor being consistent with the face of the deed, and therefore not evidence of fraud as to creditors. *Mersh v. Lawrence*, 4 Cow. 461.

42. Where goods are sold, to be paid for in cash, no time being agreed on for the payment, both the delivery and payment are simultaneous acts, and the vendor may refuse to deliver without actual payment; the latter being a condition of sale. *Chapman v. Lathrop*, 6 Cow. 110.

43. But if he deliver without payment, the property passes, and the condition is waived; and though the vendee afterwards refused to pay, trover will not lie for the goods. *Ibid.*

44. Otherwise, it seems, where they are obtained by the fraudulent contrivance of the vendee. *Ibid.*

45. The plaintiffs, having cotton at three stores in Brooklyn, sixty-nine bales marked G. G. & Co. at the store of B., and thirty of the same mark at the store of M. and W., sold sixty-six bales, marked G. G. & Co., to the defendants, delivering them a pro forma bill of parcels, thus: "66 bales, say 19,900 lbs. \$19 per cwt., 1 per cent. off," the defendants paying at the time, \$1800, in part for the whole. Then the cotton in M. and W.'s store was destroyed by fire, and the defendants demanded of the plaintiffs an order for the sixty-six bales, which was refused; but the plaintiffs gave an order for thirty-six bales. These were weighed by the plaintiffs, and another bill of parcels delivered to the defendants, including the thirty-six bales, according to the weighmaster's bill; and the thirty bales at a certain weight each, with the remark, "deduct for supposed loss 150." The thirty-six bales were delivered at the time of weighing. Held, that the property of the thirty bales did not vest in the defendants, and that, therefore, the plaintiffs could not recover the price. *Rapelye v. Meech*, 6 Cow. 350.

46. The thirty bales, not being identified in the contract, and specifically sold, the contract

might have been satisfied by a delivery of thirty bales, with the mark mentioned, from any other place besides *Brooklyn*; or, if the contract related to *Brooklyn*, then out of any other store there besides M. and W.'s; or if the contract had been to sell the thirty bales at M. and W.'s, yet they not being weighed did not pass. *Ibid.*

47. When something remains yet to be done, as between buyer and seller, or for the purpose of ascertaining either the quantity or price of the articles sold, there is no delivery; and the property does not pass, though the price be in part paid. *Ibid.*

48. And so, if there be a part delivery, the other part not yet ascertained will not pass. *Ibid.*

49. And there need not be an express agreement that something farther shall be done. It is enough that it appear, from the circumstances of the case, to be necessary. *Ibid.*

50. Where a contract was made in the city of New York for the sale of 500 bales of cotton, to be delivered on its arrival at New York from New Orleans, at any time between the date of the contract and the 1st day of June then next ensuing, to be paid for in cash on delivery, the cotton to be weighed, and two per cent. tare to be allowed; it was held, that it was an executory contract, that the title to the cotton did not pass, and that the vendor was not chargeable for not delivering it, unless it arrived in New York within the stipulated time. *Russell et al. v. Nicoll et al.* 3 Wend. 112.

51. A party contracting for the sale and delivery of a large quantity of an article, on its arrival at a particular port, is not bound to deliver a portion only of the article, the whole not having arrived. *Ibid.*

52. An action may be maintained for the non-delivery of an article, although not demanded until after the time stipulated for the payment of the money, if there is no unreasonable delay, no evidence of inability nor actual refusal on demand to pay for such article. *Doe v. Day*, 3 Wend. 356.

53. Where manufacturers in the country sent an order to merchants in the city for a quantity of plough castings, to be forwarded on the canal, only a part of which were sent, and that by land carriage, a more expensive mode of transportation; it was held, in an action for the price of the property forwarded, that the plaintiffs were not entitled to recover without showing an acceptance of the goods by the defendants. Whether or not there has been an acceptance is a question for the jury. *Corning et al. v. Colt et al.* 5 Wend. 253.

54. In ascertaining the measure of damages for the nonperformance of a contract to deliver an article of merchandise at a fixed place, and on a specified day, the true rule is the difference between the contract price and the market value of the article on the day and at the place of delivery. *Gregory v. M'Dowel*, 8 Wend. 435.

55. Evidence of the value of the articles at other places in the vicinity of the place of delivery is inadmissible, where the evidence is clear and explicit as to the value at the place of delivery; when that is not the case, evidence at other places may be resorted to, to ascertain the value at the place of delivery. *Ibid.*

56. Where A. bought the boards to be made out of a certain quantity of logs in the possession of B., to be paid for at a stipulated price per 100 feet when the boards should be sawed; and the boards were sawed, piled, and notice given to the purchaser; it was held, considering the nature of the article sold, that the delivery was sufficient to render the sale valid, and to transfer the title to the purchaser. *Bates et al. v. Conkling*, 10 Wend. 389.

57. Where a party contracts to sell a quantity of produce, and to deliver it at the purchaser's house within a few days, to entitle the purchaser to sustain an action for the nondelivery, he is bound to prove a demand before suit brought. *Stone v. Case*, 13 Wend. 333.

III. Stoppage in transitu.

58. Where a party, residing at a distance from his correspondent, ordered a quantity of merchandise, directing it to be forwarded to an intermediate place, and the goods were accordingly forwarded, and after their arrival at the intermediate place were delivered to a common carrier employed by the purchaser, and before reaching the residence of the purchaser, the vendor resumed the possession on the ground of the insolvency of the purchaser; it was held, that the goods not having arrived at the place of their final destination, the *transitu* was not ended, and the vendor had the right to stop and retain them until their price was paid. *Buckley v. Furness*, 15 Wend. 137.

59. It seems, that the right of stoppage in *transitu* is not divested by the goods being seized or levied upon by virtue of an attachment or execution at the suit of a creditor of the purchaser, where the right is exercised by the vendor before the *transitu* is at an end. *Ibid.*

60. It seems, that a vendor is not entitled to exercise the right of stoppage in *transitu*, if at the time of the sale of the goods he knows the purchaser to be insolvent. *Ibid.*

61. *Seemle*, that the mere lapse of time is a circumstance of no importance in determining the right of the vendor to resume possession of the goods; provided the right be exercised before the *transitu* is at an end. *Ibid.*

62. Where a delivery to a carrier or other agent is for the very purpose of conveyance to the purchaser, the right of the vendor to stop the goods continues until they come to the actual possession of the vendee, or reach the end of their journey. *Ibid.*

63. The right of stoppage in *transitu* does not apply to the case of a consignment from a debtor to his creditor, where there can be no risk of loss by the insolvency of the consignee. *Clark v. Mauran*, 3 Paige, 373.

IV. Fraud and warranty: (a) Express warranty as to the soundness of the goods.

64. *Assumpsit* is the proper form of action where there is a warranty of title express or implied in the sale of a chattel. *Rew v. Barber*, 3 Cow. 272.

65. A warranty of title is implied on the sale of a chattel. *Ibid.*

66. No particular phraseology is necessary to constitute a warranty of goods; but an asser-

tion or affirmation concerning the thing sold, to be evidence of a warranty, should be positive and unequivocal, one which the vendee relies on, which is understood by the parties as an absolute assertion, and not the expression of an opinion. *The Oneida Manufacturing Society v. Lawrence*, 4 Cow. 440.

67. In ordinary sales, where the vendee has an opportunity of examining the commodity, the vendor is not answerable for any latent defect, without fraud or an express warranty, or such a direct affirmation or representation as is tantamount to a warranty, and not the expression of an opinion. *Ibid.*

68. But in the case of sales by sample, the vendor is held responsible that the quality of the bulk of the commodity shall be equal to the sample shown. *Ibid.*

69. Declaration upon a warranty of cotton, that it was good merchantable cotton, free from dirt and all filthy matter; proof that the defendant produced a sample of good merchantable cotton, free, &c., (as in the declaration,) and stated that it was good upland cotton, and that the sample was true, or that it was prime upland Georgia cotton; *held*, no variance. *Ibid.*

70. On a sale by sample, the vendor is responsible that the bulk of the commodity shall be equal in quality to the sample. *Andrews v. Kneeland*, 6 Cow. 354.

71. Where a party, on the sale of an article, makes representations amounting to a warranty, and the sale is consummated by a written transfer, without a clause of warranty inserted, the vendee, in an action of *assumpsit*, is not permitted to show the representations and assertions made previous to the execution of the instrument of transfer, the presumption of law being that the writing contains the whole contract. *Van Ostrand v. Reid*, 1 Wend. 424.

72. If the quality of an article sold be warranted, the warranty is an essential part of the bargain, and should be stated in the note or memorandum; parol evidence is inadmissible to prove such warranty, and its omission renders the contract void. *Peltier v. Collins et al.* 3 Wend. 459.

73. There is no contract if there be a material difference between the note of a bargain delivered by the broker (who effected the sale) to the vendee, and that delivered to the vendor. *Ibid.*

74. In a sale of merchandise by sample, the law implies a warranty that the bulk of the commodity is of the same quality as the specimens: and the fact of the purchaser requiring the agent of the vendor to test the correctness of the sample exhibited, by procuring a second sample, does not change the character of the sale; it is still a sale by sample. *Gallagher v. Waring*, 9 Wend. 20.

75. In an action for breach of warranty in the exchange of horses, to support the allegation of a warranty, it is not necessary that the word "warrant" should have been used; and whether what was said amounted to a representation of soundness, or to a mere expression of an opinion, belongs to the jury to determine. *Whitney v. Sutton*, 10 Wend. 411.

76. A vendee who on the purchase of seve-

ral articles of merchandise, warranted as of a particular quality, gives three promissory notes in payment, and pays two of them, may, in an action by the vendor for the recovery of the third note, give in evidence a breach of warranty in respect to one of the articles of property sold, either in bar or in mitigation of the amount of recovery. *Judd v. Dennison*, 10 Wend. 512.

77. Where a man warrants an animal sound, he is bound to accountability for any unsoundness, whether he knew of it or not; when he makes a bare representation, it is necessary to aver that he knew the representation to be false; otherwise he is not liable for damages. *Cox v. Boughton*, 11 Wend. 106.

78. In general, a warranty of an article sold should be made at the time of sale; but if when parties are first in treaty respecting the sale, the owner offers to warrant the article, the warranty will be binding, although the sale does not take place until some days afterwards. *Wilmet v. Hurd*, 11 Wend. 584.

79. In an action for the recovery of damages for the breach of a warranty in the sale of goods, the defendant is not entitled to a set-off of demands against the plaintiff. *Ibid.*

80. Every sale of packed cotton is a sale by sample, and a sale by sample is *per se* a warranty that the bulk shall correspond with the sample. *Boorman v. Jenkins*, 12 Wend. 566. *S. P. Beebe v. Robert*, 12 Wend. 413.

81. A plaintiff may recover for breach of warranty in the sale of property, although before the payment of the note given by him on the transfer of the property he had notice of a breach of the warranty, and notwithstanding paid it, if the extent of the damage sustained by him was not then ascertained. *Ibid.*

82. It is not necessary to the maintenance of an action for damages for breach of warranty in the sale of personal property, that the plaintiff should have returned or offered to return the property sold; a return or offer need only be shown where the plaintiff disaffirms the contract, and seeks to recover back the money or other consideration paid by him. *Ibid.*

83. An affirmation that a horse is not lame, accompanied by the declaration of the owner that he would not be afraid to warrant him, is enough to establish a warranty. *Cook v. Mosley*, 13 Wend. 277.

84. Although a party who has a claim to damages for breach of a warranty may insist upon such claim in diminution of damages, when sued for the price of the article warranted, he is not bound to do so, and his omission to insist upon such defence is no bar to an action subsequently brought by him for the recovery of damages. *Ibid.*

(b) Implied warranty of title.

85. In an action upon a warranty of a chattel, it is not necessary to prove that the word warrant was used. *Roberts v. Morgan*, 9 Cow. 438.

86. Any affirmation amounting to a warranty is sufficient. *Ibid.*

87. Where a sheriff levied on a horse under *fi. fa.*, and conveyed him to the plaintiff in the *fi. fa.*, who directed him to return the horse to

the defendant, which he did, and left him there in the defendant's possession, who sold the horse to R., who sold him to B., who purchased *bona fide*, without notice of the levy, from whom the sheriff took him, and sold him at auction under the execution; the first sale to R. was also *bona fide*, and without notice of the levy; in an action by B. against R., upon a breach of the implied warranty of title, held, that B. was entitled to recover. *Rew v. Barber*, 3 Cow. 272.

SALE UNDER AN EXECUTION.

1. In a summary proceeding, under the act to obtain the possession of land sold under execution, the application for process may be made by any person in whom the title is at the time of the application; the remedy is not limited to the purchaser at the sale. *Brown v. Betts et al.* 13 Wend. 29.

2. The officer does not lose jurisdiction of the matter by proof that the person and estate of the defendant in the execution were at the time of the sale in the charge of guardians, appointed under the act respecting habitual drunkards. *Ibid.*

3. In this proceeding the *bona fides* of the purchase is not inquirable into; and the Court, accordingly, in this case, refused to entertain the objection that the premises of which possession was sought were purchased at sheriff's sale by one of the guardians of the defendant. *Ibid.*

4. If the defendant in the execution be in the actual occupation of the premises, the proceedings may properly be instituted against him. *Ibid.*

5. These proceedings may be had against a tenant in common before partition. *Ibid.*

SCIRE FACIAS.

1. Two *nihil* are equal to a *scire feci*, where the *terra-tenants*, &c. are named in the writ; otherwise, where it is general. *Cumming v. Bevises, Jr. of Eden*, 1 Cow. 70.

2. How the return should be in the last case. *Ibid.*

3. In proceeding by two *nihil*, the *al. sci. fa.* should lie in the sheriff's office four days, exclusive both of the day of its being lodged there and of the return day. *Ibid.*

4. Fees for serving *scire facias* on several defendants: 50 cents for serving writ on each defendant, besides mileage allowed for each; also return 12½ cents and two summoners for each tenant, at 50 cents each summoner. *Griswold v. Terre-tenants of Walton*, 1 Cow. 231.

5. Summons in writing disallowed. *Ibid.*

6. Mode of proceeding to charge heirs, devisees, and *terre*, by *sci. fe.* and two *nihil*, and the relief which they may have against their default. 1 Cow. 72, note (b).

7. The rule that one cannot, to a *scire facias*, plead any matter which he might have pleaded to the original action, is limited to parties or privies. *Griswold v. Stewart*, 4 Cow. 457.

8. Service of a *scire facias* must be personal. If the writ be served on the wife of the defendant in his house during his absence, a return stating the fact cannot be returned as a return of *scire feci*, though it may be considered as a return of *nihil*. *McCombs ads. Feeter*, 1 Wend. 19.

9. It is not necessary to issue a *scire facias* to revive proceedings, though a year have expired after interlocutory judgment, before taking out a writ of inquiry, if notice is given before its execution. *Wright v. Williams*, 2 Wend. 632.

10. A replication to a plea of *riens per descent*, in a *scire facias* against heirs, *quare executionem non*, that the heir had lands, &c. is good, without particularizing the lands descended, &c. *Sharp v. Sharp et al.* 3 Wend. 278.

11. A *scire facias* against bail who has removed from the state may be served by leaving a copy at the last usual place of residence of the bail within the state. *The People v. Monroe Common Pleas*, 3 Wend. 443.

12. Where the principal and interest due on a bond exceed the penalty, the jury on the trial of a cause ought to give the excess in damages. If, however, nominal damages are only assessed by a jury, the excess cannot subsequently be taxed by the taxing officer and included in the costs, as is the practice where the judgment goes by default or confession. *Cook et al. v. Tousey*, 3 Wend. 444.

13. Where a *scire facias* is prosecuted in good faith in a proper case, costs follow the recovery of judgment, be the amount of the recovery ever so small. *Hoyt et al. v. Blain*, 12 Wend. 189.

14. It is a good plea to a declaration on a *scire facias quare executionem non*, issued against an administratrix, that she has not rendered an account of her administration to the surrogate. *Dox v. Backenstose's Administratrix*, 12 Wend. 542.

15. It seems, that after an order of a surrogate directing an execution, a *scire facias* may be prosecuted. *Ibid.*

SECRETION OF PROPERTY.

1. The carrying of a watch about the person of a defendant in an execution, and a refusal by him to deliver the same to an officer having an execution against him, is not an offence within the meaning of the statute, declaring the secreting of property, so as to prevent its being made liable for the payment of debts, a misdemeanour. *The People v. Morrison*, 13 Wend. 399.

SET-OFF.

I. In what actions, and against what plaintiffs, a set-off will be allowed.

II. What demands may be set off.

I. In what actions, and against what plaintiffs, a set-off will be allowed.

1. In an action on a judgment, in the name of a judgment creditor, for the benefit of an

assignee of the judgment, the defendant cannot set off a debt due to him from the assignee. *Wheeler v. Raymond*, 5 Cow. 331. S. C. 9 Cow. 295.

2. Whether a notice of set-off is available with the plea of *nil tiel* record, to a declaration in debt on judgment? *Quære. Ibid.*

3. In an action by one in his own name, for a debt due to him in trust for another, the defendant cannot set off a demand against the *cestui que trust. Ibid.*

4. Where W. assigned a judgment to L. and K., who gave notice to the debtor, and then assigned to R., who assigned to another, notice of the two last assignments not being given to the debtor; in debt on this judgment by the last assignee in the name of W.; *held*, that the debtor could not set off a demand due to him from R. while the latter owned the judgment. *Ibid.*

5. A set-off cannot be pleaded. It must be by notice with the general issue. *Williams v. Crary*, 5 Cow. 368.

6. To warrant a set-off, there must be a subsisting debt due in *presenti*, and it must be due from the plaintiff to the defendant; and if it be due from a plaintiff and another to only one of the defendants, it is not admissible as a set-off; and though it be claimed by the defendants, and allowed by the jury as a set-off, the claim being, in fact, due to but one defendant, and not payable at the time, this is no bar to a subsequent action for the same demand, when it becomes payable, in favour of the defendant to whom it is really due. *Wolf v. Washburn*, 6 Cow. 261.

7. The defendant covenanted to pay the plaintiff the remainder of \$1500, after deducting what the plaintiff owed him, &c. In an action on the covenant, the defendant claimed that the plaintiff owed him \$106, money advanced. The plaintiff was allowed to give in evidence against the defendant a receipt by him of a note of \$325, from the plaintiff, for collection, on which the \$106 were endorsed; and it appearing that the defendant had collected the whole \$325, *held*, that the plaintiff should be allowed the balance in the adjustment of accounts, not as a technical set-off against the defendant's claim, but as coming within the provisions of the covenant. *Every v. Merwin*, 6 Cow. 360.

8. The fact that a promissory note was seen in the hands of the maker is, *prima facie*, sufficient to charge one who has received it for collection with the amount. *Ibid.*

9. If a plaintiff bring an action for a part only of an entire and indivisible demand, the verdict and judgment in that action are a conclusive bar to a subsequent suit for another part of the same demand; and he cannot avail himself of such part, by way of set-off, in a subsequent action against him by the opposite party. *Miller v. Covert*, 1 Wend. 487.

10. Where the holder of a note has received payment of it from the maker, who was ignorant at the time of payment of the fact that the note had not been endorsed by the payee to the holder, and it appears conclusively, that, although not endorsed, the note was transferred

to the holder before maturity for a valuable consideration, and that the omission to endorse happened by inadvertence, in a subsequent action brought by the holder against the maker, the amount of such payment cannot be set off against the holder's claim, though the maker has a claim against the payee. *Franklin Bent v. Raymond*, 3 Wend. 69.

11. A defendant in this Court against whom a judgment is rendered, will not, on motion, be allowed to set off a justice's judgment holden by him as assignee; when it is alleged that the assignor was but a nominal plaintiff, and his rights are involved in intricacy and doubt. *Story v. Patten*, 3 Wend. 331.

12. Where, in a suit by an *endorsee* of a promissory note, the defendants pleaded a set-off, averring that the note was the property of the payee, that the plaintiff was a mere *nominal party*, and that the note was transferred to him for the purpose of depriving the defendants of their set-off; and the plaintiff replied simply that the note was *his property*, and *not the property* of the payee, without traversing the corrupt transfer of the note; it was *held*, that by the pleadings the plaintiff was to be considered as having *admitted* the corrupt transfer of the note, and the existence of the set-off. *Savage v. Davis*, 7 Wend. 223.

13. A party who has neither a general or special property in goods placed by him in the hands of a manufacturer for finishing, who refuses to redeliver them on demand, cannot set off the value of such goods, in an action of *assumpsit* against him by the manufacturer, for work and labour bestowed upon other goods. *Collins v. Butts*, 10 Wend. 399.

14. A receptor to the sheriff for goods levied upon by execution would not, under such circumstances, be entitled to claim a set-off. *Ibid.*

15. It is sufficient, on the joining of an issue in a Justice's Court, for a defendant to say that he pleads the general issue, and gives notice of set-off, and claims a balance of \$50, unless the plaintiff at the time objects to the defence interposed for want of certainty, or requires a specification of the nature of the set-off. *Gwill v. Wright*, 13 Wend. 403.

16. A party holding a joint and several note against two makers is not bound to set off the same in an action against him by one of the makers. *Culver v. Barney*, 14 Wend. 161.

II. What demands may be set off.

17. A judgment for costs only will be set off against another judgment, on motion, notwithstanding the attorney's lien, although the judgment be assigned to him by his clients as security for costs, of which notice is given to the opposite party, with direction not to average the costs with the clients; especially where the attorney has notice of the matter of set-off, and that it will be claimed. *Cooper v. Bigelow*, 1 Cow. 206.

18. A notice of set-off need not express by claim a balance in the defendant's favour, in order to warrant his recovering one. *The People v. The Judges of Onondaga*, 4 Cow. 31.

19. It is enough to warrant this, that it set forth his demand in the usual form. *Ibid.*

20. Whether a set-off be admissible in an action on a bond for performance of covenants? *Quere. Hepburn v. Hoag*, 4 Cow. 57.

21. An attorney obtains judgment for costs in favour of A. against B.; the latter has no right to set off a judgment purchased by him against A. after the judgment obtained in A.'s favour, so as to defeat the attorney's lien. *Bradt v. Koon*, 4 Cow. 416.

22. The Court will protect the attorney's lien to the same extent as the rights of an assignee. *Ibid.*

23. Rules of set-off the same at law as in equity. *Van Beurch v. Van Gansbeck*, 4 Cow. 496.

24. A bond which has been cancelled cannot be set off. *Williams v. Orary*, 5 Cow. 368.

25. A judgment obtained by attachment in a Justice's Court without the defendant appearing there, cannot be set off, on motion, against a judgment in a Court of record. *People v. The Judges of Delaware*, 6 Cow. 598.

26. A set-off is not allowable against uncertain damages; e. g. in debt for the penalty in articles of agreement, by which the defendants covenanted to maintain the plaintiff, &c., and provide him with proper medicine and attendance. *Hepburn v. Hoag*, 6 Cow. 613.

27. Damages due upon such an agreement cannot be set off; and where damages are not, in their nature, capable of set-off, they cannot be met by a set-off in an action for them. *Ibid.*

28. The difference in the phraseology of the act of 1813, (1 R. L. 515, sec. 1.) in the last revision of the laws, from former acts, has not extended the right of set-off, but the present statute should be construed as were the former statutes on that subject. *Ibid.*

29. A set-off cannot be made of a debt or demand against any one other than the plaintiff on the record. *Johnson v. Bridge*, 6 Cow. 693.

30. Thus, where the plaintiff purchased a negotiable promissory note of the payee after the note was due, and the payee was indebted at the time of the purchase to the maker; in an action by the holder against the maker; *held*, that the demand of the latter could not be set off against the holder; and that it was not, in any view, a defence of the action. *Ibid.*

31. A judgment purchased by a party with the view to set it off, and with condition that if he fails to obtain the set-off on motion, the assignment shall be void, and accompanied with a stipulation that the assignee shall be indemnified against the costs of the motion, cannot be set off. *Gilman v. Van Slyck*, 7 Cow. 469.

32. To warrant setting it off, he must purchase absolutely. *Ibid.*

33. A party cannot set off a judgment, unless he be the beneficial as well as the nominal owner of it. *Satterlee v. Ten Eyck*, 7 Cow. 480.

34. Where A. indemnified T., a sheriff, against selling S.'s goods, for which S. recovered judgment against the sheriff; *held*, that A. could not set off a judgment against S. which A. had purchased, and taken an assignment of in the sheriff's name. *Ibid.*

35. The Supreme Court will order a judgment before a justice to be set off against a judgment of this Court, upon the same princi-

ples as they will a judgment of the Common Pleas. *Even v. Terry*, 8 Cow. 126.

36. Damages arising from a tort cannot be set off. *Sherman v. Ballou*, 8 Cow. 304.

37. A claim recoverable only by action of account, or bill in equity, cannot be set off at law. *Ibid.*

38. A demand against a private company cannot be set off against a note payable to the agents of such companies, and prosecuted by them in their individual names, although the note was taken for the benefit of, and belongs to the company. Nor can a demand belonging to one of two defendants be set off against a demand on both defendants. *Warner et al. v. Barker et al.* 3 Wend. 400.

39. A note of one of two partners cannot be set off against a partnership demand. *Ladue et al. v. Hart*, 4 Wend. 583.

40. If the defendant in an execution escape, the plaintiff is remitted to his former rights, the imprisonment is no longer a satisfaction, and the plaintiff may use the judgment as a set-off against a demand of the defendant, or proceed anew against his person or property. *McGuinty v. Herrick*, 5 Wend. 240.

41. Where such judgment is insisted on as a set-off, and submitted to and passed upon by a jury, whether the same be allowed or not, the judgment is extinguished, unless it be affirmatively shown that the jury could not legally have allowed the defence. *Ibid.*

42. A *tabern bill*, unless against a traveller, is not the subject of a set-off. *Evernghim v. Ensworth*, 7 Wend. 326.

43. In an action upon a negotiable promissory note assigned after maturity, a set-off to the amount of the plaintiff's debt may be made of a demand existing against the assignor, provided it be such as might have been set off against the assignor while the note belonged to him; or if the suit be in the name of a plaintiff who has no real interest in the contract upon which the suit is founded, so much of a demand existing against the party whom the plaintiff represents, or for whose benefit the action is brought, may be set off as will satisfy the plaintiff's debt; and such a right of set-off existed as well before as since the revision of 1830. *Driggs v. Rockwell*, 11 Wend. 504.

44. Though a note be transferred after its maturity, the maker is not entitled to set off a demand against the payee, if, at the time of the transfer, the payee has other demands against the maker to an amount sufficient to exhaust the demands sought to be set off. *Collins et al. v. Allen*, 12 Wend. 356.

45. Where the maker of two notes has a demand against the payee sufficient to extinguish one of them, and the payee transfers one of them after its maturity, the other being sufficient to meet its demand of the maker, and subsequently the second note is transferred also after its maturity; *it seems*, the holder of the former note would be entitled to recover the whole amount of it. *Ibid.*

46. *It seems*, that under the statute of 1801, unliquidated damages could not be set off in an action of *assumpsit* in Courts of record; but by the act of 1813, such demands were made the

subject of set-off; now, however, under the revised statutes, the law is restored as it was in 1801, and unliquidated damages cannot be set off. *Butts v. Collins*, 13 Wend. 139.

47. Where the demand for which a party sues would not have been a proper subject of set off in an action against him, no demand which the defendant has against the plaintiff can be set off. *Osborn v. Etheridge*, 13 Wend. 339.

48. A defendant against whom a verdict is rendered for nominal damages, in an action of tort, may, after the verdict, procure an assignment of a judgment against the plaintiff in the suit in which the verdict is rendered, and may claim to set off such judgment against the judgment entered upon the verdict, although such latter judgment consists entirely of costs, with the exception of the nominal damages, notwithstanding the lien of the attorney. *The People v. New York Common Pleas*, 13 Wend. 649.

49. A bond debt may be set off against any demand recoverable under the common counts, or for which an *indebitatus assumpsit* will lie. *Downer v. Eggleston*, 15 Wend. 51.

50. A plaintiff cannot, by declaring specially, when he can recover his demand under a general count, deprive the defendant of his set-off. *Ibid.*

51. A defendant has a right to insist upon a set-off, although he has positively agreed to account or pay over to the plaintiff moneys which the plaintiff has authorized him to receive as his agent. *Ibid.*

52. In an action of *assumpsit* to recover the rent of demised premises, the tenant is not entitled to set off the damages sustained by him by the breach of the agreement to repair, entered into on the part of the landlord; such case is not within the statute of set-off. *Sickels v. Fort*, 15 Wend. 559.

53. An executor or administrator cannot, either at law or in equity, set off a demand purchased by him after the death of the testator or intestate, against a debt due by the estate to the person against whom he held the demand so purchased. *Mead v. Merriitt and Peck*, 2 Paige, 402.

54. An executor cannot set off in Chancery an original debt due to him personally against a claim of the defendant on the estate. *Ibid.*

SETTLEMENT.

1. The services of an indented apprentice may be assigned by the original master to another, and his service under such assignment, for two years, in a town distinct from that where the master resides, gives him a settlement in that town. *Guiderland v. Knox*, 5 Cow. 363.

2. And it is enough that such service be by the privity and consent of the original master, though there be no written assignment. *Ibid.*

3. An agreement for consideration, that an apprentice shall serve another, is binding as between the parties. *Ibid.*

4. The binding of a child by its mother,

living the father, be not dissenting, and the child serving two years according to the indenture, confers a settlement on the child. *Owens v. Oswegatchie*, 5 Cow. 527.

5. The settlement of the child follows that of the father, if he appears to have any. If not, it follows that of the mother. *Bern v. Enos*, 6 Cow. 483.

6. The place of a child's birth is *prima facie* the place of its settlement; but the presumption is done away by proof that its mother had a settlement elsewhere. *Ibid.*

7. An indenture binding an infant pauper, executed by only one overseer of the poor of a town, though with the assent of two justices, and the binding be to another overseer, &c., of the same town, is defective; but is not void. It is voidable only; and if there be a complete service under it, the servant thereby gains a settlement. *Hamilton v. Eaton*, 6 Cow. 658.

8. A woman having a settlement marries a man who has none in this state; she retains her maiden settlement, and with her children may be removed to it if her husband fail to provide for her. *Otoge v. Smithfield*, 6 Cow. 760.

See Poore.

SHERIFF.

- I. *Duty and office of a sheriff.*
- II. *Liability of a sheriff; attachment against him; and action on the bond given by him under the statute.*
- III. *Deputy sheriff and gaoler.*
- IV. *Sheriff's fees.*
- V. *Gaol liberties: (a) What is an escape from the gaol liberties for which the sheriff is liable; (b) Action for the escape, and evidence and defence therein; (c) Sheriff's remedy over.*
- VI. *Change of sheriff, and its consequences.*
- VII. *Sheriff's sale.*
- VIII. *Execution of convictions.*

I. *Duty and office of a sheriff.*

1. A sheriff is not bound to obey the instructions of a party in executing a *fi. fa.*, if he sees it will produce a great sacrifice of property. *M'Donald v. Neilson*, 2 Cow. 139.

2. But should rather postpone the rule; especially where the plaintiff cannot sustain any injury by the delay. *Ibid.*

3. He should take all necessary and lawful measures to secure the sum he is directed to levy. *Ibid.*

4. But as to the time, place, and manner of sale, he is vested with a sound discretion. *Ibid.*

5. The sheriff may sell a term in goods or chattels, upon execution against the lessee; and the purchaser acquires a right to use the goods during the term. *Van Antwerp v. Newman*, 2 Cow. 543.

6. On levying a *fi. fa.*, if the sheriff have reasonable ground of doubt whether the goods be the debtor's property, he is bound, if no indemnity be tendered by the creditor, to call a jury and try the title. If they find the goods are not the debtor's, the *fi. fa.* may then be returned

nulla bona, and the sheriff is justified in making that return, unless an indemnity is then tendered; if it is, he is bound to proceed, notwithstanding the finding of the jury. *Curtis v. Patterson*, 8 Cow. 65.

7. The creditor is never bound to tender an indemnity till the jury have passed on the question of property. *Ibid*.

8. A sheriff acts at his peril in making a return of *nulla bona* under any other circumstances. *Ibid*.

9. The declaration of the creditor, or his attorney, that he would sell, let the jury find as they would, does not dispense with the necessity of calling a jury. *Ibid*.

10. A sheriff elected in September, 1836, to supply a vacancy occasioned by the death of his predecessor, who took his office on the 1st of January, 1836, holds his office for three years; and an election of another person in November, 1838, under an impression that the term of the former expired in January, 1839, is void. *The People v. Green*, 2 Wend. 366.

11. Where a party arrested by an officer breaks away and shuts himself up in his house, the officer is justifiable, in the attempt to retake him, to break open the outer door of the house of such party, without making known his business, demanding admission, and receiving a refusal, where the pursuit is fresh, and the party consequently aware of the object of the officer. *Allen v. Martin et al.* 10 Wend. 300.

12. A sheriff does not lose his office by neglecting to give his official bond within twenty days after receiving notice of his election, provided he execute and file the bond within fifteen days after the commencement of his term of office. *The People v. Holley*, 12 Wend. 481.

13. The omission of a sheriff to file his official bond within twenty days after notice of his election does not affect his office, provided he execute and file the bond within fifteen days after the commencement of his term of office. *Hall v. Luther et al.* 13 Wend. 491.

II. Liability of a sheriff; attachment against him; and action on the bond given by him under the statute.

14. If the sheriff sells the goods as the absolute property of the tenant, not mentioning his special property, though he know of it, no action lies against him for this at the suit of the lessor; for it does not divest the lessor's right, or impair his reversionary interest. *Van Antwerp v. Newman*, 2 Cow. 543.

15. *Aliter*, it seems, if he destroy the goods or otherwise injure them. *Ibid*.

16. The sheriff cannot seize and sell the property of A. upon an execution against B. *Ibid*.

17. Proceedings to obtain leave to prosecute the general sureties of a sheriff, under the statute. (1 R. L. 491, s. 6.) *Ex parte Noble*, 2 Cow. 590.

18. In general, the affidavit should show a *fi. fa.*, and return of *nulla bona*, &c. on the judgment against the sheriff; but this is not necessary where it is shown clearly that he is insolvent. *Ibid*.

19. The sheriff can receive nothing in satisfaction of a *ca. sa.* but money, or its equivalent; and if he discharge the party arrested, on receiving his draft upon a third person, this is a voluntary escape; but such defendant may again be arrested on a second *ca. sa.* *Mumford v. Armstrong*, 4 Cow. 553.

20. Where the sheriff sold property on a *fi. fa.* against the defendants, and endorsed the amount of sales upon the execution; but the property turned out to belong to a third person, who recovered its value in an action against the sheriff and the plaintiff jointly; the Court ordered the endorsement stricken out, and that an *alias fi. fa.* should issue for the whole. *Adams v. Smith*, 5 Cow. 380.

21. The return of a sheriff to a *ca. sa.* satisfied, is evidence that he had received the money before the return day; though the *ca. sa.* be not, in fact, returned and filed till after the return day. *Armstrong v. Garrow*, 6 Cow. 465.

22. An action for money had and received lies against a sheriff, by one for whom he has collected money on execution. *Ibid*.

23. It need not be averred in the declaration, specially, that he received the money as sheriff. *Ibid*.

24. The motion to issue further execution upon a judgment obtained against a sheriff and his sureties, on a bond given for the faithful execution of his office under the statute, (1 R. L. 491, s. 6.) should be on notice to the sheriff and his sureties. *Lewis v. Ball*, 6 Cow. 583.

25. The sureties are not liable beyond the amount of the penalty of the bond. *Ibid*.

26. Record of proceedings *in sci. fa.* on a judgment in debt on the surety bond of a deputy sheriff, including the writ or declaration, pleas, &c. *Andrus v. Bealls*, 9 Cow. 693.

27. A sheriff is responsible for money received by his deputies on erroneous process, it being received *colore officii*, and he cannot avail himself of the defect in the process. *The People v. Dunming*, 1 Wend. 16.

28. The bond of a sheriff will not be ordered to be put in suit until it be shown, which it may be by affidavit, that the sheriff is individually unable to respond in damages for the default or misconduct alleged against him. *Anderson v. Hitchcock*, 2 Wend. 399.

29. Where a sheriff actually levies an execution, two months before its return, on the property of a defendant, and seven months after the writ is returnable, returns that he has made the amount directed to be levied, evidence of these facts is *prima facie* sufficient to establish his receipt of the money before the commencement of a suit brought against him nearly three months after the time when the writ was returnable. *Crane v. Dygert*, 4 Wend. 675.

30. Payment of the money into Court by the sheriff after the commencement of the suit is no defence to the action, and interest is recoverable on the amount, notwithstanding such payment. *Ibid*.

31. A sheriff is not liable to a landlord for removing the goods of an *under tenant* from demised premises, leaving the rent unpaid,

although notice of such rent being due is duly served. *Brown v. Fay*, 6 Wend. 392.

32. In an action against a sheriff and his sureties, for not paying over moneys received from presidents of Courts Martial, it is not necessary in the breach to state the names of the presidents, nor by whom, nor under what authority they were appointed: a general reference to the act of the Legislature under which the Courts Martial were held is sufficient. *The People v. Brush*, 6 Wend. 454.

33. Nor is it necessary in such action, where a suit against the sheriff and a recovery against him are averred, to allege notice to the sureties of such suit. *Ibid.*

34. It is no answer to an action on a sheriff's bond, that he is sought to be charged for the nonperformance of duties created subsequently to the act under which the bond is executed, provided that such duties existed at the date of the bond. If new duties were imposed subsequently to the giving of the bond, it seems, it would be otherwise. *Ibid.*

35. A sheriff's bond that he will execute the duties of his office without fraud, deceit, or oppression, is broken if he be guilty of any default or misconduct. *Ibid.*

36. Where a contract provides for a single act to be done, the breach is well assigned if it be in the words of the contract, either negatively or affirmatively, or in words co-extensive with the import and effect of it; but where it requires many things, the omission of any one of which would constitute a breach, a particular breach must be specified in the assignment; accordingly, it was held, that where the condition of the bond was that the sheriff should in all things perform the duties of his office, and it was assigned as a breach that he did not well, &c. in all things perform, &c., that the breach was not well assigned. *Ibid.*

37. A sheriff may accept a *replevin bond*, with only one surety, at his peril. *Kealer v. Haynes*, 6 Wend. 547.

38. Where an appointment is made of a person to execute a deed under a sheriff's sale, in the case of the death of the sheriff, and no under sheriff, security from such person is not necessary, where nothing remains to be done but to execute the deed. *Sickles v. Hogeboom*, 10 Wend. 562.

39. In an action on the case against a sheriff, for giving up the custody of a vessel taken on an attachment under the act authorizing the arrest of ships or vessels, without requiring the bond prescribed by the statute, it is not necessary to show a judgment against the vessel *in rem*; a judgment *in personam*, against the owner of the vessel, in favour of the attaching creditors, is enough to render the sheriff liable. *West et al. v. Tuttle*, 11 Wend. 639.

40. An action against the representatives of a sheriff, as for money had and received on an execution, is an action upon a contract or legal liability, and not in the nature of an action for a tort; the statute of limitations of three years is not applicable to a case of this kind, and the claim of the plaintiff may be saved from the operation of the statute of limitations of six

months by an admission of liability. *Elliot v. Cronk's Administrators*, 13 Wend. 35.

41. It seems, that in an action against a sheriff for money received on an execution, it is enough to show the delivery of the execution, without producing the record. *Ibid.*

42. The sureties of the sheriff are liable for money received by him on an execution after the execution of their bond, although the process was received by him previous to the giving of the bond. *The People v. Ring*, 15 Wend. 623.

43. On an attachment against the sheriff for not returning the defendant's body, it appeared that bail had been put in, and had justified subsequently to the rule for the attachment, but no notice thereof had been given to the plaintiff's attorney, although he was present at the justification. Held, that the want of notice was an irregularity, and that the costs incurred subsequently to the rule should be paid by the sheriff. *Mitchell v. Rouldon and Stickney*, 1 Hall, 218.

44. The certificate of the clerk, that the rule on which the attachment is grounded has been entered, must in all cases accompany the affidavit of notice of motion for an attachment against the sheriff for not returning the defendant's body. *Ibid.*

45. Where the sheriff has endorsed upon an execution the day and hour when it was received, the endorsement is conclusive evidence of the fact that the execution was in his possession at that time; and when he has assumed to act under it, he cannot compel the creditor, who has sued him for a false return, to prove at the trial the identity of the execution, either by witnesses or collateral testimony. *William v. Lowndes*, 1 Hall, 579.

46. Where goods are in the hands and under the control of the defendant in the execution, and they are pointed out as his property to the sheriff by the creditor, the sheriff is bound to levy upon them, without an indemnity; and if he neglects to do so, and the goods are afterwards removed beyond his reach by the defendant in the execution, he will be answerable to the creditor for his neglect. *Ibid.*

47. If, after a levy, a claim to the goods be interposed by a third person, the sheriff may then demand an indemnity before he can be compelled to proceed further; and his regular course will be to call a jury *de proprietate probandi*. If he make the levy and follow this course, he will not be liable for a trespass, and the parties claiming the goods may be compelled to litigate their claims, and decide the question of property, before the sheriff can be compelled to make his return, or proceed to a sale. *Ibid.*

48. *Quere*. Whether the deputy who makes the levy can be compelled to testify as to the identity of the execution, in an action against the sheriff for a false return; and whether he be not incompetent, as a witness, for any purpose connected with the action? *Ibid.*

III. Deputy sheriff and gaoler.

49. A gaoler, who has given a bond to his principal, the sheriff, not to permit an escape, cannot defend himself against an action for

the breach of that condition, upon the ground that in an action against the sheriff for an escape which the gaoler had permitted, the former neglected to plead the statute of limitations, which had run against the action. *McClure v. Erwin*, 3 Cow. 313.

50. Sale of real estate under *fi. fa.* vacated, &c., on motion in behalf of the deputy sheriff who sold; an action having been brought against the sheriff for the penalty given by the statute, (1 R. L., 505, s. 13.) he having misdescribed the land in the advertisement by mistake; on paying the costs of the motion, and of the suit against the sheriff, the deputy having acted in good faith. *Wright v. Hooker*, 4 Cow. 415.

51. Where the plaintiff interferes, and directs a deputy sheriff to take a course in the collection of an execution out of the line required by law; as by giving a credit, selling land for less than the execution, and withholding a deed until the whole shall be paid, &c., he thereby makes the deputy his private special agent, and discharges the sheriff. *Gorham v. Gale*, (note a,) 6 Cow. 467.

52. The sheriff is not amenable for the acts of his deputy, unless they are performed in the ordinary line of his official duty as prescribed by law. Where the plaintiff gives him special directions as to the manner of execution, as by enlarging the time, giving credit to a purchaser of land, and prescribing the effect of the purchase, and the time and conditions of its consummation, the sheriff is not accountable for the money received by his deputy under the special arrangements; nor would the sureties of the deputy be liable to the sheriff for such moneys. *Gorham v. Gale*, 7 Cow. 739.

53. Nor would the sheriff's executing a deed on a sale of land so made, operate to affirm the acts of his deputy, and adopt them as his own official acts; especially where his full knowledge of the special instructions to his deputy is not shown. *Ibid.*

54. *Semble*, the act of confirmation or adoption of an agent's acts, by which the principal is to be made liable, (e. g. the adoption by the sheriff of the unofficial acts of his deputy done in his name,) is not available to sustain a suit against him commenced previous to the act of adoption being performed. *Ibid.*

55. Where the office of sheriff becomes vacant by his election to another office, or by any cause besides his natural death, the under sheriff cannot execute the duties of a sheriff, within the statute. (1 R. L. 420, s. 5.) *Paddock v. Cameron*, 8 Cow. 212.

56. *Semble*, the office and duty of sheriff, in such case, devolve on the coroners. *Ibid.*

57. In general, an action will not lie against an under sheriff for a breach of duty in his office. *Ibid.*

57°. A deputy sheriff may complete a sale and execute a deed in the name of his principal after the latter goes out of office, if a levy was made before. *Jackson v. Tuttle*, 9 Cow. 233.

58. A turnkey or assistant gaoler is not within the operation of the act forbidding sheriffs and their deputies from becoming purchasers under sales on executions. *Jackson v. Anderson*, 4 Wend. 474.

59. A deputy who has commenced execution of a process by a levy on the property during the term of office of his principal, may proceed

and complete the execution thereof after the expiration of the term of office. *Tuttle v. Jackson*, 6 Wend. 213.

60. The removal of an under sheriff from the county in which he holds the office is a virtual resignation of his office, and he is thereby disqualified from even completing an execution begun by him previous to his removal. *Ferguson v. Lee*, 9 Wend. 258.

61. A sheriff does not lose his claim upon the sureties of his deputy, although he omits to remove the deputy from office, upon the sureties signifying to him their unwillingness longer to remain sureties, and requesting the removal of the deputy. *Barnard v. Darling and others*, 11 Wend. 27.

62. A plea setting out an agreement that the sheriff would release and discharge the sureties of a deputy is bad, unless some consideration is alleged; if the pleas alleged that the sheriff did release, &c., an instrument under seal might be implied. *Ibid.*

63. Proof by a subscribing witness to a bond executed by several persons, that he remembers the transaction in reference to which the bond was given, that he recollects seeing some of the obligors sign the bond, and he presumes that he saw all the obligors execute the instrument, or that they acknowledged the execution of it, otherwise he would not have witnessed it, is *prima facie* sufficient to render the bond admissible in evidence. *Hall v. Luther et al.* 13 Wend. 491.

64. In an action by a sheriff against a deputy on his official bond, for indemnity against a fine imposed for not returning an execution, it is enough to produce the proceedings from the files of the Court imposing the fine, and to show the order made by the Court, without producing a rule to return the execution or an attachment against the sheriff, especially where the deputy had notice of the proceedings against the sheriff. *Ibid.*

65. In such action, the defendants are estopped from denying the official character of the plaintiff; at all events, proof by reputation is sufficient. *Ibid.*

66. The mere fact of a deputy sheriff being directed by his principal to levy upon specific property, on an execution being placed in his hands, does not constitute him the servant or special agent of the sheriff for that particular service; he will be deemed to act in his official character, and not as a mere servant or agent; and if the sheriff is subjected to damages in consequence of his acts in respect to such execution, he and his sureties are liable to indemnify the sheriff, notwithstanding such instructions. *Tuttle v. Cook*, 15 Wend. 274.

67. Where the deputy of a sheriff receives an execution, commanding not his principal, but the sheriff of another county, to make the money for which the process issues, the deputy may refuse to execute the writ; but if he does proceed and collect the money, having become possessed of it under colour or by virtue of his office, his principal is liable to the plaintiff for the money thus collected, in an action for money had and received. *Walden v. Davison*, 15 Wend. 575.

68. The execution in such case, being voidable merely, is amendable. *Ibid.*

IV. Sheriff's fees.

69. On a plaint in replevin, the sheriff is entitled only to thirty-seven and a half cents for serving the summons, and nothing for the service of the plaint, as distinct from the summons. He is entitled to his actual mileage for service of the summons and delivery of the property, but he cannot charge double mileage for these services, nor for two defendants, when both reside at the same place. *Prindle v. Harris*, 1 Wend. 104.

70. The sheriff may charge for the replevin bond thirty-seven and a half cents, though prepared by the plaintiff's attorney. *Ibid.*

71. A sheriff, on admitting a prisoner to the liberties of the gaol, can charge only thirty-seven and a half cents for his fees. *Merchant v. Mason*, 2 Wend. 601.

72. Sheriff's fees on bringing up a prisoner on a *habeas corpus ad testificandum* are regulated by the fee bill. *Clepp v. Van Epps*, 3 Wend. 430.

73. A sheriff has no right to sell the property of a defendant in an execution for the purpose of collecting his fees, after notice of satisfaction of the judgment; he must look to the plaintiff or his attorney for them. *Jackson v. Anderson*, 4 Wend. 474.

74. A sheriff cannot charge a plaintiff with a printer's bill for advertising real estate under an execution for a longer time than *six weeks*, unless the plaintiff has authorized a postponement beyond the six weeks, or subsequently recognised or assented to such postponement. *Camp v. Garr*, 6 Wend. 635.

75. Where several executions are issued at the same time to different counties upon the same judgment, and satisfaction is made upon one execution, the sheriff of every other county to whom an execution is issued, and who has levied upon property sufficient to satisfy the same, is entitled to poundage, which he may demand from the plaintiff; but he cannot levy it of the property of the defendant. *Bolton v. Lawrence*, 9 Wend. 435.

V. Gaol liberties: (a) What is an escape from the gaol liberties for which the sheriff is liable.

76. The arrest of a debtor on a *ca. sa.*, and a subsequent discharge from the arrest by consent of the creditor, extinguishes the judgment. *Ransom v. Keyes*, 9 Cow. 128.

77. So the arrest on a *ca. sa.*, and discharge of one of several joint debtors by consent of the creditor, discharges and extinguishes the judgment as to all the debtors. *Ibid.*

78. Thus, where one of two joint judgment debtors was arrested on a *ca. sa.*, and gave bonds for the limits, and escaped, and the sheriff was sued for the escape, and then the other debtor was arrested on an *alias ca. sa.*, and on paying part was discharged by consent of one of the creditors, pending the escape suit; *held*, that the whole judgment was extinguished; that this formed a valid defence to the action for the escape, which the sheriff should have pleaded,

(the discharge being in season for his doing this;) and his neglect to defend on this ground was in his own wrong, and though he had suffered a recovery and paid the money in the action for the escape, he could not collect the amount paid by him upon the limit bond of the defendant who had escaped. *Ibid.*

79. Where a sheriff, sued for an escape, waives a defence known to him, he acts at his peril; and though the parties to the limit bond have notice of the suit, they are not liable. *Ibid.*

80. A bond for the limits, given by a defendant who had been charged in execution, and to whom the plaintiff had previously given permission to go at large beyond the gaol liberties, does not revive the judgment, so that an action can be maintained against the sheriff for an escape. *Poucher v. Holley*, 3 Wend. 184.

81. A voluntary discharge by a creditor of his debtor from the limits discharges the judgment and debt, although such was not the intention of the creditor. *Ibid.*

82. In an action against a sheriff for the escape of a prisoner in execution from the limits, a *satisfaction piece* duly acknowledged and filed, but no entry of satisfaction made on the record, is no defence to the sheriff, if it be shown by the plaintiff that the satisfaction piece is a forgery. *Lownds v. Remsen*, 7 Wend. 35.

83. A suit against a sheriff for the escape of a prisoner in execution is an election by the plaintiff to consider the defendant out of custody; from the commencement of such suit, the defendant in execution ceases, in judgment of law, to be in custody of the sheriff, and may depart from the gaol liberties with impunity; and until again charged in execution, an action for an escape will not lie. *Broton v. Littlefield*, 7 Wend. 454.

84. Under the plea of *nil debet* to an action of debt for an escape, any matter in discharge of the action may be given in evidence, as, for instance, that at the time of the alleged escape the party in execution was not a lawful prisoner, in the custody of the sheriff. *Ibid.*

85. The delivery of a writ to a messenger to carry to a coroner, to be served on a sheriff in a suit for the escape of a prisoner from the limits, is the commencement of the suit; and if at that moment the prisoner is off the limits, the plaintiff is entitled to recover for the escape. *Van Hoesen v. Holley*, 9 Wend. 309.

86. In such case, the writ, in judgment of law, is not issued until delivered to the messenger, and thus put in motion on its way to the coroner, although previous to its delivery to the messenger, the attorney had filled out the writ and taken it with him, with the intention to deliver or send it to a coroner, in case he found the prisoner of the limits. *Ibid.*

87. Where a defendant in execution was seen off the limits on Sunday by his creditor, who held out inducements to him to remain off the limits until Monday, with the intent to fix the sheriff for the escape; *it was held*, that the device of the creditor was fraudulent, and that he was not entitled to maintain an action against the sheriff for the escape. *Van Warner v. Van Voast*, 10 Wend. 356.

(h) *Action for the escape, and evidence and defence therein.*

88. A plea or notice of voluntary return before suit, in an action of escape against a sheriff, is within the statute, (1 R. L. 426, sec. 23.) and must be supported by the defendant's affidavit that the escape was without his consent, privy, &c. *Gould v. Bruce*, 6 Cow. 601.

89. The judgment of a justice in a case cannot be questioned in a collateral action. Thus, if judgment be rendered against a sheriff for an escape, although it may be erroneous, it is conclusive (until reversed) against him, as also against the obligors of a bond for the limits, (provided due notice has been given to them of the pendency of the suit,) both as to the fact of escape, and as to the amount the sheriff has been damnified. *Riley v. Seymour*, 1 Wend. 143.

90. No particular time can be laid down as a rule for such notice, but it must afford a fair opportunity to interpose a defence. *Ibid.*

91. Where, however, a party does appear in season to make a defence, he cannot put himself on the ground that reasonable notice has not been given. *Ibid.*

92. In the case of a voluntary escape, although the prisoner return before suit brought against the sheriff, the escape is not *ipso facto* purged. But the plaintiff may, by some positive act, affirm the prisoner in custody at his suit. *Littlefield ad. Brown*, 1 Wend. 398.

93. A suit against the sheriff for an escape is an election on the part of the plaintiff to consider the prisoner out of custody, and though there be a subsequent recaption or return, (without the authority of the plaintiff,) the defendant is not a prisoner at the suit of the plaintiff, and he cannot recover against the sheriff for a subsequent escape. *Ibid.*

94. In an action of debt against a sheriff, for the escape of a prisoner in execution, the plaintiff is not entitled to recover interest on the debt or damages for which the prisoner was committed. *Ibid.*

95. The mere bringing of a suit against a sheriff for an alleged voluntary escape of a defendant in execution under a *ca. sa.* is a bar to an action for a subsequent escape of the same defendant from the custody of the sheriff. So *held*, by a majority of twelve to seven; Chancellor *Wahworth*, the president of the senate, and five others, being in the minority. *Brown v. Littlefield*, 11 Wend. 467.

96. An action does not lie against a sheriff for the escape of a prisoner in execution, arrested by his predecessor, and to whom a bond was given for the liberties, although the prisoner go at large off the liberties subsequently to the new sheriff's taking charge of the gaol of the county, if such prisoner has not been assigned by the old sheriff to the new sheriff. *Partridge et al. v. Westervelt*, 13 Wend. 500.

97. Whether the new sheriff would be liable for the escape of a prisoner in close confinement, happening after he takes charge of the gaol, and previously to an assignment? *Quære. Ibid.*

(c) *Sheriff's remedy over.*

98. A prisoner enjoying the gaol limits under a bond of surety, conditioned that he shall re-

main a true and lawful prisoner, was arrested on a charge of felony, and committed to close confinement, and while so confined broke the gaol and escaped; *held*, that the surety was not liable. *Bradford v. Consaulus*, 3 Cow. 128.

99. If the sheriff take a promissory note in satisfaction of a *ca. sa.*, and discharge the defendant, without the authority of the plaintiff, it is void as between the sheriff and the maker; and the plaintiff may sue the sheriff for an escape, or take a new execution. But if the plaintiff ratify the transaction, he may charge the sheriff as for money had and received, with interest on the amount from the return day of the *ca. sa.*, and then, *semble*, the note becomes valid as between the sheriff and the maker. *Armstrong v. Garrow*, 6 Cow. 465.

100. The recital of a *ca. sa.* in a bond for the gaol liberties is sufficient proof of it, in an action on the bond, though the bond recite that the *ca. sa.* issued on a judgment in debt, and the judgment in truth was in an action of *assumpsit*; *held*, that the variance was immaterial, the nature of the action being so, and its recital merely surplusage; and so it might be rejected. *Ransom v. Keyes*, 9 Cow. 128.

VI. *Change of sheriff, and its consequences.*

101. A sheriff, although the term of his office has expired, is authorized to perform the duties of sheriff, until served with the certificate of the clerk of the county that his successor has qualified and given security, &c. *Curtis v. Kimball et al.* 12 Wend. 375.

VII. *Sheriff's sale.*

102. A debtor, being in failing circumstances, and owing to five of his creditors \$7540, in separate and distinct debts, gave them a judgment bond, in which all their debts were included; and C., as their attorney, entered up the judgment, and issued an execution, upon which the real property of the debtor was advertised for sale by the sheriff. Three of the creditors attended the sale, in the absence of the other two, and agreed not to bid against each other, but to employ an agent to bid in the property, and to divide the profits of the purchase between them in proportion to their respective debts; and for this purpose they employed C. the attorney, who bid in the property for \$625, which was less than one-fifth of its cash value; and a few days thereafter the attorney sold the premises for \$3600, and divided the profits arising from the resale among the three creditors, to the exclusion of the other two; *held*, that the purchase by the attorney, as agent for three clients only, was fraudulent as against the other two, who were absent at the sheriff's sale. But as the resale was made to a *bona fide* purchaser, who had no notice of the fraud; also *held*, that both sales must stand; and that the three creditors who made the fraudulent purchase must account to the other two for their shares of the proceeds of the last sale, in proportion to the amount of their several interests in the judgment at the time of the sheriff's sale. *Hawley v. Cramer*, in the fourth circuit in equity, 4 Cow. 717.

103. An agreement between persons having

separate and distinct interests, not to bid against each other at a sheriff's sale, but to divide the profits of the purchase, is against public policy; and is a fraud upon other persons interested in the sale. *Ibid.*

104. It seems, that an attorney who issues an execution cannot become a purchaser at the sheriff's sale, either on his own account, or as the agent of a third person, without the consent, and against the interest of his client, and leaving the client's debt unsatisfied. *Ibid.*

105. Where the client himself is not prohibited from purchasing, the attorney may purchase, with his assent; and neither the defendant in the execution or a third person can object to the validity of such a purchase. *Ibid.*

106. A purchase made by a person standing in the situation of agent or trustee for the sale, however fair and honest it may have been, must be set aside on the application of the *cestui que trust*, or principal; if such application is made within a reasonable time. *Ibid.*

107. If the application is not made within a reasonable time, it will be considered as a waiver or abandonment of the right. *Ibid.*

108. What shall be deemed a reasonable time has not been settled by any fixed rule; and seems to depend upon the exercise of the sound discretion of the Court, under all the circumstances of each particular case. *Ibid.*

109. A person who is incapacitated from purchasing on his own account cannot purchase as the agent of a third person; neither can he become a purchaser through the intervention of another. *Ibid.*

110. Where the defendant has no title to land sold on a *f. fa.*, for which the sheriff has given a certificate of sale to the purchaser, and endorsed the sum bid on the *f. fa.*, relief will not be granted on motion, but the purchaser should go to a Court of equity. *Lansing v. Quackenbush*, 5 Cow. 38.

111. Intermediate a sheriff's sale of land on *f. fa.* and giving a deed, though the naked fee remain in the debtor, yet this is not an interest of any value; and so no consideration for a promise. *Van Alstine v. Wimple*, 5 Cow. 162.

112. After a sale of V.'s land on *f. fa.* to O. for \$42, and before the sheriff conveyed, W. agreed verbally with V. and O. to take the land of O., and give V. \$600, of which he paid \$200, and the sheriff conveyed to O., who conveyed to W., who afterwards sold part of the land for \$600, and acknowledged the agreement with V.; in *assumpsit* by V. against W. for the \$400 remaining unpaid, *held*, that the agreement was within the statute of frauds, and void, because not in writing, and also for want of consideration. *Ibid.*

113. The Supreme Court will not set aside a sale of land on *f. fa.*, and order a resale, on the ground that the plaintiff's agent bid less for it than he was instructed to bid by his principal. *Vandenburgh v. Briggs*, 7 Cow. 367.

114. Where one *f. fa.* is collected in part, a second must recite the first, and the proceedings under it. But the omission to do so is amendable. *M'Michael v. Knapp*, 7 Cow. 413.

115. A writ of error and bail within four

days after judgment is perfected supersedes execution, though it be levied; and if a writ of possession be executed, restitution will be awarded, and a judge may enlarge the time by order beyond the four days; in which case the Court will give relief by directing proceedings on the execution to stay, or granting such relief from the operation of the execution as the circumstances may require. *Jackson v. Schaubert*, 7 Cow. 417.

116. Where execution is executed, or its execution begun, and more than four days have elapsed from the time of perfecting the judgment, and there is no order to stay proceedings, the Court cannot relieve by ordering a writ of error to operate as a *supersedeas*. *Beckman v. Bemis*, 7 Cow. 418.

117. A party has four days after judgment, within which both to bring his writ of error and put in bail; and this shall supersede execution levied before either writ of error filed or bail put in. *Jackson v. Shaubert*, 7 Cow. 490.

118. Where a judgment was confessed by a party, after an injunction had been granted against him in Chancery, interdicting all conveyances, &c., but the time of the service of the *subpoena* did not appear, nor was actual notice given to the plaintiffs, to whom the judgment had been confessed, before it had been docketed; a sale under it was *held* valid, notwithstanding the *lis pendens*. *Jackson v. Roberts*, 1 Wend. 478.

119. A purchaser of lands at a sheriff's sale, under a judgment and execution, since the statutes requiring deeds to be recorded, will hold the same, although the defendant in the execution had, *previous to the judgment*, sold and conveyed the lands by deed; provided that the deed from the sheriff is recorded *previous* to the record of the deed from the debtor in the execution to his grantee, unless the purchaser at the sheriff's sale, at the time of his purchase, had notice of the previous deed. The case of *Jackson v. Post*, 9 Cow. 120, commented on and explained. *Tuttle v. Jackson*, 6 Wend. 213.

See EXECUTION.

VIII. Execution of convicts.

120. Where the execution of the sentence of a convict is respited by the governor, for the purpose of having the conviction reviewed by an appellate Court, it is the duty of the sheriff to execute the sentence of the Court on the day to which the execution is respited, unless the judgment be reversed or annulled, or a further respite be granted; it is not necessary in such a case, that the convict should be previously brought into Court by *habeas corpus*. *The People v. Enoch*, 13 Wend. 159.

SHIPS AND SEAMEN.

I. Owners of ships or vessels, and their liabilities.

II. Duty and authority of masters of ships.

III. Liability of masters,

IV. *Contract of charter party, and freightment: (a) When freight is due, and by whom it is to be paid; and of the lien of the goods for the freight; (b) Pro rata freight, and return of freight.*

V. *Seamen and wages.*

VI. *Ship's papers.*

VII. *Pilotage.*

I. *Owners of ships or vessels, and their liabilities.*

1. The plaintiffs loaned to the defendant, *Searle*, \$15,000, upon goods on board the brig *Ocean*, whereof S. was master, and received from all the defendants, a *respondentia* bond, as security for that loan. The vessel was bound from New York to Calcutta, and from thence back to New York, with liberty to touch at Madeira on the outward passage. By the first condition of the bond, the vessel was to proceed with all convenient speed on her voyage, which was to terminate within eighteen months; Second, she was to have on board during the whole voyage the stipulated amount of property; Third, the voyage was to be performed *without deviation*; and by a further condition, the defendants were to pay the \$15,000 on the return of the vessel, or at the expiration of eighteen months from the date of the bond, whichever should first happen. *Niagara Insurance Company v. Searle et al.* 2 Hall, 22.

2. The time stipulated in the bond being expired, and the vessel not having returned, the plaintiffs brought an action of debt on the bond, to which the defendants (with the exception of *Searle*, who was not arrested) *pleaded*, that after the brig sailed on her voyage, and before she arrived at Calcutta, the plaintiffs, in consideration of an additional premium of \$300, agreed with the defendants, as *sureties* for *Searle*, that the vessel should have liberty to proceed from Madeira to the Canaries, and a port or ports in South America, India, or elsewhere, and from thence to a port in the United States; that the vessel proceeded from Madeira *on the voyage last mentioned*, was then prosecuting it with all reasonable despatch, and had not returned to the United States at the time the action was commenced. *Ibid.*

3. Upon *demurrer* to these pleas, it was held, that the new agreement made with the sureties did not vary or alter the terms of the original contract, any further than to preclude the plaintiffs from taking any advantage of a *deviation* from the voyage prescribed in the condition of the bond; that it authorized a change on the course of the voyage, but did not extend the time for its performance; and the plaintiffs had judgment on the demurrer. *Ibid.*

4. As the new contract was not under seal, *quære*, whether the terms of the bond could be varied by the parol agreement? And if so, whether the pleas themselves are good? *Ibid.*

5. M. and B. sold stores for a ship to F. and S., the ship's husbands, (on a credit of four months,) who with W. and J. were owners of the ship. M. and B., in their original entry of the account, charged these stores to all the owners by name. A few days after the sale,

they rendered two bills to F. and S., charging them only; and about two months after the sale took the sole note of F. and S., at an extended credit of three months, giving a receipt for the note as in full for the stores. This note not being paid, and F. and S. becoming insolvent; held, that the other owners were not thereby discharged, but were liable in *assumpsit* for the original consideration. *Muldon v. Whitlock*, 1 Cow. 290.

6. But if in consequence of such a receipt being given, the other owners had allowed the note in account with the ship's husbands, or were otherwise injured in their dealings with them upon the credit of the receipt; this would have worked their discharge. *Ibid.*

7. It seems, that such prejudice should be shown affirmatively by the defendants, and will not be intended. *Ibid.*

8. Where an owner is on board, and exclusively attending to the shipment of the cargo, he is not bound by the master's contract. *Ward v. Green*, 6 Cow. 173.

9. But to relieve himself from liability, he must show the fact, that he was exclusively attending to the shipment of the cargo. And he must show the same thing, though he was on board as supercargo. *Ibid.*

10. It is not enough that one of the owners is on board as supercargo; and where this was the case, and the master of a general ship receipted dollars for transportation, without the knowledge of the owners, and which were not put in the freight list; the money being stolen on the voyage; held, that the owners were liable. *Ibid.*

11. What shall be deemed a general ship. *Ibid.*

12. The owner of a sloop contracted with another, that he should take and use the sloop in the freighting business; out of the avails to pay the owners a certain sum of money; and till that was paid, the legal title to remain in the vendors; and when paid, to pass to the vendee. The vendee took possession, and used the sloop accordingly; held, that the vendors were not, after this, accountable as owners for the negligence of the vendee, who sailed the sloop as master. *Thorn v. Hicks*, 7 Cow. 697.

13. Where an exclusive credit is given to the master, the owners are not liable. *Ibid.*

14. A mortgagee of a vessel out of possession is not liable as owner on the contract, or for the negligence of the mortgagor who uses the vessel as master. *Ibid.*

15. The registry of a vessel at the custom house, although accompanied by the oath required by law of the person in whose name the registration is made, is not *conclusive* evidence that the ownership of such vessel is in him. The registry does not determine the ownership of the vessel, its object being merely to show her national character, and to secure the advantage belonging to vessels of the United States. *Ring and M'Namara v. Franklin*, 2 Hall, 1.

16. The mortgagee of a vessel out of possession is not liable for repairs, unless they are made upon his credit, or by a special contract with him; and parol evidence is admissible to

show that the bill of sale whereby the vessel is conveyed, although *absolute* upon its face, was, nevertheless, intended as a mortgage. The agreement which operates as a defeasance need not be under seal; nor is it necessary that it should be made or executed simultaneously with the deed, in order to give it validity. *Ibid.*

17. A mortgagee of a vessel, out of possession at the time supplies for her are furnished, but who takes possession subsequently, is not liable for the supplies furnished before his possession commenced. *Birkbeck v. Tucker et al.* 2 Hall, 121.

18. Although the bill of sale, or instrument by which the mortgagee exhibits his title, be absolute upon its face, he may show, nevertheless, by parol evidence, what the real nature of his interest was; and it is not necessary that the defeasance (or evidence showing the apparently absolute interest to be a mortgage) should be in writing. *Ibid.*

19. Where an action was brought against the defendants *jointly*, and all of them, except one, admitted their liability; it was held, that the plaintiff was not entitled to recover against those who admitted their liability, without convicting him also. *Ibid.*

20. Notice was given to the defendant, who contested the plaintiff's right to recover against him, to produce certain books relative to the vessel, which were kept by the ship's husband, the other defendants admitting that they were in his possession. Held, that their admissions would not affect the defendant who made the defence, but that the plaintiff was bound to prove the books to be in his hands, before parol evidence of their contents could be offered. *Ibid.*

21. P., one of the defendants, agreed with R., another of the defendants, in the month of July, 1825, to purchase one-fourth part of a ship of him, which had performed but one voyage, at one-fourth of her original cost, and to come in as a part owner from the beginning. He was accordingly debited by R. with that amount, and credited with one-fourth part of the profits of the voyage. Held, that this purchase did not constitute P. such an owner from the beginning as to make him liable for bills of the ship which had accrued before the voyage was performed. *Higgins v. Packard et al.* 2 Hall, 226.

22. *Quære*, as to the effect of taking the promissory note of one of several joint owners, for a debt of the whole? *Ibid.*

23. *Quære*, also, as to the admissibility of the books of one of the joint owners, in an action by a third person, for the purpose of showing that another of the joint owners had fulfilled all his stipulations with such owner, and had paid for his proportion of the vessel? *Ibid.*

24. In an action of *assumpsit* against several joint owners of a ship, for work and labour performed in rigging her, it appeared that the plaintiff had taken the promissory note of one of the joint owners, payable sixty days after date, for the amount of his bill, and given him a receipt in full of all demands, up to a certain date. The judge charged the jury, that the

taking of the note, under the circumstances of the case, was not a discharge of the plaintiff's claims against the other, unless it was taken in fact as payment, and with the intent to discharge the other owners. Held, that this charge was correct in point of law. *Higgins v. Packard*, 2 Hall, 547.

II. Duty and authority of masters of ships.

25. The master of a vessel, when abroad, is the agent of the owners; and has power to make contracts, in relation to freight, which are binding upon the owners. *Ward v. Green*, 6 Cow. 173.

26. If it be the duty of the master, or supercargo, in behalf of the assured, to appear and put in a claim to a vessel insured, and improperly seized under pretence of carrying an illicit trade, (of which *quære*.) the omission of this duty may be excused by irregularity in the Court where the suit is pending; as where process of monition is returnable at one place, and the cause heard and the vessel condemned at another, unknown to the supercargo. *Francis v. The Ocean Insurance Company*, 6 Cow. 404.

27. The master of a vessel may collect the freight; but he has this right, not for his own benefit, but as agent of the owner. Hence the former has no lien on the cargo, as against the owner, by which to secure his general right to receive the freight, as master; but a payment of freight to the owner will discharge the goods, and is a complete defence against an action by the master for freight. *Ingersoll v. Van Bokkelen*, 7 Cow. 670.

28. A master of a ship has no lien upon the freight for his wages. *Van Bokkelen v. Ingersoll*, 5 Wend. 315.

29. It is not the duty of a ship's husband, as such, to insure a vessel; and neither he nor part owners who insure the interest of their co-owners in a vessel without express authority, can recover the premium paid by them. *Turner v. Burrows*, 8 Wend. 144.

30. Where goods are shipped at one port, consigned to particular individuals at another, and the vessel puts into an intermediate port in distress, where the master transfers the goods to another vessel, but instead of taking a bill of lading for their delivery to the original consignees, takes a bill for delivery to his own order, and by his directions the goods are delivered to a mercantile house different from the original consignees, who sell the same, the purchaser, notwithstanding that he pays a *bona fide* price for the goods, is liable for their value to the owner; the master with whom the goods were originally shipped having no authority to dispose of the goods either by himself or his agents. *Escrett v. Saltus*, 15 Wend. 474.

III. Liability of masters.

31. Both owner and master are severally liable for all supplies and advances made for the use of the vessel on the contract of the master, where there is no special agreement by which the credit is given to either exclusively. *Ingersoll v. Van Bokkelen*, 7 Cow. 670.

32. And this rule extends to supplies or ad-

vances made by consignees of the vessel as well as others. *Ibid.*

IV. *Contract of charter party and affreightment:*
(a) *When freight is due, and by whom it is to be paid; and of the lien of the goods for the freight.*

33. When the general owner of a vessel parts with his ownership and possession in the vessel to a charterer, the latter is considered owner, and the former has no lien for freight. *Clarkson v. Edes*, 4 Cow. 470.

34. Otherwise, where he does not part with the possession and control of the vessel. *Ibid.*

35. In the latter case, he may maintain an action for the freight, in the name of the master, on the bills of lading. *Ibid.*

36. Or he may enforce his claim by detaining the goods till payment, the law giving him a lien for the freight. *Ibid.*

37. Where the general owners agreed to freight and let a schooner to D. Edes, master, to proceed from New York to Havana, thence to Curacao, thence to Jacmel, and thence to New York; the owners covenanting that she should be tight, strong, well manned, victualled and apparelled during the voyage; that D. might load and discharge from on board, such cargo or cargoes, or parts thereof, in either of the ports or places as by them should be ordered; the schooner to proceed as soon as despatched by D. at either or any of the ports or places mentioned, direct, and without delay, to the next place, D. agreeing to deliver and receive the cargoes or parts thereof, at all the places alongside, and within reach of the vessels; to pay the owners at the rate of \$325 per month, at the end of every month, if in port, or on her arrival, (if required,) with all the port charges, except at New York; also, to advance what might be necessary for expenses, if wanted; sufficient room in the hold to be allowed for the provisions, wood, and water, and for storage of the cables; and on the vessel arriving at Havana, or any other port mentioned, if D. should request it of the master or commander, the vessel to return direct to New York, in which case the voyage to be deemed ended, as if she had visited all the ports; *held*, that the general owners did not, by this contract, part with the ownership and possession of the vessel to D., so as to preclude their lien for freight; and that they might sue the consignee for the freight on the bill of lading, in the name of the master; and that a payment to the charterer, with notice of the owner's claim, would not protect the consignee. *Ibid.*

38. Whether the general owner has parted with the ownership and possession to the charterer must be determined from the charter party. *Ibid.*

39. The master has a lien on the cargo and freight co-extensive with the advances made or liabilities incurred by him for the use of the ship. So of his claim for primage. *Ingersoll v. Van Bokkelen*, 7 Cow. 670.

40. Actual advances by him are not necessary to create a lien. It exists for mere liability without payment. *Ibid.*

41. And though the vessel earn freight on a

voyage directed by the pretended owner, but who is, in fact, a mere stranger and tortfeasor, from whom the vessel is taken, and the possession restored to the true owner by the decree of a Court of Admiralty; yet the true owner, especially if he claim and receive the freight, is bound to indemnify the master against his liability incurred on account of the vessel; and the master has a lien on the cargo and freight, which he may retain or control, to coerce the payment to him of the amount of such liability. *Ibid.*

42. And where the bailee of a part of the cargo, subject to such lien, which was placed with him by the master to keep in store for the latter, delivered it to the consignee by the direction of the owner, on the consignee's paying the freight to the owner; *held*, that such bailee of the master was liable to him in trover. *Ibid.*

43. Delivering goods for safe keeping by one who has a lien on them is not such a departing with the possession as destroys the lien. *Ibid.*

44. A right of lien in goods is such a special property in them as will support an action of trover even against one who converts them by the authority of the general owner. *Ibid.*

45. One to whom the master is liable for advances on account of the ship is, notwithstanding, a competent witness for the master in an action by him to enforce a lien in his favour on account of such liability. The objection goes merely to the credibility of the witness. *Ibid.*

46. Where a vessel was let by a charter party to perform several consecutive voyages, in the course of which she performed an intermediate voyage, at the request of the supercargo, who was the agent of the freighter, for which the owner was paid by the supercargo whilst abroad; *it was held*, in an action of covenant by the owner against the freighter, the voyages specified in the charter party having been performed, that the fact of the additional voyage did not show the substitution of a new contract, and that, therefore, the owner was not entitled to recover on the covenant in the charter party, he not claiming any thing for the additional voyage in the action brought by him. *Solomon v. Higgins*, 6 Wend. 425.

47. Where a charter party was entered into, whereby A. let a schooner to B. and C. for the transportation of stone, for the term of six months, the affreighters engaging to pay for the vessel at the rate of \$300 per month, for six months, or in the same proportion for whatever time she might be so employed, and at the expiration of four months an end was put to the contract by a stipulation between the owner of the vessel and one of the affreighters; *it was held*, that such act of one of the affreighters was obligatory upon both; that a *pro rata* compensation was recoverable by the owner of the vessel under a special count upon the contract, alleging the employment of the vessel from the time stipulated in the contract until the day when it was dissolved by mutual consent, or that the compensation might be claimed under a general count of *indebitatus assumpsit*. *Wheeler v. Curtis et al.* 11 Wend. 653.

48. The owner being bound by the terms of the

contract to keep the vessel manned and in good repair during the time, &c., and to deduct for damages while detained for repairs, &c.; *it was held*, that the plaintiff might recover under a count of *indebitatus assumpsit* for freight due and payable for the transportation of the stone, and was not obliged to resort to an *indebitatus assumpsit* for the hire of the vessel. *Ibid.*

49. Where, in such case, the defendants pleaded that the vessel was capable of carrying one hundred and fifty tons of stone at each trip, but that the plaintiff, refusing to carry a full freight or cargo, carried only one hundred and seven tons, and thus deprived the defendants of the whole tonnage of the vessel; *it was held*, that a replication that the vessel carried at each trip as full a freight or cargo as was safe and prudent, and that the defendants had the enjoyment of the whole tonnage as set forth in the declaration, was a good and perfect answer to the plea. *Ibid.*

50. Where a consignor of goods agrees that goods may be shipped on the deck of a vessel, and fraudulently obtains a clean bill of lading, such fraud may be shown, notwithstanding the legal import of the bill that the goods are stowed under deck. *Creery v. Holly*, 14 Wend. 226.

51. In an action on a charter party to recover the price agreed upon for the use of the vessel, the defendant may give evidence of fraudulent representations by the plaintiff as to the burden or capacity of the vessel, in diminution or satisfaction of the plaintiff's demand. Such evidence does not infringe the rule of law that a written contract cannot be varied or enlarged by parol proof. *Johnson v. Miln*, 14 Wend. 195.

52. The lien of the master of a vessel on a cargo, for freight, average, and charges, may be asserted by his factor or agent; but if the factor sells the goods, and the master had no authority to direct the sale, the purchaser of the goods cannot set up the lien, and require it to be discharged before suit against him for the goods. *Everett v. Saksus*, 15 Wend. 474.

53. A party who, upon being called upon to account for goods which have come to his hands, sets up title in himself independent of a lien, cannot afterwards, when an action is brought against him, defeat a recovery by setting up at the trial a right to detain the goods, on the ground of a lien. *Ibid.*

54. In an action of covenant on a charter party, the declaration set forth, that the defendant had stipulated that a vessel, of which he was the owner, should perform a voyage from New York to Omoa and back, for the plaintiff; that all the covenants, on the part of the plaintiff, were performed; but that said vessel, instead of proceeding to Omoa, put into the port of Norfolk, and that the defendant did not despatch her thence, but neglected and refused so to do, contrary to the effect of the charter party. *Wheelwright v. Beers*, 2 Hall, 382.

55. The defendant pleaded six special pleas in bar. The first and second set forth in substance that the vessel, while proceeding on her voyage, was so much damaged by the perils of the seas that she put into Norfolk, as a port of

necessity, where the plaintiff took possession of the cargo, and of the same ever afterwards retained possession. *Ibid.*

56. The fourth plea, after admitting the charter party, the sailing of the vessel, and that she put into Norfolk, &c., alleged that said vessel, while prosecuting her voyage, was so much damaged by the perils of the seas that it became necessary that she should put into the nearest port, and that Norfolk was accordingly selected as a port of necessity. That while there, the said vessel was examined to ascertain what repairs were requisite to enable her to proceed on her voyage, when it was found necessary, for the benefit of all concerned, that she should be sold; that she was sold accordingly, "and so, and not otherwise, the said voyage was, by the mere perils of the sea, broken up." *Ibid.*

57. The fifth and sixth pleas alleged that the plaintiff ought not to maintain his action, because the cargo mentioned in the declaration belonged to, and was laden on board of said vessel, for one John Living, for whom said charter party was made by the defendant, as his agent, as appeared by the *oyer thereof*. *Ibid.*

58. Upon demurrer to these pleas, the plaintiff had judgment upon the first, second, fifth, and sixth, and the defendant upon the fourth. *Ibid.*

59. The declaration in this case (the same mentioned in the preceding one) set forth a charter party, whereby the defendant stipulated that the brig Champion, of which he was the owner, should perform a voyage from New York to Omoa and back, for the plaintiff. It then averred a performance of all the covenants on the part of the plaintiff, and assigned, as a breach of the defendant's covenant, that the vessel did not proceed to Omoa, but put into Norfolk; that the defendant did not despatch her thence, but neglected and refused so to do, contrary to the effect of the charter party. *Ibid.* 2 Hall, 291.

60. The defendant interposed a special plea, admitting that it became necessary that she should put into the nearest port, and that she accordingly put into Norfolk, as a port of necessity. That while there, she was examined for the purpose of ascertaining what repairs were requisite to enable her to proceed on the voyage, when it was found necessary that she should be sold for the benefit of all concerned; that she was sold accordingly, and so, and not otherwise, the voyage aforesaid was, by the mere perils of the sea, broken up and prevented. "*abque hoc*, that the said vessel ought to have proceeded on her said voyage," &c. *Ibid.*

61. To this plea the plaintiff replied, admitting the injury to the vessel, the putting into Norfolk, and the breaking up of the voyage there, but averred that the voyage was not broken up by the mere perils of the sea, &c.; "*abque hoc*, that the vessel was examined at Norfolk to ascertain the repairs necessary to enable her to proceed on her voyage," &c., as alleged by the defendant, and concluding to the country; *held*, that the issue joined by these pleadings was upon the fact stated in the inducement to the plea, whether the voyage in question was broken up by the mere perils of

the sea; and that it involved, necessarily, an inquiry as to the seaworthiness of the vessel; the special traverse in the plea, and in the replication, being considered immaterial and informal. *Ibid.*

62. The jury having returned a verdict in favour of the plaintiff upon this issue, it was also held, that the rule of damages to be adopted was the difference between the prime cost of the cargo at New York, and the net amount for which the goods were actually sold after the voyage was broken up, no notice being taken of the loss of the market at Omca. *Ibid.*

63. The defendant chartered a vessel of the plaintiff, for a voyage from New York to Gibraltar, thence to Santa Cruz, in the island of Teneriffe, thence to Havana, and from Havana back to New York. In an action upon the charter party, the declaration avowed a general performance of the voyage described in it, and also a specific and particular performance, alleging that the vessel proceeded to Gibraltar and to Vera Cruz, thence to Havana, &c. *Higgins v. Solomon*, 3 Hall, 482.

64. At the trial, it appeared that the defendant put a supercargo on board the vessel, who acted as his agent during the voyage. That the vessel arrived at Santa Cruz, as stated in the declaration; but instead of proceeding directly to Havana from Vera Cruz, she first went to *Orataca*, (a port on the west side of Teneriffe,) at the request of the supercargo, and for the benefit of the defendant, and from thence to Havana. *Ibid.*

65. Held, that the declaration was supported substantially by this proof, and that there was no variance to furnish ground for a nonsuit. Held also, that the declarations of the supercargo accompanying his acts might be given in evidence as part of the *res gestæ*, he being the agent of the defendant. *Ibid.*

(b) *Pro rata freight, and return of freight.*

66. Where a ship is disabled from prosecuting her voyage by the perils of the sea, and puts into an intermediate port, and the goods are received there by their owner, he is liable for freight *pro rata itineris*. *Welch v. Hicks*, 6 Cow. 504.

67. But in such a case, where the master, without sufficient cause, refuses to repair his ship and send on the goods, and to procure other vessels for the purpose, the owner may immediately demand his goods, and shall be discharged from freight both full and *pro rata*. *Ibid.*

68. To entitle to *pro rata* freight, the acceptance must be voluntary. *Ibid.*

69. And where the master, having thus put into an intermediate port, at first refused to repair and proceed, and to procure other vessels and send on the goods, though one might have been done; and the owner negotiated several days with him, in order to induce him to do the one or the other; and at last the master made an offer to repair and proceed, under circumstances calculated to excite doubts of his sincerity; whereupon the owner demanded and received the goods, and transported them in vessels of his own procuring; in an action for

freight; held, that it should have been left to the jury to say whether the proposition to repair, &c., was made *bona fide*, and whether the acceptance was voluntary, so as to entitle the ship owner to *pro rata* freight. *Ibid.*

V. *Seamen; hiring and wages.*

70. Wages cannot in general be recovered by a seaman where no freight has been earned, and there is no fault of the master or owners occasioning the failure. *Van Buren v. Wilson*, 9 Cow. 158.

71. It is not sufficient to entitle seamen to wages, that the freight be lost without their fault. It must be owing to the fraud, or other wrongful act, or some fault of the master or owner; or at least, some act or omission on the part of the master or owner, over which the seamen can have no possible control. *Ibid.*

72. The defendant shipped the plaintiff, a seaman, on a voyage from New York to Newry in Ireland, and thence back to a port in the United States; and the vessel was libelled in the Irish admiralty by one pretending to be owner, and the crew turned ashore, and discharged by the captain. The vessel was detained more than a year, and was finally restored; but, in the mean time, had become so much deteriorated as to be unworthy of repair, and was abandoned in Ireland to the underwriters, and never returned to the United States. Held, that this was not the exercise of that superior force over the vessel, which should exempt the owners from liability to pay the plaintiff his wages, or damages for discharging him from the return voyage; and held, also, that the master and owners were not entirely free from fault, that they were bound to understand and risk their title; or, if it was contested in a mere civil proceeding, to take effectual means for liberating it, if possible, on security *pendente lite*; so as to prosecute the voyage, and enable the vessel to earn freight. *Ibid.*

73. An action will not lie at the suit of a seaman against the owners, under the act of Congress. (17 Cong. sess. 2, ch. 62, s. 3.) And see *Ogden v. Orr*, 12 Johns. 143, S. P. *Ibid.*

74. A seaman, charged with disobedience of orders and mutinous conduct, was voluntarily discharged from the ship by the captain, who expressed regret for the difficulties which had occurred, and promised to pay the seaman his wages. *Austin v. Dewey*, 1 Hall, 238.

75. In an action brought by the latter against the master; it was held, that the captain's promise operated as a waiver of any forfeiture of wages by the seaman, for disobedience of orders during the voyage. *Ibid.*

VI. *Skip's papers.*

76. By a statute of England, a certain amount of repairs in a foreign port takes away the national character of the vessel. Held, that repairs being made to less than that amount did not render it necessary to sail with evidence of the true amount of repairs, as part of the ship's papers. *Francis v. Ocean Insurance Company*, 6 Cow. 404.

VII. Pilotage.

77. A vessel of 100 tons burden and upwards, passing through Hurlgate, near the city of New York, is bound to pay half pilotage, although the master navigating her declines the services of a pilot. *Nickerson v. Mason*, 13 Wend. 64.

SLANDER.

- (a) *For what words an action for slander lies;*
(b) *Action and evidence.*

(a) *For what words an action for slander lies.*

1. An action of slander lies for words not actionable in themselves; in consequence of which, a marriage contract, between the plaintiff and another, was violated by the latter; though the plaintiff had a remedy against the latter for a breach of the contract. *Moody v. Baker*, 5 Cow. 351.

2. It seems, that recovering satisfaction for the damage occasioned by the slander would be a bar to an action for breach of the marriage contract. *Ibid.*

3. In such an action, a conversation between the one who contracted marriage with the plaintiff, and a third person, it not being offered to support the testimony of the former, who had been sworn as a witness, was held not admissible in evidence. *Ibid.*

4. What shall be considered proof of the special damage charged in such a case. *Ibid.*

5. To say of a man who was witness, he handed papers to a juror, to influence the jury, or to influence and bribe the jury, is slanderous, as amounting to a charge of embracery. *Gibbs v. Devey*, 5 Cow. 503.

6. Embracery is an attempt by either party, or a stranger, to corrupt or influence a jury, or to incline them to favour one side by gifts or promises, threats or persuasions, or by instructing them in the cause, or any other way, except by opening and enforcing the evidence by counsel at the trial, whether the jurors give a verdict or not, and whether the verdict be true or false. *Ibid.*

7. To render words actionable, they need not be stated with the same certainty as in an indictment. If the words stated import a crime in their natural and ordinary signification, it is enough. *Ibid.*

8. Where one interrupted another who was giving his testimony, as a witness, before a justice; required the justice to be particular in keeping minutes of the testimony, afterwards demanded the minutes of the justice, and said he wanted them to prosecute the witness for perjury; and on another occasion said the witness swore false, or to what was not true; and that he thought he should prosecute him for perjury; held, that these words were actionable, as imputing the crime of perjury. *Fox v. Vanderbeck*, 5 Cow. 513.

9. The witness brought an action for the above words; and declared in his first count, that the defendant said, "You are perjured,

and I will put you into the state prison;" in the second, "He has sworn false, and perjured himself; and I will put him into the state prison;" in another, "He swore to an absolute falsehood; and has perjured himself;" held, that the proof did not support either of these counts. *Ibid.*

10. To say of one, "He has been with a sow;" holden legal slander, the declaration averring, that the defendant intended to charge the plaintiff with the crime against nature. *Wolcott v. Goodrich*, 5 Cow. 714.

11. Words charging the plaintiff with being the father of a bastard child by his sister-in-law, of which she was pregnant, and that he wished the defendant to make away with it, are actionable in themselves, as importing a wish that the defendant should destroy the child as soon as born. It imports that the plaintiff applied to him to commit murder. *Demarest v. Haring*, 6 Cow. 76.

12. To be actionable in themselves, words must impute some act constituting a crime or misdemeanour, for which corporal punishment may be inflicted in a temporal Court. *Ibid.*

13. It is a high misdemeanour for one person to apply to another, and solicit him to commit murder. *Ibid.*

14. Words not actionable in themselves become so by being spoken of persons in a particular college or profession; and, *semble*, in any lawful employment by which they may gain a livelihood. *Ibid.*

15. Words imputing incontinency to a clergyman are within this rule. *Ibid.*

16. Where words may be understood in two different senses, one as imputing a crime, and the other not, it is proper to submit the question how they were understood to the jury. *Ibid.*

17. To say to a merchant, that a debt will be lost because he is unable to pay it, is actionable. *Mott v. Comstock*, 7 Cow. 654.

18. Words charging a witness with perjury, uttered by a party or his counsel in the course of a trial, may or may not be actionable, accordingly as they were or were not spoken maliciously, were or were not pertinent to the issue; as there was or was not colour for making the imputation; or as they were or were not spoken with a design to slander the witness, &c. *Ring v. Wheeler*, 7 Cow. 725.

19. The privilege of a party is the same on such an occasion as that of counsel. And if either of them speak slanderous words of a witness or party, imperitently and without proper cause, an action of slander lies. *Ibid.*

20. A declaration, therefore, charging an imputation of perjury to have been made in addressing referees by a party upon the plaintiff, a witness in the cause against the party, and that it was made falsely and maliciously, the verdict being for the plaintiff, is good on motion in arrest of judgment. *Ibid.*

21. On a motion in arrest, for defects in a declaration, the Court cannot look out of the record, except for the purpose of seeing whether the verdict may not be applied to, and a judgment rendered upon good counts, though some are bad. *Ibid.*

22. For this purpose only can the judge's notes at the trial be used. *Ibid.*

23. The prosecutor stated the crime and its circumstances, before the prosecution, to a constable confidentially, informing him that he should prosecute, and wished him to serve the process. *Held*, that this was slander, and not excused by the circumstances. *Burlingame v. Burlingame*, 8 Cow. 141.

24. He also, after the examination before the justice, and acquittal of the accused, repeated his testimony before the justice, and urged its truth to several persons who were present at the examination, insisting that the crime charged had been committed. *Held*, slander; and not excusable because spoken to persons so present. *Ibid.*

25. Words spoken by the defendant, in the presence of the magistrate, in the course of a proceeding upon a criminal complaint which had been made by him against the plaintiff, averring the truth of his complaint, are not actionable, if they were spoken under such circumstances that the defendant had reason to believe, and did in good faith believe, that it was necessary for him then to repeat the charge contained in his complaint. *Allen v. Crofoot*, 2 Wend. 515.

26. An action of slander may be brought for the charge of a crime, though not couched in direct and positive terms, and it may be as effectually made by way of interrogation as by an affirmative allegation. *Gorham v. Ives*, 2 Wend. 534.

27. The only inquiry is, whether, according to the natural and fair construction of the language used by the defendant, (taken in connexion with the preliminary circumstances stated by way of colloquium,) the persons in whose presence and hearing the language was used had a right to believe that it was the intention of the defendant to charge the plaintiff with the commission of a crime. *Ibid.*

28. A defendant, who has couched his slander in ambiguous terms, in the hope of blasting the reputation of his neighbour, without incurring legal responsibility, is not entitled to an indulgent construction of his words, either from the Court or the jury. *Gibson v. Williams*, 4 Wend. 320.

29. Slander will not lie for charging a witness with perjury whilst testifying before arbitrators, if, after the oath is administered, new parties are added to the arbitration, and new matters in controversy are submitted to be passed upon, the charge being made in reference to what is said by the witness after such addition of parties and matters in controversy. *Bullock v. Koon*, 4 Wend. 531.

30. Where words are spoken, not of a trader or manufacturer, but of the quality of articles manufactured or dealt in by him, they are not actionable *per se*, unless they import that the plaintiff is guilty of a deceit or malpractice in the making or vending, or of a want of skill in the manufacturing of the articles. *Tobias v. Harland*, 4 Wend. 537.

31. Slander will lie for the speaking of words imputing insolvency to any one to whom credit

is important in the prosecution of his business. *Ostrom v. Calkins*, 5 Wend. 263.

32. Words spoken of a man, and charging him with keeping *false books of account*, are not actionable, unless his business necessarily leads to dealing on credit, and to whose business keeping books is incident; accordingly, *it was held*, that slander will not lie for saying of a farmer, or of a sawyer of lumber and dealer therein, "he keeps false books of accounts." *Rathbun v. Emigh*, 6 Wend. 407.

33. Slander will not lie for words spoken of a person in the discharge of *official duties*, if the office has *ceased* at the time of the speaking of the words. *Forward v. Adams*, 7 Wend. 204.

34. In slander for charging the plaintiff with having sworn false, if the defendant intends to justify under a notice subjoined to his plea, he must give notice that he will prove not only that the defendant swore false, but that he swore wilfully and corruptly false. *Mitchell v. Borden*, 8 Wend. 570.

35. Slander lies for saying of another, "he has sworn falsely, and I will attend to the grand jury respecting it," without a colloquium showing the speaking of the words to refer to proceedings in which perjury could have been committed. *Gilman v. Lowell*, 8 Wend. 573.

36. A charge of false swearing is actionable, where it necessarily conveys to the mind of the hearer an imputation of perjury; otherwise, not. *Sherwood v. Chase*, 11 Wend. 38.

37. In order, therefore, to sustain an action for a charge of false swearing, the words spoken must have reference to a judicial Court of proceeding. *Ibid.*

38. Words charging a party with swearing false, in an affidavit made to obtain a warrant from a justice, are actionable, if the affidavit contain any material fact proper to be submitted to the justice on such application, although on *certiorari* the affidavit would not be held sufficient to justify the issuing of the warrant. *Dayton v. Rockwell*, 11 Wend. 140.

39. A female charged with being a prostitute may maintain an action for the slander, provided she can prove special damage; and any damage, however slight, is sufficient to sustain the action. Thus an allegation that in consequence of the speaking of the words, the plaintiff became dejected in mind and enfeebled in body, so as to be prevented from attending to her ordinary business; *was held*, upon a demurrer to the declaration, a sufficient averment of special damage to support the action. *Bradt v. Twissley*, 13 Wend. 253.

40. Slander will not lie against a person called on for the payment of a note, alleged to have been signed by him as a surety, for the speaking of words denying his signature, and that he ever gave authority to another to affix his name to the note. *Andrews v. Woodmansee*, 15 Wend. 232.

41. An innuendo, that by the speaking of such words the defendant meant to impute the crime of forgery to the maker, will not help the case. *Ibid.*

42. *It seems*, however, that where words have a covert meaning, being spoken in ironical,

oblique, or ambiguous terms, that a declaration in such case, containing an averment that the words were spoken with the intent to charge a crime, would be good. *Ibid.*

43. It is well settled, that in an action of slander for words not actionable *per se*, the plaintiff cannot recover, unless he shows special damage as the consequence of the words. And *quære*, whether words spoken by a public officer in his official capacity, concerning another, are ever actionable? And if so, whether the plaintiff must not show express malice, in order to maintain the action? *Harcourt v. Harrison*, 1 Hall, 474.

(b) *Action and evidence.*

44. In slander, where there is the least room for criticism on the import of the words, this should be determined by the jury, whose decision is conclusive. *Ex parte Bailey*, 2 Cow. 479.

45. Slander is in the nature of a penal action, and though the jury find for the defendant, against the weight of evidence, a new trial will not be granted. *Ibid.*

46. In slander, for charging plaintiff with felony, evidence of his general character is admissible, in mitigation of damages under the general issue. *Paddock v. Salisbury*, 2 Cow. 811.

47. Otherwise, it seems, if a justification be pleaded. *Ibid.*

48. In slander, in penal actions, actions for a libel and other actions, vindictive in their nature, a new trial will not be granted merely because the verdict is against the weight of evidence. *Ibid.*

49. A count in slander, charging that the defendant uttered and published these words: "He (meaning the said I., the plaintiff) has been with a sow; and I (meaning the said C., the defendant) can prove it;" preceded and followed by a recital and averment that the words were intended to charge the plaintiff with the crime against nature, &c.; held, sufficient. *Goodrick v. Woolcott*, 3 Cow. 231.

50. Where words are of doubtful import, the jury are to find their meaning. *Ibid.*

51. The office of an innuendo is merely explanatory. It cannot enlarge the meaning of words beyond their natural signification. *Ibid.*

52. In slander, the defendant gave notice with his plea, that he would prove the words true; which plea he afterwards moved to withdraw, on an affidavit that the notice was given in good faith; motion refused, unless he would swear to the falsity of the notice. *Lent v. Butler*, 3 Cow. 370.

53. In slander, a new trial will not be granted for excessive damages, if there are no grounds to believe the jury were influenced by passion, prejudice, or partiality. *Moody v. Baker*, 5 Cow. 351.

54. In slander for charging the plaintiff with a specific offence, the defendant cannot show, in mitigation of damages or otherwise, that the charge was generally reported to be true. *Matson v. Buck*, 5 Cow. 499.

55. In slander, the words must be proved as laid; and it is not sufficient to prove equivalent words. Words to the same effect are not the same words. *Poz v. Vanderbeck*, 5 Cow. 513.

56. The plaintiff need not prove all the words on the record; but he must prove so much of them as will be sufficient to sustain his action. *Ibid.*

57. The words in which the slander is conveyed must be stated in the declaration, and substantially proved. *Ibid.*

58. In slander, on a motion in arrest of judgment, because the words are not actionable, they must be taken to have been proved as laid, and with the intention imputed by the declaration. *Demarest v. Haring*, 6 Cow. 76.

59. In slander, words are to be understood, by Courts and juries, according to their plain and natural import; according to the ideas they are calculated to convey to those to whom they are addressed. *Ibid.*

60. When doubts arise, the jury are to decide whether the words are used maliciously, and with a view to defame; this being a question of fact, to be collected from all the concomitant circumstances; and the Court are to determine whether such words, taken in the malicious sense imputed to them, can alone, or by the aid of the circumstances stated upon the record, form the legal basis of an action. *Ibid.*

61. Courts and juries will understand the words in the same way as other people would. *Ibid.*

62. *Semble*, that setting forth the plaintiff's character in slander, as that he is a clergyman; and then a slander affecting him in that character, is sufficient, without saying the slander was spoken of him in relation to that character. And *vid.* the cases cited by *Emmet* and *Oakley*, *arguendo*; last paragraph of their argument, S. P. *Ibid.*

63. In slander for charging the plaintiff with perjury, the defendant, in order to justify by proving the truth of the charge, must give evidence of the same strength as would be necessary to convict of perjury on a criminal prosecution. *Woodbeck v. Keller*, 6 Cow. 118.

64. Accordingly, one witness alone is not sufficient to sustain the justification. His testimony must, at least, be corroborated by independent circumstances. *Ibid.*

65. In neither case is it precisely accurate to say that the charge must be made out by two witnesses, swearing positively, or by circumstances equivalent to a second witness. If there be only one witness, circumstances strongly corroborative are enough; although not of themselves, and uncontradicted, sufficient to prove a fact. *Ibid.*

66. In an action of slander, there were four witnesses against two as to one fact; and the judge charged the jury not to believe the two. On moving for a new trial, upon the ground that the judge should have left the evidence to the jury; held, that he should have done so; but as it was plain from the case, that they ought to have come to that conclusion, a new trial should not, for that reason, be granted. *Ibid.*

67. A notice of justification in slander should be proved with great particularity. *Ibid.*

68. But the truth of the slander cannot be given in evidence under the general issue, in

mitigation of damages. *Root v. King*, 7 Cow. 613.

69. And circumstances tending to prove the truth are equally inadmissible. *Ibid.*

70. The general character of the plaintiff is, however, at issue in an action of slander, without regard to the pleadings or notice on the part of the defendant. *Ibid.*

71. But this means his character in the most general sense, not his character in relation to any foibles, failings, or vices which may derogate from a good general character. The question to the witness should be, what is the plaintiff's general character? The defendant cannot go beyond this in the first instance, though the plaintiff may call for the witness's grounds. *Ibid.*

72. A plea or notice of the truth in justification of a slander, if unsupported by evidence, is proper to be considered in aggravation of damages. *Ibid.*

73. The fifth count of a declaration in slander averred that the defendant said of the plaintiff, who was a merchant, speaking of him as a merchant, and of and concerning his state and circumstances, and a sum of money which he owed one H., "There is poor H.; it is hard for him to lose his debt;" innuendo, that the plaintiff was insolvent, and unable to pay the debts; and that H. would lose the debt in consequence of the plaintiff's insolvency. The verdict being general for the plaintiff, on this, among other counts admitted to be good, on motion in arrest, *held*, that the innuendo was warranted by the words connected with the colloquium and circumstances disclosed; and the jury having found in favour of the innuendo, such finding was conclusive. *Mott v. Comstock*, 7 Cow. 654.

74. In slander, the witnesses for the plaintiff, and one of the defendant's witnesses, swore that the words charged assistance in burning a gaol, and murdering a man in it; and the defendant's other witnesses, present at the same time, swore the charge was of simply aiding an escape. *Held*, that evidence of the plaintiff being generally suspected of the latter was inadmissible, either as corroborating the witnesses who swore to the latter words, or in mitigation of damages. *Cole v. Perry*, 8 Cow. 214.

75. In slander, a new trial will not be granted for excessive damages, unless they are so large as to afford evidence of partiality, prejudice, intemperance, or corruption in the jury. *Ibid.*

76. In slander, where the words are not actionable in themselves, but become so by extrinsic circumstances, these must be averred and proved. *Bullock v. Koon*, 9 Cow. 30.

77. The best evidence must be produced; and where the charge was of swearing false before arbitrators, and the submission appeared to have been by bonds; *held*, that they must be produced, and the submission could not be shown by parol. *Ibid.*

78. In such case, as on an indictment for perjury, enough must be shown to give the Court or magistrate administering the oath jurisdiction. Enough must be proved, also, to show materiality of the testimony. *Ibid.*

79. In an action of slander for words charg-

ing a party with false swearing before arbitrators, the evidence alleged to have been false must be shown to have been material. The test is not whether the witness believes his testimony to be material; but whether, if false, he can be indicted for perjury. *Ross ad. Rouse*, 1 Wend. 475.

80. In slander, though the words proved are equivalent to the words charged in the declaration, yet if they are not the same in substance, the action cannot be maintained. *Olmsted v. Miller*, 1 Wend. 506.

81. In an action of slander, proof of the bad character of the plaintiff subsequent to the speaking of the words is not admissible in evidence, in mitigation of damages; although the character offered to be proved is not of such a description that it could have been caused by a belief of the charge made by the defendant. *Douglass v. Thusey*, 2 Wend. 352.

82. Any words which in common acceptation imply a want of credit or responsibility, when spoken of a merchant, are actionable. *Sewall v. Catlin*, 3 Wend. 291.

83. A bank director is not justified in making, in the public streets, a communication to a co-director, affecting the credit or responsibility of a merchant, and there is nothing to show that such communication was intended to be confidential. *Ibid.*

84. Where, in the first count of a declaration in slander, it was alleged in the introductory part of it, that the plaintiff was a merchant, which was omitted in the second and third counts, but the words were alleged to have been spoken in another discourse of and concerning the plaintiff, "in his business of a merchant, and of and concerning his said books of account which he kept with his customers and others, as such merchant as aforesaid;" it was *held*, that the reference to the first count was sufficient to cure the defect. *Loomis v. Swick*, 3 Wend. 205.

85. In slander, where the words are spoken in a foreign language, the proper mode of declaring is to state the words in the foreign language, and to aver the signification of them in English, and that they were understood by those who heard them. *Wormouth et ux. v. Cramer et ux.* 3 Wend. 394.

86. In an action of slander, particular facts, which might form links in the chain of circumstantial evidence of the truth of the charge against the plaintiff, cannot be received, under the general issue, in mitigation of damages. *Ibid.*

87. A publication by the editors of a newspaper, affecting the character of a candidate for public office, is not a privileged communication, relieving the publishers from the necessity of proving the truth of the charges made, in order to shelter themselves from damages, and casting the *onus probandi* upon the party slandered of showing actual malice, or a knowledge of the falsity of the charge. *King et al. v. Root*, 4 Wend. 113.

88. Malice, which is the gist of the action of slander, need not be proved, but it will be implied if the charge be false. Legal malice differs from actual malice, or ill-will towards the individual, frequently given in evidence to enhance the damages. *Ibid.*

89. If a plaintiff has been injured in his character or feelings by an authorized publication, it is the duty of a jury to award him a full compensation in damages, without reference to any particular ill-will entertained against him by the defendant. *Ibid.*

90. The truth of the publication may be pleaded in bar of the action; but if the defence thus set up be not supported by proof, the defendant will not be allowed to show that the charge was made under a mistake; but if the defendant goes to trial on the general issue only, such testimony may safely be admitted, as it only goes to reduce the damages, by rebutting all presumption of actual malice. *Ibid.*

91. Evidence of the general character of the plaintiff, or of the opinions of others as to the truth of the charge, is inadmissible, if in the publication the defendants state what they publish as facts within their own knowledge, without reference to the opinions of others. *Ibid.*

92. In an action of slander, under the general issue, evidence that the defendant has been told by a third person, or of general reports, that the plaintiff was guilty of the imputed crime, is inadmissible. *Mapes v. Weeks*, 4 Wend. 659.

93. In slander, where the charge was felony, made in reference to a transaction innocent in itself, and so understood by several persons; *it was held*, that as it was fairly to be inferred that others were present at the time of speaking the words, and as the words were spoken in reference to a transaction the subject of felony, and no explanation accompanied the speaking, showing that the charge did not amount to felony, the action was maintainable. *Phillips v. Barber*, 7 Wend. 439.

94. Circumstances which disprove malice, but do not tend to establish the truth of the charge, may be given in evidence, in mitigation of damages: notwithstanding such proof, the plaintiff is entitled to recover. *Gilman v. Lowell*, 8 Wend. 573.

95. In slander, it is no defence, nor can it be given in evidence in mitigation of damages, that the defendant, at the time of speaking of the words, gave his author, and was, in fact, told by another what he uttered against the plaintiff. *Inman v. Foster*, 8 Wend. 602.

96. Nor can general reports of the truth of the charges be given in evidence in mitigation of damages, unless they be such as to have affected the general character of the plaintiff. *Ibid.*

97. Words spoken more than two years before suit brought may be given in evidence to show malice. *Ibid.*

98. Proof in support of the plaintiff's general character is admissible, where his reputation has been attacked on the trial by the defendant; otherwise, not. *Ibid.*

99. In an action of slander, the charge of forgery does not necessarily and conclusively mean a *felonious forgery*, punishable as such; if the plaintiff is charged with having been guilty of any forgery, which, if committed, would subject him to criminal punishment of any kind, the action lies. *Alexander v. Alexander*, 9 Wend. 141.

100. Thus, where there were general words charging forgery, and from the explanation of

the witnesses, it appeared that the defendant charged the plaintiff with forging his name to a petition to the Legislature, in relation to a lot of land to which the defendant claimed a pre-emptive right, by means of which the plaintiff, instead of the defendant, obtained the lot; *it was held*, that an action of slander might be maintained for speaking the words; for, if the charge was true, the plaintiff would be punishable as for a misdemeanour. *Ibid.*

101. Where words charging *false swearing* relate to a trial in a Court before a justice of the peace, in a civil cause, in which an oath was administered to the party complaining of the slander, *the judgment will not after verdict be arrested*, although it is not averred in the declaration that the justice had *jurisdiction* of the subject-matter of the suit, nor that the evidence was given upon a *point material*. *Sherwood v. Chace*, 11 Wend. 38.

102. Thus *it was held*, where the words were, "I cannot enjoy myself in a meeting (*i. e.* a religious meeting) with Sherwood, for he has *sworn false*, and I can prove it; and if you (addressing the bystanders) do not believe it, you can go to esquire Bassett's and see it, in a suit between A. B. plaintiff and C. D. defendant." *Ibid.*

103. In an action of slander, where the words are alleged to have been spoken charging perjury in reference to a particular transaction, as where the defendant is charged with having spoken words imputing perjury to the plaintiff, in giving testimony as a witness in a certain cause, the plaintiff is bound to prove the words as laid, and is not at liberty to give evidence of a general charge of perjury. *Aldrich v. Brown*, 11 Wend. 596.

104. In slander, where the plaintiff is charged with false swearing on the trial of a cause, and the words are not *per se* actionable, the plaintiff is bound to prove that the testimony given by him in reference to which the charge is made, was material to the point in issue, in the cause in which he was sworn as a witness. *Power v. Price*, 12 Wend. 500.

105. Where there is no dispute as to the facts sworn to, the question whether the testimony was or was not material to the point in issue, is a question of law. *Ibid.*

106. In an action of slander, it is no cause of nonsuit that all the actionable words laid in the declaration are not proved; it is enough that some be proved. *Purple v. Horton*, 13 Wend. 9.

107. It is not competent to a defendant, in mitigation of damages in an action of slander, to give evidence of facts and circumstances which induced him to suppose the charges true at the time they were made, if such facts and circumstances tend to prove the charges, or form a link in the chain of evidence to establish a justification; and he is not allowed to give such evidence, although he expressly disavows a justification, and fully admits the falsity of the charge. *Ibid.*

108. In slander, charging a party with perjury in testifying as a witness on the trial of a cause, the plaintiff is bound to show that the evidence charged to be false was *material to the issue*, to

prove or disprove which the witness was called. *Roberts v. Champlin*, 14 Wend. 120.

109. In an action of slander, no evidence can be given of any loss or injury sustained by the plaintiff, unless the same be specially stated in the declaration, and this, whether the special damage be the gist of the action, or whether the words be actionable *per se*. *Shipman v. Burrows*, 1 Hall, 399.

110. Where, therefore, under the allegation that, in consequence of the speaking of the slanderous words, "certain insurance companies in the city of New York refused to insure any vessel by him commanded," the plaintiff was permitted to prove that the New York Insurance Company refused to make such insurance; the evidence was held to have been improperly admitted. *Ibid*.

111. In this action, the plaintiff cannot give evidence of the fairness of his general character, until it is attacked by the defendants; and the fact that a justification has been pleaded makes no difference in the rule. *Ibid*.

112. Where the plaintiff, therefore, was allowed to give evidence of his general good character, after the defendant had gone through with his defence, without impeaching such general character; this evidence was also held to have been improperly admitted. *Ibid*.

SLAVES.

1. An agreement by a master with his slave that he may work out his freedom, by working and paying £80, though the slave leave his service, and actually come and pay a part of the money, and refuse to return on being ordered back by his master for default of paying the residue, does not amount to a manumission. *Smith v. Hoff*, 1 Cow. 127.

2. Such an agreement is conditional, and does not take effect till the whole consideration be paid. *Ibid*.

3. It seems, that such an agreement, though not in writing, is valid, and if performed will work a manumission. *Ibid*.

4. The purpose of a written manumission, &c., is to avoid being answerable for the future support of the slave. *Ibid*.

5. Evidence that a negro, being imprisoned in New York as a slave, claimed his freedom, and was liberated as a free man by the police of the city, is not admissible against the master. *Ibid*.

6. Whether the declarations of a negro are evidence for the master to prove the negro his slave, in an action to recover his price of the purchaser? *Quere*. It seems, they are. *Ibid*.

7. It seems, that at common law a slave could not contract matrimony; and his right to marry in this state depends upon the statute of February 17, 1809. (Sess. 32, ch. 44, sec. 2; 5 W. 450, 2 R. L. 201.) Hence the child of a slave could not inherit at common law. *Jackson v. Devey*, 5 Cow. 397.

8. At common law, a slave was not capable of taking lands either by descent or purchase. *Ibid*.

9. But by the resolutions and laws of this state, a slave might take lands granted to him for military services during the revolutionary war. *Ibid*.

10. The children of such a slave, though born of a slave, with whom he had contracted marriage before the statute of February 17, 1809, (sess. 32, ch. 44, sec. 2; 5 Wend. 450, 2 R. L. 201.) may inherit. *Ibid*.

11. That act was retrospective, and legalized all marriages and births of slaves before as well as after its passage. *Ibid*.

12. That a negro works for and is claimed by one as a slave, is *prima facie* evidence that he is a slave. *Trongott v. Byers*, 5 Cow. 480.

13. An agreement by the owner of a negro slave, that the slave shall work for another during his life, provided that if the vendee sell him within two years he shall pay the vendor one-half of the purchase money, is a sale of the slave, and though his term of slavery would be out in 1827, yet it passes all the interests of the owner. *Ibid*.

14. The owner of a slave who deserts his master, and works for another, need not give notice of his claim to entitle himself to an action for the slave's services. *Ibid*.

15. Evidence of advances made to a slave while wrongfully in the service of another, are not, however necessary they were, a matter of set-off against the owner in an action for his slave's services. *Ibid*.

16. A parol agreement with a slave to manumit him is void. *Ibid*.

17. D. owned a slave, which he agreed to manumit on six and a half years' faithful service. He then sold the slave to B., who manumitted the slave before that time had expired, without obtaining a certificate of the slave's ability to maintain himself, pursuant to the statute, (sess. 40, ch. 137, sec. 7.) and he being in fact unable to maintain himself at the time of manumission. The slave afterwards became chargeable to the town of Bethlehem, whose overseers of the poor expended money, upon an order of maintenance, for his support; held, that B. was liable to the overseers in an action for such money, upon the statute. (Sess. 40, ch. 137, sec. 7.) *Warren v. Brooks*, 7 Cow. 218.

18. Held, also, that no notice to B. to maintain the pauper was necessary previous to the expenditure. *Ibid*.

19. Held, also, that no adjudication of two justices, as to the pauper's place of settlement, was necessary. But that the manumitting master is liable, upon the statute, to any town to which the slave may become a charge. *Ibid*.

20. Where the services of a negro (whose services it was supposed might be disposed of) were sold for a term of five years, and he left the employment of his master, asserting his freedom, and it appeared that he was in fact free at the time of the sale; it was held, in an action by the vendor against the vendee to recover the sum agreed to be paid for his services, that the consideration of the promise to pay was illegal, and in analogy to the rule of law applicable to the sale of chattels, that the assertion of freedom in this case was equivalent to the legal eviction of a vendee, on the claim of the

true owner. *Livingston v. Bain*, 10 Wend. 384.

21. Where a fugitive slave, on being brought before the recorder of New York on a *habeas corpus*, sues out a writ of *homine replegiando*, and judgment upon that writ is given for the claimant; it was held, that the recorder did not lose jurisdiction by the suing out of the *homine replegiando*, but that its effect was only to suspend the proceedings upon the *habeas corpus* until final judgment upon such writ, which being in favour of the claimant, it was his duty to grant a certificate authorizing the removal of the fugitive. *Ex parte Floyd v. Recorder of New York*, 11 Wend. 180.

22. Where a slave escapes from one state into another, and is pursued by his owner and taken before a magistrate, and the magistrate, in pursuance of the law of Congress, examines into the matter, and grants a certificate that the slave owes service or labour to the person claiming him, and allows the claimant to remove him to the state from which he fled, the claimant cannot be prevented from removing him by a writ of *homine replegiando* sued out under the authority of a state law. *Jack v. Martin*, 12 Wend. 311.

23. To entitle the owner of a slave to the benefit of the provisions of the constitution and law of the United States, it is not necessary that he should be a citizen of the state from which the slave fled. *Ibid.*

24. The Legislature had the power to require persons entitled to the services of children born of slaves to cause a record to be made of the ages of such children, and in default thereof to reduce the term of servitude. *Griffin v. Potter*, 14 Wend. 209.

25. A strict compliance with the terms of the act in this particular must be shown, or the term of servitude will be reduced. *Ibid.*

SPECIFIC PERFORMANCE.

1. A valuable or meritorious consideration is necessary in a contract to warrant a decree for its specific performance. *Woodcock v. Bennet*, 1 Cow. 711.

2. But where the party accepts a draft as security for the consideration, and does not use due diligence in demanding payment and giving notice to the drawer, &c., he cannot resist a specific performance, on the ground that it has not been paid. *Ibid.*

3. By such neglect he makes the draft his own, and the party will not be decreed to pay him the money, as a condition of the decree. *Ibid.*

4. When one agrees to convey by quit-claim, the agreement has reference to the title as it is at the time of the agreement, not to one subsequently acquired. *Ibid.*

5. And if the covenantor have no title at the time, there is nothing upon which a decree for a specific performance can operate, and it would be inequitable to decree the conveyance of a title subsequently acquired. *Ibid.*

6. Where land is bound by a judgment against a previous owner, and the present proprietor covenants with another to give him a quit-claim deed of an undivided share thereof at a certain day, and the day passes, and the covenantor conveys the land away, on a bill filed by the covenantee for a specific execution, a Court of Chancery ought not to decree an equivalent in damages to the value of the land, without providing that the covenantee shall first pay or secure a proportion of the judgment, corresponding to the proportion which the share he contracted to purchase bears to the whole land bound by the judgment. *Ibid.*

7. In such a case, a Court of Chancery may refer it to a master, to assess the damages. *Ibid.*

8. And need not, except under very peculiar circumstances, award an issue of *quantum damnicatus*. *Ibid.*

9. Where a party has put it out of his power to perform specifically, yet a bill filed for a specific performance will be retained, and an equivalent in damages awarded, to be assessed on reference to a master or to a jury, upon an issue of *quantum damnicatus*, according to circumstances. *Ibid.*

10. The chancellor's duty as to awarding issues in general, discussed by counsel. *Ibid.*

11. Whether a Court of Chancery shall decree the specific performance of an agreement or not, is a matter resting in its discretion; but this is a sound legal discretion. *Seymour v. Delancy*, 3 Cow. 445.

12. The party claiming performance must present a case fair, just, and reasonable; the contract to be performed must have been entered into upon adequate consideration; and must be free from fraud, misrepresentation, or surprise; and it must not be hard, unconscionable, or unequal. *Ibid.*

13. Where the inadequacy of price, in a contract to sell or convey, is so great as to be conclusive evidence of fraud, as where it would shock the moral sense of an indifferent man, a Court of Chancery should not carry it into effect. *Ibid.*

14. But inadequacy of price merely, without being such as to prove fraud conclusively, the contract being entered into deliberately, and fair in all its parts, is not an objection to its being executed. *Ibid.*

15. The cases upon this point of mere inadequacy cited, and the substance of them stated in chronological order, per *Savage*, Chief Justice. *Ibid.*

16. A Court of Chancery requires stronger reasons for setting aside an agreement, or delivering it up to be cancelled, than would be sufficient to warrant denying a specific performance. *Ibid.*

17. So a Court of Chancery will, in many cases, not disturb an agreement executed, though it might have denied a specific performance. *Ibid.*

18. It will order an agreement to be delivered up to be cancelled for fraud, circumvention, or misrepresentation. *Ibid.*

19. Drunkenness. Cases cited by counsel upon the question, how far this shall operate as

a defence against a bill for the specific performance of a contract. *Ibid.*

20. On a bill filed by the vendor to compel a specific performance, it is sufficient if he can make a good title at the time of the decree, unless he has been quickened by the vendee, or time be of the essence of the contract, as where it relates to stocks or personal chattels. *Ibid.*

21. It is in general no objection that the vendor's remedy is good at law, by reason of there being a mortgage on the estate, &c., so that he could not convey a good title at the day fixed upon by the contract. Cases to this point cited in their chronological order, per *Savage*, Ch. J. *Ibid.*

22. It is the peculiar province of Courts of equity to interfere where the remedy is defective at law, if such interference be not against conscience. *Ibid.*

STATE AGENT.

1. The comptroller is the general agent of the state in its fiscal department, and he has authority, without any express legislative provision, to accept additional collateral security from the debtors of the state. *Jackson v. Brown*, 5 Wend. 590.

STATE TREASURER.

1. The officers of the treasury are not bound to receive from the occupant the purchase money of land sold for quit rents, and fifty per cent. advance, for the purchaser, after a conveyance to the latter, until notice has been given by him to the occupant to pay the same. *The People v. Comptroller of New York*, 1 Wend. 301.

STATUTES.

- I. Construction of statutes.
- II. Private acts.
- III. Construction of different statutes, local, temporary, private, &c.

I. Construction of statutes.

1. A penal statute should be strictly construed. *Sprague v. Birdsell*, 2 Cow. 419.

2. So, of a statute in favour of corporations or particular persons, and in derogation of common right. *Ibid.*

3. They should not be extended beyond their express words, or their clear import. *Ibid.*

4. Where the computation of time in a statute is to be from an act done, the first day should be excluded. *Ex parte Dean*, 2 Cow. 605. *Lester v. Garland*, 2 Cow. 606, note (a). S. P. discussed. *Presbrey v. Williams*, *ibid.* S. P. discussed.

5. *E. g.*, under the statute (sess. 41, ch. 94, s. 17.) prescribing the time within which an appeal should be brought from a Justice's

Court. *Ibid.* *Sims v. Hampton*, 2 Cow. 612, note (a). S. P. *Browne v. Browne*, *ibid.* S. P.

6. Where computation of time in a statute is to be from an act done, the first day, or day of the act, should be excluded. *Ex parte Dean*, 2 Cow. 605. S. P. *Homan v. Liswell*, 6 Cow. 669.

7. In construing a statute, wherever the intention of the Legislature can be discovered, it should be followed with reason and discretion, though such construction seem contrary to the letter of the statute. *Jackson v. Collins*, 3 Cow. 69.

8. *It seems*, that a statute incorporating a bank is, in its nature, a public statute. *Bank of Ulster v. Smedes*, 3 Cow. 662.

9. The Court will take judicial notice of public statutes. *The People v. Herkimer*, 4 Cow. 345.

10. If a statute give a remedy in the affirmative (without a negative expressed or implied) for a matter which was actionable at the common law, the party may still sue at the common law as well as upon the statute; for this does not take away the common law remedy. *Crittenden v. Wilson*, 5 Cow. 165.

11. The words shall or may, when used in a statute, are imperative only when the public interest and rights are concerned; but where a statute declares that an individual or individuals shall or may do certain acts, or have a certain remedy, which is intended for his or their own benefit, he or they have a discretion to do the act, or pursue the remedy, or not. *Malcom v. Rogers*, 5 Cow. 189.

12. A penal statute is not to be extended by an equitable construction. *Myers v. Foster*, 6 Cow. 567.

13. Where a statute declares that an act shall be done within a certain number of days, Sunday must be reckoned as one, though it happen to be the last. *Ex parte Dodge*, 7 Cow. 147.

14. *E. g.*, in the time given for appealing by statute, (sess. 47, ch. 238, s. 36.) the fifty dollar act. *Ibid.*

15. Two statutes shall stand together, and both have effect, if possible; for the law does not favour repeals by implication, and all acts *in pari materia* should be taken together, as if they were one law. *McCarlee v. Orphan Asylum*, 9 Cow. 437.

16. A repealing statute, being itself repealed, revives the first statute recognised. *Wheeler v. Roberts*, 7 Cow. 536. S. P. *Finch v. McDowell*, 7 Cow. 537.

17. In computing time given by a statute, (as for advertising six months,) both the first and last days are never reckoned inclusive. *Jackson v. Van Valkenburgh*, 8 Cow. 360.

18. In a statute speaking of months, where there is nothing from which it can be inferred that calendar and not lunar time was intended, the months will be considered lunar. *Parsons v. Chamberlin*, 4 Wend. 512.

19. Neither a commissioner in vacation, nor the Court during a term, can enlarge the time within which an act is to be done, when such time is regulated by statute. *Jackson v. Wiseburn*, 5 Wend. 136.

20. A statute, specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, is *directory* merely, unless the nature of the act to be performed, or the phraseology of the statute is such, that the designation of time must be considered as a limitation of the power of the officer; and *it was accordingly held*, that a brigade order constituting a Court Martial issued in July, when, by the law under which the proceeding was held, it was made the duty of the commandant of the brigade to issue such order on or before the first day of June in every year, was *valid*. *The People v. Allen*, 6 Wend. 486.

21. Where a forfeiture of goods and chattels is imposed, for the violation of an act of the Legislature, and a right to sue for such violation is given by statute, the right to the property does not *ipso facto*, by the prohibited act being done, vest in the party to whom the property is given, but a proceeding in a Court of law must be shown, adjudging the forfeiture, and declaring the party entitled to the property. *Fire Department of New York v. Kip*, 10 Wend. 266.

II. Private acts.

22. Where the rents and profits of an estate are given to a father during his life, and the remainder in fee to his children, and it be necessary for the support and maintenance of the tenant for life, and his family, and the education of his children, that the estate should be sold, a private act of the Legislature, authorizing the sale of the property for the above purposes, and for the payment of debts incurred by the tenant for life, in the necessary support of himself and family, and in the education of his children, is constitutional, although its operation is limited to particular property, and bears upon a few individuals only, and does not extend to every other case of a like character. *Clarke v. Van Sursey*, 15 Wend. 436.

23. If the sales of property authorized by such act require the assent of the chancellor, and orders are made by the Court of Chancery to carry the act into effect, such orders cannot be called in question by the children, or those in remainder, in an action of ejectment against a *bona fide* purchaser at such sales, on the ground of excess of authority on the part of the Court of Chancery; the orders of that Court not being void, the remedy, if any, is in a Court of equity or in a Court of review. *Ibid*.

III. Construction of different statutes, local, temporary, private, &c.

24. To entitle to treble damages under the act, (sess. 36, ch. 56, s. 29.) the declaration must refer to the act. *Brown v. Bristol*, 1 Cow. 176.

25. The sheriff's omission to file the certificate of sale according to the statute, (sess. 43, ch. 184, s. 1.) will not prejudice the purchaser. *Jackson v. Young*, 5 Cow. 269.

26. This act is not a condition precedent; but the statute is merely directory. *Ibid*.

27. Where judgment is obtained against heirs or devisees, part of whom are infants and

part adults, execution may go against the latter immediately, the statute (1 R. L. 318.) applying to the infant defendants only. *Shoote v. Phillips*, 5 Cow. 440.

28. The plaintiff, by mistake, proceeded against heirs and devisees, as joint debtors, within 1 R. L. 521, s. 13, the process being served on some of the defendants, against whom the plaintiff declared. The defendants served with process demurred; upon which the parties agreed that judgment should be entered against the plaintiff on demurrer, with leave to amend on payment of costs, as if the cause had been argued and decided for the defendants on the demurrer; *held*, that the plaintiff might then bring in the other defendants on *simul cum process*, and declare and proceed against the whole. *Thomas v. Van Ness*, 6 Cow. 588.

29. The statute giving a bill of exceptions does not extend to criminal cases; and hence the evidence given in an inferior criminal Court cannot be reviewed by writ of error or *certiorari*. *The People v. Vermilyea*, 7 Cow. 108.

30. But where a criminal cause goes down to the circuit, the proceedings at the trial may be reviewed, on motion, the same as in a civil cause; and the evidence be brought up on the case. *Ibid*.

31. It is regular under the statute of 1824, (sess. 47, ch. 238.) for a debtor to divide an entire demand of more than twenty-five dollars into smaller sums, confess several judgments for those sums, each amounting to twenty-five dollars, or less, without the specification or affidavit required by the fourteenth section of that act. *Cornell v. Cook*, 7 Cow. 310.

32. In drawing a jury under the statute, (1 R. L. 331, s. 20.) if any juror does not appear when drawn, and his name called, he may be refused a place in the box, though he afterwards appear and answer before a full jury is drawn. *The People v. Vermilyea*, 7 Cow. 369.

33. Or, *semble*, he may be received, in the discretion of the Court. *Ibid*.

34. The plea that the parol demur is taken away by statute, and may be treated as a nullity. *Sharp v. Sharp*, 1 Wend. 14.

35. The provisions of the revised statutes relative to writs of right do not affect suits commenced previous to the 1st of January, 1830. Such suits may be conducted conformably to the practice as it existed previous to that day. *Bradstreet v. Clarke*, 4 Wend. 211.

36. The act prohibiting the carrying on of banking business by individuals and corporations, unless specially authorized by law, does not preclude individuals or corporations, if otherwise authorized, from lending their funds upon promissory notes by way of discount or otherwise. *The People v. Brewster*, 4 Wend. 498.

37. The only effect of the revised statutes upon offences committed previously to those statutes going into operation is, that the proceedings in prosecutions for such offences must be conducted according to the provisions of those statutes. *The People v. Phelps*, 5 Wend. 10.

38. The provision in the revised statutes, authorizing the amendment of any pleading either

in form or substance, for the furtherance of justice, does not change the law of amendment existing at the time those statutes went into force. *Trinder v. Durant*, 5 Wend. 72.

39. The provisions of the revised statutes, substituting the action of ejectment to recover dower in lieu of the writ of dower, affect only the forms or mode of proceeding in prosecuting the suit, and do not alter or modify the right or interest of the widow in the land; she has a mere right of action, and is not a tenant in common, and consequently is not bound to prove an actual ouster, or other act amounting to a denial of her right. *Yates v. Paddock*, 10 Wend. 528.

40. The statute authorizing summary proceedings against tenants who hold over, applies only where the *conventional* relation of landlord and tenant exists, and not where such relation is created by act of law. *Evertson v. Sutton*, 5 Wend. 281.

41. A judge who issues a warrant under this statute to dispossess a person, without having obtained jurisdiction of the matter, is a trespasser, and an action lies against him by the person dispossessed, although such person came illegally into possession. *Ibid*.

42. An officer to whom the execution of this law is intrusted, sued for acts done by him, is bound to show affirmatively the facts giving him jurisdiction. His minutes will not be received as evidence in justification. *Ibid*.

43. A mistake in the *placita* of a record of the Common Pleas as to the place where the Court was held at the time the *capias* was returnable, is cured by the statute of *jeofails*. *Law v. Merrill*, 6 Wend. 268.

44. Where an inchoate right accrued under the statutes as they existed previous to the late revision, and by the revised statutes the proceedings to perfect the right are regulated and prescribed, such regulations and requirements must be pursued, or the party is remediless. *The People v. Livingston*, 6 Wend. 526.

45. A citizen could not inherit real estate through an alien, before the adoption of the statutes 11 and 12 Wm. III. ch. 6, into our law of descent, (1 Jan. 1830.) So held, where the children of a naturalized citizen claimed that their father was the heir of a naturalized citizen, they being obliged to trace their descent through their grandmother, who was an alien. *Jackson v. Green*, 7 Wend. 333.

46. An administrator's deed executed subsequent to the act of 1813, which requires sales to be at public vendue and on notice, if executed by virtue of an order granted under the act of 1801, is valid, although the premises conveyed were sold at private sale, and without public notice. *Jackson v. Irwin*, 10 Wend. 441.

47. An order giving authority to lease real estate is not a revocation of a previous order conferring power to sell; such powers may well exist together. *Ibid*.

48. The statute requiring a written acknowledgment of a right of action to rebut the presumption of payment, arising after the lapse of twenty years upon a sealed instrument for the payment of money, is prospective. *Van Rensselaer v. Livingston*, 12 Wend. 490.

49. In cases not affected by that statute, the admission of the contract under seal, and the declaration of an intention to apply for an abatement of interest, is sufficient to rebut the presumption of payment, although accompanied by expressions showing an unwillingness to pay. *Ibid*.

50. The statute requiring actions against public officers, for acts done *virtute officii*, to be brought in the county where the fact complained of happened, does not apply to a case where the ordinary action for money had and received can be sustained. *Elliot v. Cronk's Administrators*, 13 Wend. 35.

51. Under the act of 1824, which declares that the pleadings before justices shall be liberally construed, it is sufficient if they answer the substantial purposes of pleading, and apprise the opposite party of the real grounds of action or defence. *Fitch v. Miller*, 13 Wend. 66.

52. Where a statute creating an offence imposes a *specific penalty*, and also declares that the offence shall be a misdemeanour punishable by fine and imprisonment, the offender is subject to an indictment, in like manner as he would have been, had the offence been a misdemeanour at common law; and this, though the penalty shall have been previously recovered from him. *The People v. Stevens*, 13 Wend. 341.

53. Before the act of 15th April, 1817, an executor was not entitled to any compensation for his services. That act authorizes this Court to make an allowance to executors for their services, according to a fixed rate, and to fix that rate; but does not authorize the Court to make special allowances, without regard to a fixed rule or rate. *M'Whorter v. Benson*, 1 Hopk. 28.

54. A foreign corporation may be proceeded against in Chancery by advertising under the statute, as in case of an absent defendant. *Cunningham v. Fell*, 5 Paige, 607.

STOCK.

1. A transfer by a stockholder of his stock in an incorporated or joint stock company passes his interest to the purchaser, although the transfer be not made in conformity to the rules and by-laws of the company. *Gilbert v. Manchester Iron Manufacturing Company*, 11 Wend. 627.

2. After such transfer, the former owner is a competent witness for the defendants in an action against the company, without showing that the transfer was made in conformity to the by-laws. *Ibid*.

3. In order to charge a defendant, in an action for money paid for the purchase of stock on his account and by his order, the plaintiff must clearly show the authority under which he acted, and prove that he was instructed by the defendant to make the purchase. And where the proof was so defective, at the trial, that the jury would have been compelled to infer such authority from conversations and admissions of the defendant, which were neither explicit nor satisfactory, the plaintiffs were nonsuited, and the Court refused to set the nonsuit aside. *Ward v. Van Duzer*, 2 Hall, 162.

4. At the time of the purchase of the stock by the plaintiffs, the persons with whom they contracted for its delivery had no stock standing in their names on the books of the corporation by which it was issued, and there was no evidence that they in fact were the owners of the stock which they professed to sell. *It seems*, that the transaction was void under the act relative to stockjobbing, and that the plaintiff's action could not be sustained. *Ibid.*

5. The defendant signed a subscription for a certain number of shares in the stock of the Morris Canal and Banking Company; which subscription was upon condition, that 3000 shares of the stock, then held by the company itself, should be subscribed for within ninety days from its date; and this fact was to be certified by at least two of the directors, and by the cashier of said company. The president, cashier, and two of the directors signed the requisite certificate, and the defendant paid the first instalment on his stock. Refusing to pay the subsequent instalments, an action was brought against him upon his subscription; and at the trial he offered to show that the 3000 shares of stock mentioned in the agreement had never been subscribed as stated in the certificate, and that the persons who signed it, did so fraudulently, knowing it to be untrue. *The Morris Canal Company v. Nathan*, 2 Hall, 239.

6. This evidence was rejected by the presiding judge, and the Court granted a new trial, upon the ground that the testimony thus offered was admissible, the certificate itself, if false and fraudulent, being a mere nullity. *Ibid.*

7. A subscriber to the stock of an incorporated company has, by the act of subscribing, such an interest in the stock of the company as will furnish a sufficient consideration to support a promise on his part to pay the amount of his subscription. And the remedy of the company for the nonpayment of the instalments, duly called for, according to the terms of the subscription, is not confined to a forfeiture of the shares; but they may maintain an action of *assumpsit* upon the promise contained in the subscription for the amount of the instalments. *Harlaem Canal Company v. Seixas*, 3 Hall, 504.

8. The subscriber who pays the amount of his subscription can compel the company to furnish him a proper certificate of his stock; and where, by the terms of subscription, the first instalment was not to become payable until a certain amount of stock was subscribed for, a call for the first instalment was deemed tantamount to a notice to the subscriber that the requisite amount had been taken up. *Ibid.*

STREETS.

1. In proceedings under the act relative to streets in the city of Albany, in the apportionment and assessment of damages awarded to owners of ground required for the widening of a street, among the owners and occupants of houses and lots of ground benefited, the jury, — the amount to be paid by the owner or

occupant of a lot having a dwelling house or other building upon it, have not the right to regard such lot as vacant and *unimproved*, but must deduct from the whole amount of benefit such damages, if any, as will be done to the building, or such expense as will necessarily be incurred by the owner, in consequence of the contemplated alteration of the street. *Canal Bank of Albany v. Mayor, &c. of Albany*, 9 Wend. 244.

2. If, in the opinion of the jury, the damages or recompense to which the owners of ground required for an improvement under this act are entitled, exceeds the benefit which will accrue to the owners or occupants of such houses and lots of ground as in their judgment ought to be assessed, the jury must so certify, and all further proceedings will be suspended. *Ibid.*

3. In making their inquiry, the jury cannot regard covenants or agreements existing between landlords and tenants, or the use to which a lot or the building thereon is appropriated; all they have to do in this respect is to set forth the names of the owners, leases, and occupants, and whether the whole or only part of a lot subject to a lease or agreement is required, &c. *Ibid.*

4. As the persons making the inquiry partake more of the character of commissioners than of a common law jury, their affidavits showing the grounds of their inquiry will be received to impeach or invalidate it; the rule of law that the affidavits of jurors will not be received to impeach their verdict, being *held* inapplicable to proceedings of this kind. *Ibid.*

5. If they refuse to make affidavits, proof of their admissions or confessions will be received, which will be considered conclusive, unless contradicted. *Ibid.*

6. The jury may view the premises, but such view should be under the charge of the sheriff, as one of the officers. *Ibid.*

7. The Mayor's Court may issue *subpoenas* to compel the attendance of witnesses before the Court and jury, and parties interested are entitled to be heard previous to the jury retiring to deliberate; but on the motion for confirmation, oral testimony, impeaching the justice or contesting the correctness of the inquiry, is inadmissible. *Ibid.*

8. The costs and expenses of the proceedings must be paid by the corporation, and cannot be included in the apportionment and assessment upon the owners of lots benefited. *Ibid.*

9. In street cases, neither a *certiorari* removing proceedings, nor a *writ*, nor rule to show cause will be granted, unless notice of the application has been given to the parties to be affected by the proceedings. *Albany Water Works Company v. Albany Mayor's Court*, 12 Wend. 292.

See ALBANY CITY.

SUNDAY.

1. One is not bound to perform a contract on Sunday. *Delameter v. Miller*, 1 Cow. 75.

2. Whether a contract made on Sunday is void? *Quere. Ibid.* note (a).

3. An award made and published on Sunday is void. *Story v. Elliot*, 8 Cow. 27.

4. No judicial act can be done on Sunday at the common law. Other acts are lawful on that day, unless prohibited by statute. *Ibid.*

5. An award is a judicial act. *Ibid.*

6. The prohibition in our statute relative to the observance of Sunday, against exposing to sale on that day any goods, chattels, &c., extends only to the *public exposure* of commodities to sale in the streets or stores, shops, warehouses, or market places, and has no reference to mere *private contracts*, made without violating or tending to produce a violation of the public order and solemnity of the day, and transfers of personal property made under such private contracts are valid. *Boynston v. Page*, 13 Wend. 425.

7. In an action for deceit in the sale of a horse where the sale took place in the state of Connecticut on a Sunday, it was held, that as by the law of Connecticut all secular business on Sunday is prohibited, the action could not be sustained either as founded on the deceit or upon the contract of sale. *Northrup v. Foot*, 14 Wend. 248.

SUPERVISORS.

1. A supervisor of a town, in discharging his duties as such, acts not in his natural, but in his official capacity; and is *pro tanto* a corporation. *Jansen v. Ostrander*, 1 Cow. 670.

2. He has the capacity of suing and being sued so far as his trust is concerned. *Ibid.*

3. The right to sue is incident to his office, and passes to his successor. *Ibid.*

4. Within this rule; the successor of a supervisor, who has taken a collector's bond under the statute, (3 R. L. 126.) may sue upon it in his own name. *Ibid.*

5. If in a suit brought by or against a supervisor, as such, he fails in his action, execution goes against him personally, and his remedy is against the town. *Ibid.*

6. Remedies by and against corporations *sub modo* considered. *Ibid.*

7. It seems, that their rights and liabilities pass to the successor, whether they arise from torts or contracts, and whether the latter be simple or by specialty. *Ibid.*

8. Distinction between one who has a corporate capacity for his own benefit, and when he acts in trust for others. *Ibid.*

9. It seems, that a penalty incurred under the twelfth section of the act relative to the duties and privileges of towns, (1 R. L. 121.) while one is supervisor, but not sued for by him, may be collected in the name of his successor. *Ibid.*

10. The power granted to supervisors of a county to examine, settle, and allow all accounts chargeable against a county, involves the right to reject, if sufficient reasons in the opinion of the supervisors are not presented for the allowance. *The People v. Supervisors of Dutchess*, 9 Wend. 508.

11. The supervisors have a discretion, and may allow only such items of expenses incurred

by boards of health in execution of the act of 1832, for the preservation of the public health, as they think proper, except as to the compensation of the health officer of a place, in relation to which they have no discretion, but must allow such compensation as has been fixed by the board of health under whose direction he acts. *Ibid.*

12. In the appointment of superintendents of the poor, if no nomination is made by a majority of the board of supervisors after an ineffectual attempt for that purpose, and a nomination is made by the judges, the two chambers, when convened to compare their nominations, may proceed to elect by ballot in the same manner as if on comparison it was found that there was a disagreement in nomination. *Ex parte Humphrey*, 10 Wend. 612.

SURROGATE.

1. Bugbee, an inhabitant of the town of Benton, in the county of Ontario, died, and afterwards the county of Yates was erected, including the town of Benton; held, that the granting administration of the estate of Bugbee pertained to the surrogate of Ontario, and not to the surrogate of Yates. *Bugbee v. Surrogate of Yates*, 3 Cow. 471.

2. Debt lies on the decree of a surrogate for the payment of money. *Dubois v. Dubois*, 6 Cow. 494.

3. Such a decree against an executor for the payment of a legacy changes the character of the claim into one against the defendant personally. *Ibid.*

4. Hence, in an action of debt on the decree by the legatee against the executor, the former may declare against, and charge the latter in his own right, and no security need be filed pursuant to the statute. (1 R. L. 314, 15, s. 19.) *Ibid.*

5. And the latter may set off a demand due to him, in his own right, from the plaintiff, to his own right. *Ibid.*

6. The surrogate has no authority, as agent for a party, to receive money which he has decreed that another should pay to the party. *Ibid.*

7. Therefore, where the surrogate decreed that A. should pay B. a sum of money; and A. laid it down on the surrogate's table, who took out a part, and the residue was attached by a constable under process in favour of A. against B.; held, that this was not such a payment as would vest the money specifically in B.; and that, therefore, it was not the subject of a levy on an attachment against him. *Ibid.*

8. Held, that it was like money collected on execution by an officer, which cannot be levied on by process against the one at whose suit it was collected. *Ibid.*

9. Held, also, that the surrogate having no authority to receive the money, the payment did not satisfy the decree; but an action would still lie upon it. *Ibid.*

10. In debt, on the decree of a surrogate against the defendant requiring him to pay a

legacy, such decree is, in itself, evidence that there was a will, and that the defendant was executor; and, therefore, neither of these facts need be shown by the plaintiff on the trial. *Ibid.*

11. The surrogate has no power by the statute (1 R. L. 454, sec. 30.) to appoint or allow a guardian for an infant who is over fourteen years of age, until such infant makes choice of a guardian. An appointment without such choice is, therefore, without jurisdiction and void. *Sherman v. Ballou*, 8 Cow. 304.

12. A petition for the sale of real estate, presented by one of several administrators, accompanied by an account of the personal estate and debts of the intestate, is sufficient to confer jurisdiction upon the surrogate in a proceeding relative to the sale of real estate for the payment of debts. *Jackson v. Robinson*, 4 Wend. 436.

13. The error or irregularity of the proceedings before the surrogate cannot be shown in a collateral action, but must be corrected on appeal. *Ibid.*

14. The testimony of a witness, that on search made in a surrogate's office he could not find a will, which, according to the laws relating to ancient wills, ought to have been deposited, is sufficient to render an exemplification of the will from the surrogate's office admissible in evidence. *Jackson v. Russell*, 4 Wend. 543.

15. A surrogate may make order for execution against executors or administrators on judgments after a trial at law upon the merits; but he has no jurisdiction where judgments pass against executors or administrators without trial. *People v. Judges of Albany Mayor's Court*, 9 Wend. 486.

16. A surrogate obtains jurisdiction in reference to the sale of the real estate of a testator or intestate, by the presentation of a petition by executors or administrators praying his aid, and by the exhibition of an account of the personal estate and debts of the deceased. *Jackson v. Irwin*, 10 Wend. 441.

17. It is no objection to an order of sale that the surrogate directs a village plot to be sold, without prescribing it to be sold in lots or parcels; under such order, administrators may and should sell by parcels. *Ibid.*

18. Sales under surrogate's orders, in pursuance of the act of 1801, might be either public or private, in the discretion of the executors or administrators obtaining the orders. *Ibid.*

19. Evidence of abuse of power by administrators is inadmissible to defeat the title of a purchaser under the surrogate's order. *Ibid.*

20. A petition to a surrogate for the sale of real estate, presented by administrators, accompanied by an account of the personal estate and debts of the intestate, is sufficient to confer jurisdiction upon the surrogate in a proceeding relative to the sale of real estate for the payment of debts under a surrogate's order. *Jackson v. Crawford*, 12 Wend. 533.

21. The title acquired under such sale cannot be defeated by showing any error or irregularity in the proceedings before the surrogate, in any other way than by appeal. *Ibid.*

22. Parol evidence is admissible to show the effect of proceedings before a surrogate

for the sale of an intestate's estate, where it appears that the records and papers of the surrogate, during the time that the proceedings were had, were not properly kept; and the presumption is thus raised that papers of his office may be lost. *Ibid.*

23. A sale, under a surrogate's order, of the real estate of an intestate, is void, unless an order of confirmation be obtained previously to the conveyance to the purchaser. *Rea et al. v. M'Eachron*, 13 Wend. 465.

24. The only remedy for a purchaser, though *bona fide* and for a full price, is by application to Chancery for a confirmation of the sale. *Ibid.*

25. An attachment against an administrator for not accounting may be issued by a surrogate to a county different from that of which he is surrogate, and it may there be executed. *The People v. Pelham*, 14 Wend. 48.

26. To give validity to a deed of lands, executed under a sale by virtue of a surrogate's order, it must be affirmatively shown that an account of the personal estate and of the debts of the testator or intestate was presented to the surrogate; it is not enough that the presentment of such account, and the adjudication of the surrogate thereon, are recited in the order of sale, even though the surrogate testifies that he has no doubts that all the proceedings thus recited were actually had. *Ford v. Walsworth*, 15 Wend. 449.

27. Where one of the next kin cites the administrator to account before the surrogate, for the purpose of obtaining his share of the estate, the administrator must cause the other distributees to be cited, if he wishes a final settlement and distribution of the whole estate. *Hall et al. v. Hare*, 5 Paige, 315.

28. To authorize the surrogate, upon the settlement and distribution of the estate in the hands of an administrator, to retain a portion of the estate for the payment of outstanding claims, there must be a representation and proof on the part of the administrator that such claims probably exist against the estate. *Ibid.*

SURVEYOR.

1. An owner of land is bound by a division line, recognised by his surveyor as correct, where the owner has given deeds in conformity to a map and field-book made by the surveyor, and no efficient attempt is made for the period of twenty-two years to correct the line. *McComick v. Barnum*, 10 Wend. 104.

2. The admissions or declarations of such surveyor relative to a line adopted by him as the basis of his survey, made shortly after the survey, are admissible in evidence as the admissions or declarations of an agent. *Ibid.*

TAVERNS AND TAVERN LICENSES.

1. Groceries cannot be licensed in this state (except in the city of New York) to sell strong

and spirituous liquors, to be drank in the building in which such groceries are kept; none but tavern-keepers may sell liquors to be drank in their houses. *Harrington v. Trustees of Rochester*, 10 Wend. 547.

2. The revised statutes, limiting to tavern-keepers the sale of liquors to be drank in the house of the seller, repeal all former statutes conferring power upon commissioners of excise or trustees of villages to grant licenses to grocers to sell strong and spirituous liquors to be drank in their houses; such commissioners and trustees are deprived of the power of granting licenses to grocers for the above purpose, notwithstanding the saving clause, (s. 27.) it requiring the corporations of cities and the trustees of villages to exercise their powers in the manner prescribed in the statutes, and such manner amounting to a total prohibition. *Ibid.*

3. The prohibition extends as well to trustees of villages, who were authorized to grant licenses to petty grocers, as to all others. *Ibid.*

4. A general act of the Legislature, forbidding the licensing of grocers to sell strong or spirituous liquors to be drank in their houses, and declaring the violation of such act a misdemeanor, has operation within the bounds of incorporated cities and villages, to the officers of which, by the charters thereof, the power is given to license grocers to sell liquor to be drank in their houses, although the charters of such cities or villages were granted previously to the passage of the act creating the offence; unless they were expressly exempted by the statute from its operation. *The People v. Morris*, 13 Wend. 325.

5. The provision in the constitution of this state, requiring the assent of two-thirds of the members elected to each branch of the Legislature to every bill creating, continuing, altering, or renewing any body corporate or politic, does not apply to public corporations. *Ibid.*

6. Political powers conferred upon a corporation for the local government of a place are not vested rights as against the state; and may be abrogated by the Legislature, as well by a general law affecting the whole state, as by a special act altering the powers of the corporation. *Ibid.*

7. An individual corporator cannot object to an act of the Legislature, altering, modifying, or abrogating any power or franchise conferred by charter upon the corporation. *Ibid.*

8. An indictment for selling spirituous liquors, without license as a tavern-keeper, is no bar to an action for the penalty given by the statute in such cases. *Blatchley v. Moser*, 15 Wend. 215.

9. In a suit by overseers of the poor for the recovery of the penalty, the character in which they sue may be proved by reputation. *Ibid.*

10. A license to a tavern-keeper does not authorize the sale of spirituous liquor as a grocer. *Benson v. Moore*, 15 Wend. 260.

11. *It seems*, that a person having both a tavern license and a grocer's license cannot sell spirituous liquors in quantities less than five gallons, whether to be drank in the house of such person or elsewhere, without subjecting himself to a penalty. *Ibid.*

TAXES.

1. A resolution of the Common Council of the city of Albany, that certain sums should be raised for the support of the poor, and for the city night watch and lamps, and to pay the interest of the city funded debt, &c., is imperative upon the board of supervisors of the city and county of Albany, who are bound to raise such sums upon the city. *Albany ex parte*, 3 Cow. 358.

2. They have no right to refuse, on the ground that large sums of money, heretofore raised for these purposes, have been misapplied. *Ibid.*

3. The duties of the board of supervisors, in raising moneys on vote of towns to destroy noxious animals, &c. (2 R. L. 132, s. 15.) and on the certificate of commissioners of highways to improve roads, (2 R. L. 280, s. 31.) placed on the same footing by *A. Spencer, arg.*, and adverted to by the Court in delivering their opinion, as illustrating the main question. *Ibid.*

4. *It seems*, therefore, that in these and the like cases, the duties of the board of supervisors, in raising money, are merely ministerial. *Ibid.*

5. The real and personal estate of manufacturing companies are, by the act for the assessment and collection of taxes, passed April 23d, 1823, (sess. 46, ch. 262, s. 14.) rendered subject to taxation; and that act virtually repeals the act for the encouragement of manufactures within this state, passed February 28th, 1817. (Sess. 40, ch. 64.) *Columbian Manufacturing Company v. Vanderpoel*, 4 Cow. 556.

6. Interest runs on arrears of taxes owing by a county to the state, to be calculated after thirty days from the time when the account current is made up, and rendered by the comptroller, pursuant to the statute. (Sess. 38, ch. 29, s. 4.) *People v. Comptroller of New York*, 5 Cow. 331.

7. Where a tenant took a lease of a village lot for twenty-one years, and covenanted to pay all taxes, charges, and impositions which should be imposed upon the demised premises; and during the term, the premises were subjected to an assessment for pitching and paving a street, under an act incorporating the village and authorizing such assessment, passed subsequent to the date of the demise; *it was held*, that by the terms of the covenant, the tenant was liable to pay the assessment, although the expenditure was for a permanent benefit, extending beyond the term. *Blecker v. Ballou*, 3 Wend. 263.

8. The individual property of an executor, administrator, or trustee may be taken for a tax imposed upon him in his representative character, when no property of the testator, intestate, or cestui que trust can be found. *Williams v. Holden et al.* 4 Wend. 223.

9. The regularity of the assessment of a tax upon an executor cannot be impeached, in an action against the collector for a neglect of duty, by a plea that there were other executors who acted jointly with the person upon whom the tax was imposed. *Ibid.*

10. A title to lands sold for taxes can be perfected only by giving notice of the purchase,

&c., to the person in the possession or occupancy of the lands, if they be occupied, and producing the certificate of the comptroller, that the payments required to be made into the treasury have not been made. *Jackson v. Esty*, 7 Wend. 148.

11. A waiver of the notice by an occupant having no interest in the property sold, is not equivalent to a notice, the title of the purchaser depending upon a strict compliance with the requirements of the statute; and it was accordingly held, in this case, that the purchaser, not having given notice, was not entitled to recover the possession, although he showed an offer by the occupant to purchase. *Ibid.*

12. In an action against a collector of taxes, and his sureties, for not paying over moneys received by him, the averment that the moneys were received by him by virtue of a warrant issued and delivered to him cannot be traversed, unless it be pleaded that he had the right to receive, and did in fact receive the moneys by virtue of some other authority; in which case, as the question under which authority the money was received is presented, it is matter of fact, and the receipt of the money by virtue of the warrant may be traversed. Thus where the trustees of a village were bound to demand taxes before acquiring the right to issue a warrant for the collection of them, and they sued the collector of the village and his sureties for non-performance of his duties as collector, averring that moneys were received by him by virtue of a warrant issued by the trustees; it was held, that the defendants, on alleging that the collector was appointed to demand and receive the money, and averring that the moneys were received by him by virtue of such appointment, might traverse the allegation that the moneys were received by virtue of the warrant. *Trustees of Rochester v. Symonds*, 7 Wend. 399.

13. In such action, it is not necessary to aver a previous demand and refusal by the taxable inhabitants to pay the taxes; the process being regular on its face, and the officer entitled to protection in its execution, he has no right to inquire into its regularity. *Ibid.*

14. Where village taxes are directed to be assessed upon the freeholders and inhabitants of the village according to law, a moneyed or stock corporation having its banking house or office for the transaction of business within the bounds of such village, is an inhabitant within the meaning of the act, and a conformity in the assessment to the general law on the subject of the assessment and collection of taxes, as it exists at the time of the assessment, declares property subject to taxation which, according to universal usage, was not deemed subject to tax under the general law as it existed at the time when the act was passed authorizing the assessment. *The Ontario Bank v. Bunnell*, 10 Wend. 186.

15. Where a party justifies the taking of property to satisfy a village tax imposed upon a bank, it is no objection to the defence that the personal property of the bank was assessed at double its value; the remedy of the bank was to have applied to the assessors for a reduction of the assessment. *Ibid.*

16. Where a farm is owned and actually possessed by the widow and heirs of a person deceased, the designation of such owners in a tax list, and warrant for the collection of a common school district tax, as "the widow and heirs of A. B. deceased," is a sufficient compliance with the directions of the statute to justify the collector in executing the warrant. *Wheeler v. Anthony*, 10 Wend. 346.

17. The deed of the comptroller of lands sold for taxes inoperative as a conveyance, unless, among other things, the purchaser gives notice of such sale, and of the terms upon which the lands may be redeemed to the person or persons, if any, in the actual possession or occupancy of the lands. *Comstock v. Beardsley*, 15 Wend. 348.

18. Any person liable to be taxed for the real estate he occupies is, within the meaning of the act requiring notice, an occupant; it is not necessary that his possession should be of such a character, as that after twenty years' continuance it should ripen into a title. *Ibid.*

19. The comptroller's deed is inoperative even as to unoccupied and unimproved lands, if such lands constitute a portion of an entire lot conveyed by the comptroller, and other portions of the lot are actually possessed or occupied, and notice has not been given to the person or persons in such actual possession or occupancy. *Ibid.*

TENANTS IN COMMON.

1. The admission of a plaintiff or defendant will in general affect none but himself, and not his co-plaintiff or defendant, unless they are his partners. *Dan v. Brown*, 4 Cow. 483.

2. Thus, in partition, by several tenants in common against others, on a plea of non tenet *in simul*, the admission of one of the plaintiffs that a will was lost shall not be received to affect his co-plaintiffs. *Ibid.*

3. The confession of one tenant in common of lands is not evidence against his co-tenant. *Ibid.*

4. Co-heirs under the statute of descents (1 R. L. 59, s. 3.) are tenants in common; and though they may join in a real action, pursuant to the statute, (1 R. L. 80, s. 2.) they are not compellable to join; but may bring several actions for their respective shares or interests. *Malcom v. Rogers*, 5 Cow. 188.

5. *Assumpsit* will not lie by one tenant in common against another for repairs to the land, though they be proper or necessary, without a previous request to join in the repairs made, and a refusal by the latter. *Mumford v. Brown*, 6 Cow. 475.

6. Whether even then *assumpsit* be the proper remedy? *Quære. Ibid.*

7. After an exclusive and uninterrupted possession of land, by one tenant in common, for nearly forty years, without any account with his co-tenants, a jury are authorized to presume an ouster; and an action of ejectment by his co-tenants is barred. *Jackson v. Whitbeck*, 6 Cow. 632.

8. Land being let on shares, the lessor and

the lessee are tenants in common of the crop. *De Mott v. Hagerman*, 8 Cow. 330.

9. One tenant in common cannot maintain *assumpsit* against his co-tenant, or the guardian of his co-tenant, or the agent of such guardian, for a portion of the rent received by either. The only remedy is by action of account, or bill of equity. *Sherman v. Ballou*, 8 Cow. 304.

10. Such claim against such co-tenant, guardian, or agent, is not the subject of set-off. *Ibid.*

11. Tenants in common cannot sever in an action for rent due, on a joint demise made by them. *Ibid.*

12. Whether they may sever where they become seized of the rent as tenants in common, by act and operation of law? *Quære. Ibid.*

13. On the death of a man, intestate, leaving personal property, of which one of two distributees take possession, he is a tenant in common with the other, unless the property be sold or destroyed by the possessor. *Hyde v. Stone*, 9 Cow. 330.

14. One tenant in common cannot, like a partner, sell the whole interest of his co-tenant. If he does so, trover lies by the other. *Ibid.*

15. By marriage, the property in possession of the wife passes to the husband; and if her interest be that of a tenant in common, her husband becomes a tenant in common. *Ibid.*

16. In trover, by one tenant in common against his co-tenant, where it appeared that the defendant admitted that some of the chattels were lost or destroyed, but did not say by himself; and they had before been in possession of his wife, by marriage with whom he acquired his interest; *held*, that it should be put to the jury whether there was a conversion by the defendant, and to what extent; and though he had before admitted that his co-tenant was entitled to a certain value, or to certain articles, which he (the defendant) proposed to deliver; yet, *held*, that the judge had no right to direct a verdict for any certain sum; but the amount of damages should be put to the jury. *Ibid.*

17. One tenant in common cannot bring an action merely for dispossessing him; for his right is not superior to that of the other. *Ibid.*

18. One tenant in common entering on, or being in possession of lands generally, shall be presumed to have entered, or taken and possessed, consistently with the common title of all; and in such case, though the possession be exclusive, the statute of limitations will not run against his co-tenant; but when by some notorious act he claims an exclusive right, though it be under a title which is void, yet the statute shall run from the time of such claim. *Jackson v. Tibbels*, 9 Cow. 341.

19. Thus, where a tenant in common caused a partition to be made, professing to be under the act of 1785. (1 Jones and Varick, 201.) which was void in law, yet he having possessed in severalty under the partition for twenty years; *held*, that a co-tenant was barred his right of entry. *Ibid.*

20. A tenant in common having the share of his co-tenant, and continuing in possession at the expiration of the term, but doing no act to prevent his co-tenant from occupying with him,

is not liable to double rent, as holding over, though notice to quit has been given. *Mumford v. Brown*, 1 Wend. 52.

21. Where mills are worked on shares, the owner and the occupant are tenants in common in the mills, as well as the profits. But if the owner bring an action on the case in his own name, for an injury sustained from the withholding water from the mills, the nonjoinder of the occupant can be taken advantage of only by a plea in abatement, or upon the trial by way of apportionment of the damages. Though if the occupant had exclusive possession of the mills for a portion of the time laid in the declaration, the owner cannot recover damages for that period, unless the injury was of such a nature as to entitle him to damages as tenant of the freehold, and his interest has been described accordingly. *Rich et al. v. Penfield*, 1 Wend. 380.

22. Where A. and B. were tenants in common of certain lands, and carried on the farming business as partners, and A. sold and transferred his moiety of the lands; *it was held*, that by such transfer the partnership was dissolved, and that the grantee became a tenant in common with B., taking the undivided share of his grantor, subject to all the rights of A., and to the account to be taken between the original partners. *Mumford v. M'Kay*, 8 Wend. 442.

23. And where, after such a transfer, B. took and sold a crop harvested on the lands; *it was held*, that he was responsible to the grantee of A. in an action of trover for the value of a moiety of the wheat, unless B. could show that there were outstanding debts. *Ibid.*

24. A license by one or two tenants in common, who are also partners in the lumber business, to a third person to cut timber on the lands held in common, from which the tenants in common procure timber to carry on their business, is good, and confers title to the timber cut by such person, especially where the license is in satisfaction of a demand due from both tenants in common. *Baker v. Wheeler*, 8 Wend. 505.

25. One tenant in common of a chattel cannot bring trover against his co-tenant for dispossessing him; if the chattel be destroyed or sold, which is constructively a destruction, the action lies. *Furr v. Smith*, 9 Wend. 338.

26. A tenant in common of real estate, who takes a lease of the moiety of his co-tenant for a term, subject to a specified rent, and continues in possession of the premises after the expiration of the term, will not be considered as holding over under the lease, and thus liable in an action of *assumpsit* for use and occupation; the presumption of law being that he is in possession under his own title, and such presumption will prevail, unless there be evidence that he holds as tenant to his co-tenant. *M'Kay et al. v. Mumford*, 10 Wend. 351.

TENANT AT WILL.

1. Notice to quit is necessary before the landlord can bring ejectment against his tenant

from year to year, or at will, unless some act has been done which determines tenancy; and so generally, wheresoever the tenant enters into possession with the assent of the landlord, no definite period being fixed for the continuance of the possession. *Jackson v. Miller*, 7 Cow. 747.

2. The cases on the subject of notices to quit collated and compared. Per *Savage*, Ch. J., in delivering the opinion of the Court. *Ibid.*

3. But the case of vendor and vendee is an exception to the general rule; though the latter enter into possession under a contract of purchase with the consent of the former. In such case, the vendor may maintain ejectment against the vendee without a previous notice to quit. *Ibid.*

TENANT BY THE COURTESY.

1. Four things are necessary to constitute a tenancy by the courtesy: marriage, seisin of the wife, issue, and death of the wife. But it is not necessary that seisin and issue should concur together at one time; and therefore, if the wife become seised of lands during the coverture, and then be diseised, and then have issue, the husband shall be tenant by the courtesy of these lands; and on his wife's death, may enter as such; and, during her life, he is called tenant by the courtesy initiate; so if the wife become seised after issue, though the issue die before her seisin. *Jackson v. Johnson*, 5 Cow. 74.

2. As to what shall amount to a seisin, it is enough that the wife have a tenant in possession, who holds at will, or who entered under a contract to purchase her estate. *Ibid.*

3. And, it seems, that the rule which requires actual seisin applies only to cases where it is not complete till entry; as where the estate comes to the wife by descent or devise; not where it comes by purchase, and is transferred into possession by the statute of uses. *Ibid.*

TENANT BY SUFFERANCE.

1. Where a party executed an absolute deed of a lot of land, and it was agreed that the grantee should receive the rents, except of a small portion of the premises, of which the grantor was to remain in possession for the term of two years free of rent, and that the grantee should reconvey on being repaid, at any time during the two years, certain advances made by him; it was held, that the conveyance, though absolute in its terms, was in reality a mortgage, and that at the expiration of the two years the grantor could not be treated as a tenant by sufferance, and dispossessed under the statute allowing summary proceedings. *Roach v. Cosine*, 9 Wend. 237.

2. The jurisdiction of the assistant justices of the city of New York under that act extends over the whole city, and is not limited to the for which they were appointed; it is im-

material where the parties reside, or the property is situated. *Ibid.*

3. If there be a default of jurors on the return of a venire, the justice is authorized to issue a second venire, and so *toties quoties* until a jury appears. *Ibid.*

4. A mortgagor cannot be turned out of possession of the mortgaged premises under the statute allowing summary proceedings. *Ibid.*

5. A *certiorari* lies from this Court to the assistant justices of the city of New York, to remove proceedings had before them under the statute relative to summary proceedings to recover the possession of land. *Ibid.*

TENANT FOR LIFE.

1. A tenant for life of real or personal estate is bound to account for the principal only; the income or interest belongs absolutely to such tenant, and may be appropriated or invested at pleasure. *Miller v. Delameter*, 12 Wend. 433.

TENANT FOR YEARS.

1. A tenant for years forfeits his term by a refusal *in pais* to pay rent, and by denying the title of his landlord, and accepting title from a hostile source. *Jackson v. Vincent*, 4 Wend. 623.

TENDER.

1. Upon a note payable in ponderous articles, at a day certain, without specifying any place of payment, to make a tender, the promisor ought to seek the promisee before the day, and know of him where he will have the articles delivered; and then, if he appoint a reasonable place, or such a one as might have been in the contemplation of the parties when they contracted, offer the articles there. *Barns v. Graham*, 4 Cow. 452.

2. If the note be payable either generally or at a certain place, the articles should not be tendered in bulk, mixed and undistinguishable from others of the kind; but should be separated and distinguished, so that the promisee may know what to take. *Ibid.*

3. A tender must be before suit brought, though it may be after the creditor has directed a suit to be commenced. *Hubbard v. Chenango Bank*, 8 Cow. 86.

4. It is no objection to a tender in specie that it be for too much; otherwise, it seems, if the tender be in bank notes. *Ibid.*

5. A tender of the money due upon a judgment does not discharge it, or take away the lien of the judgment creditor; but he may still redeem upon it, as a judgment creditor, within the statute. (Seas. 43, ch. 194, s. 3.) *Jackson v. Law*, 5 Cow. 248.

6. A tender must be made before suit brought. *Ibid.*

7. After judgment, the only way to make a tender effectual is to bring the money into Court; and move for, and obtain a rule to enter satisfaction upon the record; and, in the mean time, an order may be obtained restraining the sale of property on execution upon the judgment, if the sheriff refuse the money upon its being tendered, it being his duty to receive it. *Ibid.*

8. It is always the duty of the sheriff to receive money tendered upon a *fi. fa.*, and forbear to sell. *Ibid.*

9. The effect of a tender, when made in season, is merely to discharge the debtor from subsequent interest. *Ibid.*

10. The principal is never discharged by a tender, unless under peculiar circumstances; as where there is not, after tender and refusal, any remedy to enforce the payment of the debt or performance of the duty. *Ibid.*

11. Even a tender of money upon a judgment, if followed up with the proper means to render it available, will bar a claim of interest. *Ibid.*

12. Whether it will have this effect if not so followed up? *Quære. Ibid.*

13. A tender of money due upon a judgment does not *per se* discharge it, or take away the lien of the judgment creditor; but he may still redeem upon it as a judgment creditor, within the statute. (Sess. 43, ch. 184, s. 3.) *Lew v. Jackson*, 9 Cow. 641.

14. Where a vendor of real estate tenders a deed, which the vendee does not consider according to the contract of sale, he should prepare a deed in conformity to the contract, and present it to the vendor to be executed, in order to put him in default. *Hackett v. Kusun*, 3 Wend. 949.

15. Where parties came together for the purpose of redeeming certain stock which had been pledged, and a broker attended to receive the reassignment of the stock, and to pay what should be found due to the pledgee; and after the amount was agreed upon, the broker, being requested by the agent of the pledgor to draw his check for the amount, took out of his pocket-book a blank check for the purpose of filling it up as directed. Whereupon he was interrupted by the pledgee, who said, "Let it be done to-morrow," assigning as his reasons for the interruption, that he was surety for the pledgor in a replevin bond, and wished to be indemnified, and that he would not reassign the stock unless he received the whole value of the stock, being about \$700 more than the amount agreed upon. *Held*, that the circumstances did not amount to a tender. *Dunkan v. Jackson*, 6 Wend. 22.

16. The circumstance of demanding more than is due is not sufficient to excuse an actual tender of what is due. *Ibid.*

17. The tender of specific articles on the day and at the place specified for performance, where a note is payable in specific articles, is a satisfaction of the contract; and if the tender be not accepted, the right of action is not revived by a subsequent demand and refusal. A plea of tender in such a case needs not the averment of *tout temps prié*; nor is it necessary to aver that the tender was made in satisfaction of the debt. *Lamb v. Lathrop et al.* 13 Wend. 95.

18. After tender and refusal to accept, the relation of the parties is changed to that of bailor and bailee. *Ibid.*

19. Where a sum certain is agreed to be paid in specific articles at the market price, at the appraisal of two individuals, it is incumbent upon the promisor to procure the appraisal of both the individuals named in the contract; or the sum stipulated must be paid in money. It is not enough to show an appraisal by one, and an excuse for the omission of the other. If the appraisal be made, it is not necessary to aver that it was at the market price. *Ibid.*

20. On such a contract, if the specific articles tendered in payment be appraised at an amount exceeding the sum agreed to be paid, the promisee is not bound to accept the articles and pay the difference. In such a case, it is at the election of the promisor to tender the specific articles at the amount agreed to be paid, or pay the money in satisfaction of the debt. *Ibid.*

21. The tender of the demi-mark is inapplicable under our form of government, and vitiates a plea to which it is added. *Bradstreet v. Supervisors of Oneida County*, 13 Wend. 546.

22. A tender and refusal is equivalent to performance, and where a delivery is necessary to be averred, facts and circumstances tantamount to a delivery may in some cases be pleaded, instead of generally averring a delivery. *Kemble v. Wallis*, 10 Wend. 374.

23. To prove a plea of tender, it must appear that there was a production and manual offer of the money, unless the same be dispensed with by some positive act or declaration on the part of the creditor. It is not enough that the party has the money in his pocket, and says to the creditor that he has it ready for him, and asks him to take it, without showing the money. *Bakeman v. Pooler*, 15 Wend. 637.

24. When the plaintiff, by the terms of a contract for the purchase of goods, is to pay for them in his own promissory notes at different dates, it is not necessary for him to aver in his declaration (in an action for the breach of the contract) a formal tender of the notes. It is sufficient if he allege his readiness to accept the goods, and pay for them in the manner agreed upon. *White v. Demill*, 9 Hall, 405

TIME.

1. The law will not notice the fractions of a day, as between the parties, in order to determine whether the judgment record was filed before execution issued, unless to prevent actual injustice. *Small v. M'Chesney*, 3 Cow. 19.

TITLE TO PROPERTY.

1. Wild bees in a bee-tree belong to the owner of the soil where the tree stands. *Perguson v. Miller*, 1 Cow. 243.

2. Though another discover the bees, and obtain license from the owner to take them, and mark the tree with the initials of his own name,

this does not confer the ownership upon him, until he has taken actual possession of the bees. *Ibid.*

3. If he omit to take such possession, the owner of the soil may give the same license to another, who may take the bees without being liable to the first finder. *Ibid.*

4. The two parties both having license, the one who takes possession first-acquires the title. *Ibid.*

5. Whether giving the second license to take the bees was a revocation of the first? *Quære. Ibid.*

6. The owner of bees which have been reclaimed may bring an action of trespass against a person who cuts down a tree into which the bees have entered on the soil of another, destroys the bees, and takes the honey. *Goff v. Killa*, 15 Wend. 550.

7. Where bees take up their abode in a tree, they belong to the owner of the soil, if they are unreclaimed; but if they have been reclaimed, and their owner is able to identify his property, they do not belong to the owner of the soil, but to him who had the former possession, although he cannot enter upon the lands of such owner to retake them without subjecting himself to an action of trespass. *Ibid.*

TOWNS AND VILLAGES.

1. A town meeting may be opened for business at any time between sunrise and sunset *Godell v. Baker*, 8 Cow. 286.

2. When so opened, the meeting may be continued to the second day; and it may be adjourned immediately on opening the first day to the next, and to a different place, in the discretion of the meeting, provided they deem this necessary for their accommodation. *Ibid.*

3. Of this necessity the meeting are the exclusive judges. *Ibid.*

4. In proceedings relative to the laying out and opening streets, under the act to incorporate the village of Rochester, the power of the trustees of the village is analogous to that of the corporation of New York in similar cases. When a sum of money is awarded, as damages, to an individual in such a proceeding, by the verdict of a jury, confirmed by the judgment of the president of the village, the individual acquires a vested right to the sum awarded, which it is not in the power of the trustees to defeat by discontinuing the proceedings. *Hawkins v. The Trustees of Rochester*, 1 Wend. 53.

5. A grant by the sovereign authority of the state to A. B. and five others, as patentees, for and on behalf of themselves and their associates, the freeholders and inhabitants of the town of Hempstead, is a valid grant, being made to individuals who might be trustees for the freeholders and inhabitants. *North Hempstead v. Hempstead*, 9 Wend. 109.

6. Where lands are granted by the sovereign authority of the state to individuals, to be possessed and enjoyed by them in a corporate capacity, the grant itself will confer a corporate character. *Ibid.*

7. Towns, under the laws of this state, are considered corporations for certain purposes; the authority conferred on them to make regulations respecting their common lands, of itself, is sufficient to create a capacity in them to take and hold common lands. *Ibid.*

8. Where a corporation, whose jurisdiction extends over a tract of country, comprising within its bounds lands and other property held in its corporate character, is divided into two distinct and separate communities; each community is entitled to hold in severalty the public property which falls within its limits. *Ibid.*

9. By the statute authorizing the enactment, by towns, of rules and regulations respecting the use of common lands, exclusive jurisdiction on this subject is given to the town within which the property is situated. *Ibid.*

10. Where a division of a town possessing corporate property was made, dividing it into two towns, and part of the corporate property on such division fell within the bounds of each town, and each town, for a period of thirty-seven years, regulated the common property within its own limits, and neither town, either by resolutions in town meeting or otherwise, interfered with the other, by claiming a right to participate in the control or enjoyment of the corporate property lying without its bounds; it was held, that such right, if it did exist after the division, was barred by lapse of time. *Ibid.*

11. The authority given by the act relative to the village of Brooklyn to the trustees of the village, to take the lands of any persons for the purpose of laying out and widening streets, includes in it the power to remove buildings. *Patkin v. Trustees of Brooklyn*, 2 Wend. 377.

12. The Court of Common Pleas cannot look into the regularity of the proceedings of the trustees. Such proceedings can only be reviewed by the Supreme Court upon *certiorari*. It is the duty of the Court of Common Pleas, however, to see that the jury are legally brought before them; and they have the power, and in the exercise of a sound discretion, they should postpone the proceedings before them on the ground of the absence of a material witness, without the fault of the party asking the postponement. *Ibid.*

13. Where a view is had, under this statute, the jury should be attended by a proper officer. *Ibid.*

14. An error committed in the assessment of the expense of regulating and paving streets in the village of Brooklyn, under the act relative to that village, in the quantum of the assessment upon particular lots, and not in the principle upon which the assessment is made, cannot be corrected by the Supreme Court. *Boulton v. Brooklyn*, 2 Wend. 395.

15. A party who appeals from an assessment, and is heard on such appeal, cannot afterwards object to the sufficiency of the notice of assessment. *Ibid.*

16. After a review of an assessment, a new notice for parties interested to appear and object is not necessary. *Ibid.*

17. Under an ordinance of the corporation of New York, directing the filling up, altering, or amending a public slip, the assessment should be made under the 269th section of the act rela-

tive to that city; and property in the vicinity belonging to the corporation is equally liable to assessment with the property of individuals, notwithstanding that the statute directs that one-third of the expense of the improvement shall be borne by the corporation. *Ross et al. v. The Mayor et al. of New York*, 3 Wend. 333.

18. The trustees of a village holding over beyond the term for which they were elected will be ousted from their offices, if they have neglected to notify an election, by means of which new trustees are not chosen, although by the terms of the act of incorporation they may hold over until others are elected in their place. *The People v. Bartlett*, 6 Wend. 439.

19. Although the title of the trustees, they being officers *de facto*, could not be inquired into collaterally; yet in a prosecution of this kind they are bound to show a good title. *Ibid.*

20. The electors of towns may, at their annual town meetings, adopt such rules as they think proper for improving lands owned by the town, and for making fences around the same; but such rules cannot be adopted at a special town meeting. *The People v. Works*, 7 Wend. 466.

21. Even at an annual town meeting, a tax cannot be voted for improving or fencing lands or buildings not owned by the town in its corporate capacity; although the town may have an equitable interest in the property, or hires a town house, at the public expense, the electors are not justified in voting a tax for the improvement of property the title to which is not in the town, and if such tax be imposed, a writ of prohibition will be granted. *Ibid.*

22. The trustees of the village of Brooklyn have no power, under the act incorporating the village, and the act amending the same, passed in 1824, to lay out a new street, without the consent of the owners of the land over which the same is laid. *President, &c. of Brooklyn v. Patchen*, 8 Wend. 47.

23. A Court of Common Pleas, to whom an assessment of damages in the laying out of a street is to be returned, and who are to give judgment upon such assessment, have no authority to inquire into the regularity of the incipient proceedings; if error occurs in such proceedings, the remedy of a party affected is by *certiorari* directed to the officers before whom they were had, by *injunction* restraining the proceedings, or by action of *trespass*; the Court, however, may require that enough shall be shown to give them jurisdiction in the matter. *Ibid.*

24. All persons are competent to serve as jurors in such cases, who are not the owners of property liable to assessment by reason of the intended street. *Ibid.*

25. The ministerial duties of a sheriff may be executed by deputy. *Ibid.*

26. Where a sheriff or other officer is authorized to select and summon a jury, he cannot, after summoning a person to serve as a juror, discharge him from attendance, and summon another in his stead; if the officer after hearing his excuses summons the juror, he can subsequently be discharged only by the Court. *Ibid.*

27. When power is delegated to a Court in relation to the laying out of streets, all the ordinary powers of a Court applicable to the subject-matter may be exercised, such as awarding *subpoenas*, adjourning, &c. *Ibid.*

28. Where, at an annual town meeting, the electors limit the number of constables to be chosen to four, ballots containing the names of more than four persons designated as voted for the office of constables cannot be canvassed, but must be rejected. *The People v. Loomis*, 8 Wend. 396.

29. Although the office has expired when judgment on the right of the parties comes to be pronounced, the Court will, notwithstanding, proceed and pronounce judgment, as the relators, if successful, are entitled to costs. *Ibid.*

30. The determination of the electors of a town as to the number of constables to be chosen, must be by a formal vote or resolution. *The People v. Adams*, 9 Wend. 333.

31. Where there is no limitation of the number by such formal resolution, and more than five persons are voted for, the five having the greatest number of votes are entitled to discharge the duties and receive the emoluments of the office. *Ibid.*

32. Where a by-law of an incorporated town forbids the taking about or selling by retail meats within the bounds of the corporation, except at the public markets, &c., within certain distances thereof; the sale of a quarter of lamb to a grocer at a place within the allowed limits, and taking goods in payment, is a violation of the ordinance, subjecting the seller to the penalty imposed. *Village of Buffalo v. Webster*, 10 Wend. 99.

33. A by-law of a corporate body for the regulation of trade, and imposing particular restraints as to time and place, is good; but general restraints are bad. *Ibid.*

34. It seems, that a stranger violating the law of a corporation relative to the sale of certain articles within their laws would be subject to the penalty, and would be deemed an inhabitant *pro hac vice*, and chargeable with notice of the law. *Ibid.*

35. A banking corporation, located in a village, authorized by law to raise money by tax for certain purposes, is liable to pay its proportion of the village taxes, and its real and personal estate is accordingly subject to taxation. *Ontario Bank v. Bunnell*, 10 Wend. 186.

36. A party objecting to proceedings relative to the opening of a street, cannot avail himself of an irregularity which may exist in the proceedings relative to property in which he has no interest. *Coles v. Trustees of Williamsburgh*, 10 Wend. 659.

37. Where a board of trustees of a village consists of the number of five, a resolution passed at a meeting of such board is not obligatory, in which only two of the members concur, the other three members omitting to vote on the ground of interest, but entering their assent to the proposed measure. *Ibid.*

38. A vote of confirmation of an assessment passed at a meeting of a board of trustees consisting of the number of five, at which only four members attended, and in which vote but two

trustees concurred, the others being interested, declining to vote is not a valid act, although the two trustees who did not vote assented to the vote of their colleagues. *Ibid.*

38. The trustees of the village of *Williamsburgh*, in the county of Kings, may proceed in the execution of the powers intrusted to them by their act of incorporation, although the map of the survey of the village, directed by the act to be made, does not exhibit the gradations and regulations required in the streets, roads, and alleys to be permanently laid out. *Ibid.*

39. It seems, that where, in an act of incorporation of a village, such requirement is made, the act will be considered as complied with, if the duty be performed as far as practicable; i. e. if the inequalities of the surface of the village plot be so great and embarrassing as to render an accurate gradation impracticable, it may be omitted. *Ibid.*

40. The trustees of a village authorized to open a street on the presentment of a petition, may act upon a petition presented to their predecessors, and direct the street to be opened, if such petition was duly presented and received, although not legally proceeded upon by the trustees in office at the time of its presentment. *Ibid.*

41. Lands appropriated for the opening of a street may be entered upon and worked previous to the appraisalment of the value of the same, and before payment of the damages to the owner. *Ibid.*

42. It is no objection to an appraisalment of the value of land required for a street, that in form it estimates the value of the land at a certain sum per foot, instead of stating its value in a gross amount. *Ibid.*

43. Where, on the altering of a street in the village of Rochester, the damages were assessed to the owner of land taken for the street, and an action was brought by him against the corporation of the village for the recovery of the sum assessed in his favour, and it appeared that there was a building erected on the ground required for such alteration, the expense of removing which would exceed \$100; it was held, that the action did not lie, and that the corporation were not estopped from alleging that the whole proceeding was a nullity, from the want of jurisdiction in the trustees to make the alteration. *Cuyler v. Trustees of Rochester*, 12 Wend. 165.

44. The Municipal Court of Brooklyn has power to issue an attachment against the goods of a debtor, who is about to depart from the county, or is concealed, &c.; but that Court has no authority to issue such process against the goods of a debtor about to remove his property from the county, with intent to defraud his creditors. *Whitney v. Johnson et al.* 12 Wend. 359.

45. The Supreme Court, on application for the confirmation of a report of commissioners of estimate in the laying out of a street in Brooklyn, cannot pass upon the question of jurisdiction of the Court appointing the commissioners, or upon the regularity of the incipient proceedings; and they can be reviewed only upon *certiorari* directed to such Court. *Patchin v. Mayor, &c. of Brooklyn*, 13 Wend. 664.

46. The inhabitants of Easthampton have no right to take sea weed from Hive Place beach, by virtue of any stipulation or condition contained in the deed executed in 1770, by the trustees of that town, to Benjamin Leek. *Parsons v. Miller*, 15 Wend. 561.

TRESPASS.

I. *When the action must be trespass, and when case.*

II. *When an action of trespass lies: (a) For injuries to the person; (b) For injuries to personal property; (c) For injuries to real property, and trespass for mere profit, &c.; (d) For acts committed under colour of legal proceedings.*

III. *Defence and justification.*

IV. *Trespasser ab initio.*

V. *Joint trespassers.*

I. *When the action must be trespass, and when case.*

1. Where a party is authorized by an act of the Legislature to erect a dam in the river previously declared a public highway, and after its erection it is wilfully and intentionally cut away by third persons, and an immediate and direct injury ensues, the remedy is by action of trespass, and not case. *Wilson v. Smith et al.* 10 Wend. 324.

II. *When an action of trespass lies: (a) For injuries to the person.*

2. Where an injury is not the effect of an unavoidable accident, the person by whom it is inflicted is liable to respond in damages to the sufferer. *Bullock v. Babcock*, 3 Wend. 891.

(b) *For injuries to personal property.*

3. Trespass *de bonis asportatis* lies when one unlawfully intermeddles with the goods of another, though there be no unusual interference, as by exercising an authority over them in defiance or exclusion of the owner. *Wingstrington v. Lafay*, 7 Cow. 735.

4. Thus, where a constable, having an execution against G., levied on L.'s goods in G.'s hands, as L.'s agent, by taking an inventory and security for their forthcoming, saying he would take them away unless security should be given; held, that he was a trespasser. *Ibid.*

5. Where one delivers personal property to another, to be returned after a certain time; at the expiration of the time, the same identical property reverts to, and the title is in the bailor; he may take it from one having a wrongful possession, without being liable to an action of trespass. *Hurd v. Ward*, 7 Cow. 752.

6. Otherwise where the contract of the bailor is either in the alternative, to return the property bailed, or deliver property of the same kind and quality, or when the contract is to do the latter only. In either of these cases the obligation on the part of the bailor rests in contract; and till he actually made the delivery, though the time had expired, the bailor has no vested interest in the property. The letting is

not properly a bailment, but operates as a sale, and the right of the bailor is a chose in action only; and see note (a) to this case. *Semb. Seymour v. Brown* (19 Johns. 44.) is overruled. *Ibid.*

7. But on the delivery of the identical property, or other property, to the bailor, in satisfaction of the contract, he has a vested interest in possession in the specific property delivered. *Ibid.*

8. Possession, though tortious, is sufficient to maintain trespass against a stranger who divests such possession. *Ibid.*

9. When one having possession of personal property, delivered it to another who claimed, but had no right to it, upon his agreement to see L., and negotiate about the title, which, on obtaining possession, he refused to do, but claimed and sued the property as his own; *held*, that trespass lay against him at the suit of the one from whom he so obtained the property. *Ibid.*

10. A plaintiff having a right to personal property, loaned to another for an indefinite term, may maintain trespass for taking it. *Orser v. Storms*, 9 Cow. 687.

11. Where a father loaned two cows to his daughter, which, or their young, continued in her possession seventeen years; *semble*, the father might maintain trespass for taking them, or their young, from the possession of the daughter, or daughter's husband. *Ibid.*

12. A right to reduce property into actual possession is sufficient to entitle a party to bring trespass *de bonis asportatis*. Where a party is in possession of a part of a lot of land without title, his possession is confined to the land actually occupied by him; and cannot be extended, by construction, beyond it, so as to entitle him to reclaim timber cut on that part of the lot not in his actual possession. The purchaser of a lot of land has no right to follow and reclaim logs cut upon the lot, and removed therefrom, previous to his purchase. In trespass *de bonis asportatis*, the defendant cannot show property in a stranger. *Aikin ad. Back et al.* 1 Wend. 466.

13. Trespass will not lie against a person whose servant takes property by mistake, where no direction or authority is given by him to the servant to take the particular property in question, and where there is no subsequent assent or approbation, with a knowledge of the trespass. *Broughton v. Whallon*, 8 Wend. 474.

14. Trespass *de bonis asportatis* lies for levying upon the property of A. under an execution against B., and requiring the engagement of a *receiver* that the property shall be forthcoming, or the amount of the execution paid; although there has been no removal of the property, and the receiver permits the party to remain in possession, and to dispose of it as his own. *Phillips v. Hall*, 8 Wend. 610.

15. The party whose property has been levied upon, and who has indemnified the receiver, is in such cases entitled to recover the full amount of the sum agreed to be paid by the receiver, in case of the nondelivery of the property. *Ibid.*

16. Trespass *de bonis asportatis* lies against a party who directs the detention of property

taken by an officer, and indemnifies the officer against damages consequent upon such taking. *Root v. Chandler*, 10 Wend. 110.

17. The constructive possession of an owner is sufficient to entitle him to maintain trespass for the taking of property out of the hands of a person to whom it was lent. *Ibid.*

18. Where a party sold a mill standing upon the lot of his neighbour, and appointed a day for the purchaser to take it away, promising to aid him in its removal if assistance was necessary, and the mill was subsequently taken down and removed by the purchaser; *it was held*, that the vendor was liable to an action of trespass, although there was no proof of his being present, or aiding in the removal of the building. *Wall et al. v. Osborne*, 12 Wend. 39.

19. The plaintiff recovered a judgment for \$5000 against different persons, in an action of trespass *de bonis asportatis*; but no execution was ever issued upon, nor was any satisfaction ever obtained of, the judgment. The defendant received into his possession the goods (or a part of them) which were the subject of the action of trespass; sold them, and took the proceeds. In an action of *assumpsit* against him for money had and received, (being the proceeds of the goods sold,) *it was held*, that the action was well brought, and could be sustained. *Sturtevant v. Waterbury*, 2 Hall, 449.

(c) *For injuries to real property, and trespass for mesne profits.*

20. In an action of trespass for *mesne profits* against a *bona fide* purchaser, he shall be allowed against the plaintiff, in mitigation of damages, the value of permanent improvements made in good faith, to the extent of the rents and profits claimed by the plaintiff. *Jackson v. Loomis*, 4 Cow. 166.

21. A lessor in an action of ejectment may bring trespass *quare, &c.*, against the defendant or his servants for an injury done to the freehold, intermediate the verdict and *hab. fac. poss.* executed. *Dewey v. Osborne*, 4 Cow. 329.

22. After the re-entry of the *disseisor*, the law supposes the freehold all along to have continued in him; and he may maintain trespass against the *disseisor* and his servants. *Ibid.*

23. The record of recovery in ejectment is conclusive evidence of title in the lessor of the plaintiff from the time of the demise laid against the defendant and his servants, who cannot, therefore, in bar of an action of trespass, show title in another after that time. *Ibid.*

24. Where there are several separate demises in a declaration in ejectment, an action of trespass against the defendant or his servants may be maintained in the name of that lessor upon whose title the recovery was had; and where it appeared that the sheriff delivered possession to one of the several lessors under the *hab. fac. poss.*; *this was held*, *prima facie* evidence that the recovery was upon his title. *Ibid.*

25. A writ of error, by the defendant in ejectment, will not protect him against an immediate action for the *mesne profits*. *Jackson v. Delancy*, 5 Cow. 33.

26. A recovery of the *mesne profits* intermeditates the judgment in ejectment and affirmance

in the Court for the Correction of Errors, pursuant to 1 R. L. 144, is no bar to the common action for *meane profits* for the residue of the time during which the defendant in the ejectment was in possession. *Lion v. Burtis*, 5 Cow. 408.

27. In trespass for *meane profits*, the recovery in ejectment is conclusive evidence of title against the defendant, and his servants, from the time of the demise laid in the declaration. *Ibid.*

28. The action for *meane profits* may be sustained by the nominal or real plaintiff in the ejectment. *Ibid.*

29. A mere executory contract to purchase land will not confer a right to enter. *Erwin v. Olmstead*, 7 Cow. 233.

30. One enters and builds on the lands of another, who enters upon the intruder, and the intruder, in his turn, enters and turns the owner out of possession; the owner may maintain trespass. *Ibid.*

31. One tenant in common has no right to enter upon his co-tenant, and oust him of his possession. If he do so, trespass *quare clausum fregit* lies for the injury. *Ibid.*

32. In an action of trespass *quare clausum fregit*, brought in the Common Pleas, by reason that the defendants pleaded title in a Justice's Court, in a suit for the same cause there, the defendant is confined to his plea of title, which admits the trespass. And though he plead the general issue in the Common Pleas, and the cause go down to trial on that issue, on the production of the plea of title upon the trial, the Court should confine him to it, and not require the plaintiff to prove the trespass. *Marsh v. Berry*, 7 Cow. 344.

33. Though the defendant may, yet he is not bound to give notice, and move to strike out the plea of the general issue. *Ibid.*

34. But if the Court allow the plea of the general issue, and thereupon the plaintiff prove the trespass, and the cause is tried upon its merits, and a verdict found, and judgment rendered for the defendants, the proceedings will not be set aside on error. *Ibid.*

35. Under that issue the defendants may prove that the plaintiff had not possession of, or title to, the *locus in quo*, when the trespass was committed. *Ibid.*

36. In trespass on lands of which the plaintiff has no actual possession, he must necessarily show its title, and thus make out a constructive possession. *Hubbell v. Rochester*, 8 Cow. 115.

37. Hence, though he sue in this Court, and recover less than \$50, he is entitled to full costs. *Ibid.*

38. Where, in trespass for cutting timber, the plaintiff recited and referred his claim to the old statute of 1805, which is repealed; *held*, that he could not recover treble damages upon the statute of 1813. (1 R. L. 528.) *Ibid.*

39. Whoever has an exclusive right in the soil, as to a crop of wheat growing thereon, may maintain trespass *quare clausum fregit*. *Austin v. Sawyer*, 9 Cow. 39.

40. An action of trespass will not lie by a reversioner for an injury to the inheritance, committed by a person who acts under the authority of the permission of the tenant for life; such

person not being a *stranger* within the meaning of the statute authorizing actions by reversioners for such injuries. *Livingston et al. v. Mott*, 2 Wend. 606.

41. A plaintiff in the Common Pleas is not entitled to double costs; on the contrary, is liable to pay costs to the defendant, where the recovery is less than a sum sufficient to carry costs in the Common Pleas, in an action of trespass *quare clausum fregit*, originally commenced in a Justice's Court, but removed by plea of title into the Common Pleas, in which Court the plaintiff, after a plea of *liberum tenementum*, new assigns, and the defendant pleads not guilty to such new assignment. *The People v. The Rensselaer Common Pleas*, 3 Wend. 647.

42. The severance of machinery from a mill does not divest the owner of his property; what was before part of his freehold becomes personalty by the severance. *Morgan v. Varick*, 8 Wend. 587.

43. A disseisee, after recovering possession, may maintain trespass against the disseisor or his servants, or a stranger acquiring title from the disseisor. Where a stranger derives his title from a person rightfully in possession at the time, trespass does not lie against him. *Ibid.*

44. Where property is severed from the freehold, and remains upon the premises, and is subsequently removed, the statute of limitations is no bar, if the suit for the removal be brought within six years, although more than six years have elapsed since the severance. *Ibid.*

45. The person in possession of the property, by requesting another to remove it from the premises, subjects himself to an action of trespass. *Ibid.*

46. Where A. has been in possession of two farms for forty years, and loses one of them in an action of ejectment, of which possession is delivered to the plaintiff in ejectment without specification of metes and bounds, in an action of trespass *quare clausum fregit* against A. for entering upon the farm lost by him, he is at liberty to show that the *locus in quo* is part of the farm still retained by him, and not a portion of the farm lost by him in the ejectment. *Dewey v. Boardwell*, 9 Wend. 65.

47. Trustees *de facto* of a religious society, whether such society be incorporated or not, may maintain an action against a trespasser for an injury to the meeting-house of the society. *Green v. Cady*, 9 Wend. 414.

48. The owner of the land through which a road passes may maintain trespass for an appropriation of the soil of the road. *Gidney v. Earl*, 12 Wend. 98.

49. In trespass *quare clausum fregit*, the defendant may, in mitigation of damages, prove that the trespass was not wilful and malicious; and in this case it was *held*, that he might show that he entered to survey off a certain portion of the premises sold for quit rents. *Machin v. Geortner*, 14 Wend. 239.

50. Proof that the premises were used as a wood lot, for the purposes of fuel and fencing, is sufficient evidence of actual possession to sustain an action of trespass. *Ibid.*

51. In an action of trespass *quare clausum fregit*, evidence that the *locus in quo* is a private

road belonging to the defendant is inadmissible under the general issue. *Saunders v. Wilson*, 15 Wend. 338.

(d) *For acts committed under colour of legal proceedings.*

52. A purchaser, for a valuable consideration, of chattels levied upon under an execution, and suffered to remain in possession of the defendant in the execution, (by the plaintiff's order to the sheriff to suspend proceedings until further directions,) acquires title to the goods, and may maintain trespass against the sheriff for retaking the property, to execute the writ by virtue of which he had levied. *Hick v. Coates*, 2 Wend. 419.

53. A justice who issues a second execution after the first is satisfied is a trespasser; and it is no excuse that such second execution issued through the false representation of the plaintiff that the first was lost. *Lewis v. Palmer*, 6 Wend. 367.

54. A constable acting under such second execution is not liable as a trespasser. *Ibid.*

55. A recovery may be had for the full value of the property sold under a void execution, although not removed by the purchaser. *Ibid.*

56. Trespass will not lie against a party who has procured a search warrant to search for stolen goods, if the warrant be duly issued and regularly executed. *Bealy v. Perkins*, 6 Wend. 382.

57. A person acting in aid of an officer, and by his commandment, in overcoming resistance, to the execution of process, is a trespasser, if the officer is not justified by the process; as where, on an execution against A., property is attempted to be taken from the possession of B., who resists the officer, and a bystander, commanded to assist, forcibly lays hands on B. to overcome his resistance, if it turns out that the property is the property of B., and not of A., the bystander is liable for an assault and battery. *Elder v. Morrison*, 10 Wend. 128.

58. The bystander obeys at his peril; if the officer has authority to do the act, the bystander is bound to obey, and is justified; and if he refuses or neglects, is guilty of a misdemeanor, and subject to fine and imprisonment; on the contrary, if the officer has no authority to do the act, the bystander is not bound to obey, and if he yields obedience, is a trespasser. *Ibid.*

59. Trespass lies for an arrest under voidable process set aside by the Court as irregularly issued. *Chapman v. Dyett and others*, 11 Wend. 31.

60. Where a school district tax is voted, the trustees, in apportioning the same among the taxable inhabitants, must apportion only the sum voted, and not make the apportionment upon it and the per centage allowed the collector. Where, however, the apportionment was made upon the sum voted and the per centage, although erroneous; it was held, that the trustees were not liable in trespass for causing property to be sold in the collection of such tax. *Easton et al. v. Calendar*, 11 Wend. 91.

61. So it was also held, that they were not chargeable as trespassers, where they had omitted to insert the names of all the taxable inha-

bitants; there being no evidence of *mala fides*. *Ibid.*

62. In these cases, the remedy of a party aggrieved is by appeal to the superintendent of common schools, or by suing out a common law *certiorari*. *Ibid.*

63. Subordinate tribunals are not liable as trespassers for acts done, growing out of an error in judgment. *Ibid.*

64. Where a party, or inferior magistrate, or any one acting in that character, extends the power of the Court or a statute to a case to which it cannot be lawfully extended, they become trespassers, and are amenable to the party aggrieved as such. *Ibid.*

65. Where trespass is brought in a Justice's Court against three, only two of whom are brought into Court and join issue, and judgment is rendered in their favour by the justice, and the plaintiff sues out a *certiorari*, and the Common Pleas reverse the judgment, and render judgment for costs of the *certiorari* against all three defendants, such judgment is erroneous, and will be reversed on writ of error. *Ibid.*

66. Where the owner of premises, purchased by him under a foreclosure of the same, is entitled to resort to force to obtain possession of the property, his agents and servants using such force are exempt from liability; and the fact of procuring a warrant to authorize the proceedings will not make them liable, though such warrant be void. *Gault v. Jenkins et al.* 12 Wend. 488.

67. In an action of trespass in a Justice's Court, where the defendant justified as a constable under attachments issued by a justice of the peace, and the plaintiff objected generally to the admissibility in evidence of the attachments, which were notwithstanding received by the justice; it was held, that the plaintiff below, on suing out a *certiorari* to the Common Pleas, had no right to object to the admission of the evidence, that the constable should have produced the preliminary proofs authorizing the issuing of the attachments. *Parker v. H'aroud*, 12 Wend. 296.

68. Whether in an action of trespass, by a third person against an officer, for taking property by virtue of process from a Court of limited jurisdiction, it is necessary to show that the process was legally issued, or whether it is enough that the process on its face appears to have been legally issued? *Quere. Ibid.*

III. Defence and justification.

69. In justifying under an execution issued by a justice of the peace, it is necessary to state the statute under which the justice acted, and that by virtue thereof he issued process, or that under it a plaint was levied. *Cleveland v. Rogers*, 6 Wend. 438.

70. When, in pleading, the facts necessary to give jurisdiction are omitted to be stated, and it is only alleged that a judgment was rendered, and that an execution was issued upon such judgment, without setting forth the execution *verbatim*, so that the Court may see whether it afforded protection to the officer who executed it, the officer will be considered a trespasser. *Ibid.*

71. Matter of justification or excuse, at common law, must be pleaded in an action of trespass *de bonis asportatis*, and cannot be given in evidence under the general issue. *Root v. Chandler*, 10 Wend. 110.

72. In an action of tort against several, if when the plaintiff has closed his proofs, there is no evidence against one of the defendants, he may be discharged by a verdict in his favour, and sworn as a witness for his co-defendants; but this cannot be done where he has united with the others in a plea of justification, or where there is some evidence against him. *Bates v. Conkling*, 10 Wend. 389.

73. It seems, that to justify an acquittal of one defendant for the purpose of making him a witness, the want of evidence must be so glaring and obvious as to afford strong grounds of belief that he was arbitrarily made a defendant to prevent his testimony. *Ibid.*

74. Where one of two defendants sued in a Justice's Court confesses judgment as well for his co-defendant as for himself, and an execution issues upon such judgment, by virtue of which the property of his co-defendant is taken and sold by his direction; in an action of trespass against him by his co-defendant, he may justify under the judgment and execution, without proof of his authority to confess the judgment: if there was a want of authority, the judgment may be reversed, but it is not void. *Ingalls v. Sprague*, 10 Wend. 679.

IV. Trespassers ab initio.

75. Two joint trespassers were sued by a single nonbailable *cap. ad resp.*, but appeared by separate attorneys, and the proceedings were several for the trespass against each, with five dollars damages by confession and full costs against each. On having paid or being discharged from the damages; *held*, that this discharged the other, but the plaintiff might collect his costs of each. *Knickerbocker v. Colver*, 8 Cow. 111.

76. Here were two separate suits for the same trespass. *Ibid.*

77. In such case, the plaintiff may elect, *de melioribus damnis*, but can have only one satisfaction. *Ibid.*

78. Though nonbailable process go against several jointly, the plaintiff may declare against them severally. *Ibid.*

79. Where each party demurs to some pleading of his adversary, the one first demurring ought to make up the demurrer books. *Lisher v. Pierson*, 8 Cow. 113.

80. If one, who enters the house of another by license, commits an unlawful act after such entry, the person so entering is a trespasser *ab initio*. *Allen v. Crofoot*, 5 Wend. 506.

V. Joint trespassers.

81. One of two defendants, sued jointly for the same trespass, though he suffer judgment to pass against him by default, cannot be a witness for his co-defendant. Otherwise, if he plead, and there be no evidence against him. *Bohem v. Taylor*, 6 Cow. 313.

82. In trespass against several persons jointly for the same act, the damages must be jointly

assessed, though they sever in pleading, or one suffer judgment by default, and the trial proceed upon a *venire tam quam*. *Ibid.*

83. In trespass *quare domum fregit*, *held*, that the defendants might show, in mitigation of damages, their motives and inducements to enter the house, as that it was to search for furniture which they had been informed was missing. *Ibid.*

84. Where several individuals act in concert in entering upon a lot of land, and cutting and carrying away timber, they are jointly liable in an action of trespass, although they do not participate as partners, share and share alike, in the avails of the trespass. *Williams v. Sheldon et al.* 10 Wend. 664.

TRIAL AND ITS INCIDENTS.

I. In civil cases, and when a demand should be proved at trial.

II. In criminal cases.

I. In civil cases, and when a demand should be proved at trial.

1°. A point once directly decided by the Court may be reversed for the purpose of bringing a writ of error in another cause; but the Court will not have it argued. *Bank of Utica v. Wager*, 2 Cow. 712.

1. To excuse from trial and costs on account of the defendant's insolvency, the plaintiff must show that he was discharged under the insolvent act after suit brought, and move to discontinue without costs. *Case v. Bolden*, 5 Cow. 422.

2. That the plaintiff was surprised with a defect of testimony which he could not supply at the circuit, allowed as an excuse from stipulating, but not from costs. *Ibid.*

3. A bill of particulars stating an endorsement of a note in blank may be filled up on the trial. *Norris v. Badger*, 6 Cow. 449.

4. An issue was on the sufficiency of G.'s property to satisfy a certain judgment and execution. *Held*, that the amount of previous encumbrances on the same property was within the issue, and might be inquired of on the trial. *Ibid.*

5. In general, where a party is charged with a specific fraud in a civil action, his character is not in issue. The evidence of fraud cannot be repelled, therefore, by proving his general good character for integrity. *Howler v. The Etna Fire Insurance Company*, 6 Cow. 673.

6. After the plaintiff rested his cause at the circuit, on the trial of a question of fact, the defendant's counsel called a witness on his part, who was sworn; but the judge intimated an opinion in favour of the defendant on the question, and the counsel forbore to examine the witness or introduce any further testimony; and this, though the defendant urged him to go on with his proof. The jury found for the plaintiff; *held*, that this was no ground for a new trial. *Beckman v. Bemis*, 7 Cow. 29.

7. A Circuit Court may be holden during term. *Beach v. Fulton Bank*, 7 Cow. 509.

8. And the *venire* may be awarded returnable the first day of the term, with a *non misit*, &c., and a continuance to a day in term subsequent to the day of trial. *Ibid.*

9. And the *venire* itself may be issued, tested, and returnable accordingly. *Ibid.*

10. The jury for the circuits are summoned independent of, and without reference to the *venue*, the award or form of which may be amended in any way, so as to make them conform to the fact, and even a new *venue* may be ordered and filed *nunc pro tunc*. *Ibid*.

11. Where counsel rose to address the jury, and the judge told him he should charge against him, and he did not therefore address the jury; *held*, that this was a voluntary relinquishment of the right to address them, not compulsory by the decision of the judge. *Jackson v. Cody*, 9 Cow. 140.

12. The poverty of a defendant will not excuse the plaintiff from trying a cause, unless the defendant has obtained an insolvent's discharge. *M^cGlade ads. Wheaton*, 1 Wend. 34.

13. A judgment will not be reversed because the Court omitted to charge the jury as to the legal inference arising from the testimony in the case: to sustain a writ of error on the ground that the Court neglected to charge the jury upon a question of law arising upon the facts, it must appear by the bill of exceptions, not only that the facts upon which the question arose existed, but also that the Court was distinctly requested to instruct the jury as to the law on that point. *Law v. Merrill*, 6 Wend. 218.

14. Nor will a judgment be reversed because from the record it appears that the jury have passed only upon the issue of *non-assumpsit*, when there is such a plea, and also a plea of payment; the finding of the jury upon the issue under the plea of *non-assumpsit*, necessarily negatives the plea of payment. *Ibid*.

15. It is not a proper exercise of discretion in a Court after the question has been submitted to a jury, and after it was seen that a confession in a particular form was necessary to make it conclusive evidence to defeat the action, to permit the witness to remould the confession into that form. *Ibid*.

16. An issue of *nul tiel record*, being an issue of fact, must be tried by jury: where, therefore, a defendant pleaded *nul tiel record* and an insolvent discharge, the Court refused a rule that the defendant elect between his pleas. *Trotter v. Mills*, 6 Wend. 512.

17. A general oath may be administered to jurors at the opening of a Court for the trial of issues; it is not necessary that they should be sworn in each cause in which they are called. *The People v. Albany Common Pleas*, 6 Wend. 648.

18. In an action *ex delicto*, the nonjoinder of a party plaintiff can be taken advantage of only by plea in abatement, or by way of apportionment of damages on the trial. *Gilbert v. Dickinson*, 7 Wend. 449.

19. Where a general objection is made to the decision of a Court on the trial of a cause, and on review thereof, the decision, if objectionable at all, is so only in part; the party is not allowed to avail himself of the objection, for the want of precision in stating it at the trial. *Reab v. M^cAlister*, 8 Wend. 109.

20. The rule of damages in an action of *trover* is a question of law, not to be submitted to the discretion of a jury. *Baker v. Wheeler*, 8 Wend. 605.

21. Where property is tortiously taken, the plaintiff is entitled to recover its *enhanced value*; e. g. where *saw logs* are taken and converted into *boards and plank*, the plaintiff is entitled to recover the value of the boards and plank. So also, he is entitled to *interest* on the value thus ascertained. *Ibid*.

22. On putting off the trial of a cause, a defendant cannot be required to pay beyond the taxable costs of the circuit. *Hall v. Dwinell*, 10 Wend. 628.

23. Where a manufacturer of iron ware delivered to another manufacturer of the same article a quantity of ware, upon an order in these words, "Will you lend me, until my furnace gets in blast, and let me pay you in the same ware, the following articles, viz." &c.; and afterwards brought his action to recover the value of the ware; it was *held*, that to entitle him to sustain his action, it was incumbent upon him to prove a demand of the articles to be returned, when the furnace of the defendants was put in blast. *Gilbert v. Manchester Iron Manufacturing Company*, 11 Wend. 625.

24. A plaintiff cannot, on the second trial of a cause, give proof of the testimony of a deceased witness, who, on the former trial, was called by the defendant, and on his cross-examination gave evidence beneficial to the plaintiff, where the defendant shows that such witness, at the time of testifying, was interested in the event of the cause on the side of the plaintiff. *Crary v. Sprague*, 12 Wend. 41.

25. A new trial will not be granted on the ground of the admission of improper evidence on the trial, unless there be probable reasons to believe that injustice has been done by the admission of such testimony. *Ibid*.

26. Where one party enters into a contract to pay to another a certain sum of money in services of a particular character and within a given time, and the party contracting disables himself from rendering the services within the specified time, a demand of performance need not be shown to entitle the other party to sustain an action for the amount specified in the contract. *M^cNish v. Coon*, 13 Wend. 26.

II. In criminal cases.

27. *Semble*, that where several defendants, entirely disconnected in the transactions through which they are sought to be convicted, are jointly indicted, it would be a sound exercise of discretion to grant them separate trials. *The People v. Vermilyea*, 7 Cow. 108.

28. But where the right of peremptory challenge is out of question, it is in the discretion of the Court to allow a separate trial or not. *Ibid*.

29. *Semble*, however, that this is a legal discretion; and should a separate trial be improperly denied by a circuit judge, the Supreme Court would on motion order a new trial. *Ibid*.

30. Where several defendants are jointly indicted, but the indictment is removed by *certiorari* at the suit of a part of the defendants; whereupon, the whole cause is retained for trial on the civil side; if the other defendants will not voluntarily come in and be recognised, &c., they may be brought in on a *capias*. *Ibid*.

31. Where a criminal cause is tried at the

circuit, judgment is rendered by the bench; and if there be a conviction, *semble*, that the circumstances in evidence must be laid before them by a case, or in some other way, to enable them to estimate the measure of punishment. *Ibid.*

32. The Supreme Court will not render judgment against the defendant in a case of perjury, though convicted on the civil side at the circuit, unless he be present in Court at the time of judgment. *The People v. Winchell*, 7 Cow. 525.

33. Sentence of the slightest corporal punishment cannot be given *in absentia*. (Note 6.) *Ibid.*

34. What is corporal punishment? It includes imprisonment. *Semble*, sentence *in absentia* can be given only of a fine. *Ibid.*

35. An accomplice admitted to testify of one crime, may, though he behave well, be prosecuted for another crime, the implied promise of pardon not extending to that; and if it appear that he is charged with any other felony than that in relation to which the prosecutor moves for his admission as a witness, this fact of itself will be a sufficient ground for rejecting him. *People v. Whipple*, 9 Cow. 707. See also *People v. Vermilyea*, 7 Cow. 369.

36. A prisoner tried for felony must be present at the taking of the verdict. *The People v. Perkins*, 1 Wend. 91.

37. A party is entitled to poll the jury, even where a sealed verdict is brought in, unless he has expressly assented to waive the right. *Jackson v. Hawks*, 2 Wend. 619.

38. To render a conviction before a Court of Special Sessions valid, it is not necessary that the Court should inform the prisoner of his right to be tried by a jury, or that he should expressly waive such right. *The People v. Goodwin*, 5 Wend. 251.

39. The books of a party charged with having obtained the signature of a person to a note by false pretences, are not evidence to show the state of accounts between him and the prosecutor, unless accompanied by proof *aliunde* of the real situation of the accounts. *People v. Genung*, 11 Wend. 21.

40. Evidence that the prosecutor of a criminal charge had offered to leave Court, and not appear as a witness against the party charged, in case he would settle with him the subject-matter of the charge, is not admissible. *Ibid.*

41. It is no error in the charge of a judge, if in commenting upon the testimony, he points out discrepancies in the relation given by witnesses, at different times, of the facts of a case. *Ibid.*

42. On the trial of an indictment for stealing foreign bank bills, it is incumbent upon the public prosecutor to produce at least *prima facie* evidence of such banks, and of the genuineness of the bills. *The People v. Cary*, 12 Wend. 547.

43. On an indictment for obtaining by false pretences the signature of a party to a promissory note, where the pretence was, that the prisoner had money in the hands of a third person absent at the time; it is not necessary to prove the amount represented to be identical sum stated in the indictment. It is enough if the amount represented was sufficient to meet the amount of the note which the party was in-

duced to sign. Nor is it necessary to a conviction that the false pretences should be the sole inducement to the signing of the note; if they have a controlling influence in inducing the signature, it is enough, although minor considerations operate upon the mind of the party. *The People v. Herriek*, 13 Wend. 87.

44. It is competent to a party whose signature has been fraudulently obtained, to state the reasons why he did not confide in the personal responsibility of the accused. *Ibid.*

45. A false representation authorizes the inference of an intent to defraud. *Ibid.*

46. Where a signature to a note has been obtained by false pretences, and the party defrauded has been obliged to pay the note, the indictment may charge the sum paid to have been obtained by false pretences, without setting forth the obtaining of the signature. *Ibid.*

47. If the accused attempts to show his ability to pay, the proof must be limited to the time when the signature was obtained. *Ibid.*

48. Proof that a party from whom a note was obtained by false pretences has been subjected to a suit, or to the payment of the money specified in the note, is inadmissible, unless there be a count for obtaining money by false pretences. *People v. Gates*, 13 Wend. 311.

49. Admissions made to a clergyman may be received in evidence in a criminal case, if they be not made to him in his *professional character* in the course of discipline enjoined by his church. *Ibid.*

50. A defendant may be tried at the same time for different offences charged in the same indictment, if the offences are of the same grade, and subject to the same punishment. *Ibid.*

51. It is not competent in a criminal case to give evidence of the bad character of the prisoner, when no evidence in support of his character has been adduced by him; so held, where, on the trial of an indictment for having counterfeited bank bills with the intent to pass them, the confession of the prisoner that he had been a convict in a state prison was given in evidence on the part of the prosecution. *The People v. White*, 14 Wend. 111.

52. It is a matter of discretion with the Court before whom a trial is had whether they will or will not compel counsel to disclose what they expect to prove by a witness before he is examined. Where the case is one of delicacy and importance, and the evidence is nicely balanced, and the scale is liable to be affected by slight circumstances, Courts are vigilant in preventing any extraneous or irrelevant matter from being brought before the jury. In such cases, counsel will be required to state the substance of what they expect to prove, in order that, if irrelevant or improper, the evidence may not be given. When the lines of the case are more broadly marked, less caution is necessary, as the rights of the parties may be sufficiently protected by the Court deciding upon the competency or relevancy of the evidence as it falls from the witness. *Ibid.*

53. Where a Court of Oyer and Terminer were asked to direct the district attorney to state what he expected to prove by a witness who was about to relate a conversation with the

prisoner, which request was overruled, and the witness stated the prisoner's confession, that he had been the inmate of a state prison; the Supreme Court *held*, that this was precisely one of those cases in which the request of the prisoner's counsel should have been granted. *Ibid*.

52. A party who is charged with a crime, or any other act involving moral turpitude, may give evidence of general good character to rebut the presumption of guilt. *Townsend v. Graves*, 3 Paige, 453.

53. But if the party accused does not think proper to resort to that species of evidence, the adverse party or prosecutor cannot be permitted to give evidence of general bad character. *Ibid*.

53. Particular acts of bad conduct cannot be proved, even to rebut evidence of general good character. *Ibid*.

TROVER.

I. *By and against whom, and in respect of what property or possession, an action of trover lies.*

II. *Conversion.*

III. *Defence.*

I. *By and against whom, and in respect of what property or possession, an action of trover lies.*

1. Though *assumpsit* or case will lie against a bailee, yet trover may also be brought, if a conversion can be proved. *Lockwood v. Bull*, 1 Cow. 322.

2. The sheriff has a sufficient property in goods levied upon by him to maintain trespass or trover, for taking them away or converting them. *Ibid*.

3. The measure of damages in trover for a note is its nominal value, unless that be reduced by showing payment, or the insolvency of the maker, or some facts to invalidate the note. *In-galls v. Lord*, 1 Cow. 240.

4. What will constitute a delivery of goods to the master of a canal boat, so as to make him accountable in trover. *Packard v. Gelman*, 6 Cow. 757.

5. If it be a sufficient delivery, according to the usages of business, to leave them on the dock by or near the boat; yet this must be accompanied with express notice to the master. *Ibid*.

6. When personal property is taken, the taker cannot, by any act of his own, acquire title, unless he destroy the identity of the thing, or annex it to and make it a part of some other thing which is the principal, or change its nature from personal to real property. *Brown v. Sax*, 7 Cow. 95.

7. This rule illustrated by several cases. *Ibid*.

8. Thus, when one takes trees and saws them into board or plank, the owner of the trees may take the boards or plank, or bring trover for them. *Ibid*.

9. And the value of the boards or plank shall, in such case, be the measure of the damage. *Ibid*. *S. P. Baker v. Wheeler*, 8 Wend. 505.

10. Trover will not lie for goods delivered in

payment of a usurious debt, or absolutely on a sale. The only remedy is upon the statute (1 R. L. 64.) to recover the excess beyond legal interest. *Ackley v. Finch*, 7 Cow. 290.

11. But, if *seems*, where goods are delivered in mortgage to secure a usurious debt, or upon any usurious consideration, the contract being void, trover lies. *Ibid*.

12. To maintain trover, the plaintiff must have a general or special property. *Dillenback v. Jerome*, 7 Cow. 294.

13. The measure of damages is the value of the property at the time of the conversion, with interest from that time. *Ibid*.

14. One who receipts property levied upon by a constable or sheriff by virtue of an execution, and engages to deliver it to the officer, has neither a general nor special property. He is the mere servant or agent of the officer, and cannot maintain trover in his own name, though the property be taken and converted by a stranger. *Ibid*.

15. And this, if *seems*, whether the receiptor takes possession or not. *Ibid*.

16. The general property of goods levied on by execution is in the debtor. The special property is in the officer who levies. *Ibid*.

17. Property in goods is either general or special. There is no intermediate property. *Ibid*.

18. The endorsement of a levy, on an execution, by a constable, is *prima facie* evidence of the levy in an action of trover by him, for the property levied on, against a creditor whose execution is levied on the same property. *Cornell v. Cook*, 7 Cow. 310.

19. Though consignees may maintain trover for goods before they have reached them, especially where they have the direction of the consignor to sell the goods, and credit the net proceeds to the consignor; yet the consignor may also have that action for the goods even after they have reached the port of destination, and been demanded by the consignees. *Smith v. James*, 7 Cow. 328.

20. *Semble*, that trover lies at the suit either of the general or special owner of goods; and that a recovery by one will bar the other. *Ibid*.

21. H., being indebted to J., agreed with the latter to take his corn and manufacture it into whisky, and that the latter should sell the whisky, crediting H. with what it brought beyond the price of the corn. The whisky being manufactured, and delivered to S. for sale; *held*, that H. had no interest whatever in the whisky. *Ibid*.

22. Trover will lie against a corporation aggregate. *Beach v. The Fulton Bank*, 7 Cow. 485.

23. In trover by one having a lien on goods against another who has converted them by the direction of the general owner, the plaintiff may recover the amount of his lien as damages. *Ingersoll v. Van Bokkelen*, 7 Cow. 670.

24. Otherwise, if *seems*, where the goods are of less value than the lien. *Ibid*. note (a), 681.

25. Distinction between damages, in trover, by one having a special property, against the general owner, or a stranger. In the former case, he recovers according to the value of his special property; in the latter, according to the

value of the general property, holding the balance, beyond the value of his special property in trust for the general owner. Note (a). *Ibid.*

36. Recovery in trover and actual satisfaction change the property in a chattel, so that plaintiff cannot afterwards have trover against another for the same chattel; otherwise, where there is no actual satisfaction, but a mere commitment in execution. *Osterhout v. Roberts*, 8 Cow. 43.

37. To warrant trover, the plaintiff must show a present right of possession in the chattel. If it appear to have been pledged by the plaintiff's vendor, before the sale, in order to secure a debt or duty to a third person, the plaintiff cannot recover, unless he show such debt or duty to have been discharged, or that the operation of the pledge has ceased in some other way. *Bush v. Lyon*, 9 Cow. 52.

38. One who claims property in himself in the chattel in question, in trover, is a competent witness for the defendant to show such property, whether it be special or general. *Ibid.*

39. The finder of a chattel has a general property in it, and may maintain trover against any one who shall convert it, except the rightful owner. *M'Laughlin v. Waite*, 9 Cow. 670.

40. But the rule does not apply to the finder of a chose in action; e. g. a lottery ticket. *Ibid.*

41. Where M. found one-half of a lottery ticket, and gave it to W. and W., with directions to advertise it, which they did, but no owner came for it, and the ticket finally drew \$5000, which W. and W. received; held, that they were not accountable to M., the finder, for one-half of the prize money. *Ibid.*

42. A person entering into the possession of wild and uncultivated land, under a contract of sale, giving him a right of entry and occupancy, and reserving to the landlord the land as security for the consideration money by withholding the deed until payment, has a right to enter and enjoy the land for agricultural purposes, but not to commit waste. The landlord may bring trover against a bona fide purchaser from the occupant of timber cut by him for purposes other than agricultural. *Moore v. Wait et al.* 3 Wend. 104.

43. Trover will not lie against a common carrier for not delivering goods intrusted to him for transportation, if the goods are not in his possession at the time of the demand; and have either been lost or stolen. If such is the fact, the action should be case, and not trover. *Packard v. Getman*, 4 Wend. 613.

44. If, however, they be in his possession, or if he has delivered them to a third person, though by mistake, trover lies. *Ibid.*

45. The master of a brig, having a cargo on board obtained at New Orleans, and consigned to merchants at New York, put into Norfolk in distress, sold part of the cargo to pay the expenses of the vessel, procured the residue to be transferred to another vessel, obtained a bill of lading for the delivery of the cargo to himself in New York, and on its arrival, instead of delivering it to the original consignees, directed it to be delivered to other persons, who sold it and received the money. In an action of trover by the owner against the persons thus receiving the same property, it was held, that they were liable to re-

spond for its value, notwithstanding they acted without fraud, and in ignorance of the rights of the true owner. *Everett v. Coffin*, 6 Wend. 603.

46. An admission by a defendant, in an action of trover, that the property claimed had come to his possession, that he had sold it, and received the money for it, is sufficient evidence of conversion, to maintain trover, without showing a demand and refusal. *Ibid.*

47. The lien of a master of a vessel on a cargo for freight and charges may be assigned; and an action of trover for the cargo cannot be maintained against the assignee, unless before suit brought the lien be discharged, or a tender in satisfaction be made. *Ibid.*

48. Trover will lie by a son entitled to succeed to the possession of personal estate on the decease of his father, where it is not shown that administration has been granted to any one, especially where the right of the plaintiff to the property claimed has been admitted. *Hyde v. Stone*, 7 Wend. 354.

49. Trover will lie by one tenant in common against another, for the loss or destruction of personal property while in his possession. *Ibid.*

50. Trover will not lie by one tenant in common of a chattel against a co-tenant, simply because the latter claims to be the exclusive owner, and locks up the property. A loss, destruction, or sale must be shown. *Gilbert v. Dickerson*, 7 Wend. 449.

51. Where the agent of the owner of a watch delivered it to a third person for the purpose of having its value appraised by a watchmaker, with the view to a purchase or loan to be made upon the watch as security, and the watch was accordingly put into the hands of a watchmaker, and while in his hands was levied upon and taken by an officer by virtue of an execution against the agent; it was held, that an action of trover lay by the owner against such third person, especially as there was reason to suspect collusion between him and the officer. *Spencer v. Blackman*, 9 Wend. 167.

52. In an action of trover, it is not necessary to show a demand and refusal, except where the defendant came into possession of the property lawfully. *Bates et al. v. Conkling*, 10 Wend. 589.

53. Trover for personal property is a local action; trespass for an injury to personal property is transitory. *Brice v. Vanderheyden*, 9 Wend. 472.

54. Trover may be maintained against a stranger upon a mere prior possession obtained by a purchaser of chattels under a void execution. *Duncan v. Spear*, 11 Wend. 54.

55. Where one party takes raw materials belonging to another to work up into manufactured articles on shares, and agrees to give the owner security for his share, payable at a future day, and before doing so disposes of the property, the owner may maintain trover for his share of the property. *Rightmyer v. Raymond et al.* 12 Wend. 51.

56. A purchaser of personal property at sheriff's sale cannot maintain an action of trover against a plaintiff who subsequently causes the same property to be sold by virtue of a judgment and execution in his favour, without

proving the judgment as well as the execution under which his purchase was made. *Yates v. St. John et al.* 12 Wend. 74.

47. A general bailee, without hire, may maintain trover for property taken from his possession against all persons but the rightful owner. *Faulkner v. Brown*, 13 Wend. 63.

48. It seems, that it is otherwise with a mere servant. *Ibid.*

49. Where a party becomes possessed of an article the property of another, and changes a part of the appendages of the article, and the owner subsequently repossesses himself of it without the knowledge of the change in its appendages, trespass cannot be maintained against him for the substituted appendages; the remedy of the party, if any, is by an action of trover. *Parker v. Walrod*, 12 Wend. 296.

50. An officer who has levied an execution upon personal property is not deprived of his special interest therein by taking the bond or receipt of a third person, stipulating for its production on the day of sale; and, if forcible possession be taken of the goods by a wrong-doer, the officer may maintain trover for them, founded upon his special interest. *Hankins v. Kingsland*, 2 Hall, 425.

51. A conditional sale of goods, accompanied by a delivery thereof to a third person, who is to hold the same, as the agent of the contracting parties, until the terms of sale are complied with, will not vest the property in the purchaser until the condition precedent is fulfilled. *Van Buskirk v. Purinton and Collins*, 2 Hall, 561. *S. P. Cullman v. Collins*, 2 Hall, 569.

52. And where goods purchased conditionally were put on board a vessel by such agent, with the intent that when the condition precedent was complied with, the title thereto should vest in the purchaser, who had, by a charter party, agreed to furnish a cargo for the vessel to proceed to a foreign port; the seller was permitted to reclaim the property out of the hands of the ship owner and master, upon a failure by the purchaser to fulfil the precedent condition, although the defendants claimed to have a lien upon the goods for the freight specified in their charter party. *Ibid.*

53. The plaintiffs, through B., an agent, agreed with R. and C. to advance a sum of money sufficient to cover the first cost of a quantity of turpentine, upon condition that the turpentine, when purchased, should be shipped and consigned to them at London, "freight free," by the bills of lading. R. and C. acceded to the terms, and a quantity of turpentine was purchased by B., the agent, and R., one of the contracting parties, and put on board a ship which R. and C. had chartered of the defendants for a voyage to London and back. It was agreed between B., the agent, and R. and C., that the turpentine should not become the property of the latter until they had produced bills of lading therefor, signed, "freight free;" and upon these conditions B., the agent, paid for the turpentine with money received of the plaintiffs, put it on board the ship, taking receipts therefor in his own name. The master of the vessel, with the approbation of the defendants, refused to sign bills of lading for the turpentine, "freight free,"

contending that they had a lien on it for the freight money mentioned in the charter party. The contemplated voyage was, by this means, broken up, and the defendants took the turpentine out of the vessel, and sold it. *Held*, that R. and C., not having complied with the condition upon which the turpentine was to become theirs, had no title to the property; and as the plaintiffs had paid for the turpentine, and received possession of it through B., the agent, they were entitled to maintain trover for the conversion of it by the defendants. *Collman v. Collins*, 2 Hall, 569.

54. *Held*, also, that the turpentine, under the circumstances of the case, was not put on board the ship under the charter party, and that the defendants, therefore, had no lien on the property for their freight. *Ibid.*

II. Conversion.

55. A sheriff, having by execution levied on the goods of B., took a receipt therefor from B. and E., by which they promised to redeliver them on demand, and they were left on B.'s premises. On the day appointed for the sale, the goods were redelivered to the sheriff, but he was at the same time served by the defendant with an order to stay proceedings. After some dispute about the effect of the order, the receiptors finally agreed to receive the goods again on the terms contained in the receipt; and they were left as before. The sheriff appointed another day for the sale, and advertised accordingly; but in the mean time the goods were removed by J., (who claimed them as his own,) with the consent and in the presence of E.; but they remained openly in the county, accessible to the sheriff. He demanded them of the receiptors, who did not deliver them. *Held*, that this was a conversion in E., but not in B. *Lockwood v. Bull*, 1 Cow. 322.

56. One who receives goods to keep and redeliver to the owner, but delivers them over to a third person, or suffers him to take them, is guilty of a conversion. *Ibid.*

57. Demand and refusal are *prima facie* evidence of a conversion, but may be repelled by giving any matter in evidence which shows there is no conversion. *Ibid.*

58. If one undertake to exercise dominion over personal property, in exclusion or defiance of the owner's right, it is a conversion. *Reynolds v. Skuler*, 5 Cow. 323.

59. Thus where S., a bailiff, distrained goods in R.'s coal-house, as the goods of G., and sold them, but did not remove them; *held*, that this was a conversion. *Ibid.*

60. But the restoration to, or repossession of goods by the plaintiff, before suit brought, will go in mitigation of damages. *Ibid.*

61. A mortgagee in possession of chattels may maintain an action for their conversion. *Ibid.*

62. Where an actual conversion is shown, a demand and refusal is not necessary in the action of trover. *Tompkins v. Haile*, 3 Wend. 406.

63. Where a levy was made under an attachment on property in the hands of a mechanic, and the officer did not take actual possession of it, but left it as he found it; and the plaintiff in

the attachment, as soon as informed that there was a claim to it by a third person, gave notice to such person that he relinquished all right to the property; *it was held*, that a conversion had not been proved, and that an action of trover would not lie. *Bailey v. Adams*, 14 Wend. 301.

64. Where there is an unqualified consignment of property, the legal presumption is, that the consignee is the owner, and an action for a conversion of the property or injury to it may be brought in his name; but the suit need not, of necessity, be in his name, but may be in the name of the real owner. *Everett v. Saltus*, 15 Wend. 474.

III. Defences.

65. In trover against A., it is no plea that the plaintiff had before brought trover against B. for the same chattel, and recovered judgment, and imprisoned B. in execution for sixty days; otherwise, if it had obtained actual satisfaction. *Osterhout v. Roberts*, 8 Cow. 43.

66. A defendant in trover cannot set up property in a third person without showing some claim, title, or interest in himself, derived from such third person. *Duncan v. Spear*, 11 Wend. 54.

67. *It seems*, trover will lie on a bare possession against a stranger. *Daniels v. Ball and Brown*, 11 Wend. 57; in note.

TRUST.

- I. Nature of a trust; how created, and assignment of it.
- II. Resulting trust.
- III. Trustee.

I. Nature of a trust; how created, and assignment of it.

1. A trust in real estate must be manifest and proved by writing; or it is void. *Whelan v. Whelan*, 3 Cow. 537.

2. *It seems*, that a conveyance in fee, to one, in trust for others, coupled with power to sell or mortgage, for the purpose of reimbursing to the trustee certain moneys to be expended about the trust property, does not carry the possession or legal estate to the *cestui que trust* by virtue of the statute of uses. *Jackson v. Johnson*, 5 Cow. 74.

3. T. had a judgment against M., and both agreed that P. should advance \$100 to M. to pay to T. on the judgment, and that the judgment, which was for about \$380, should stand as security for the \$100 to P. The advance was accordingly made and the money paid to T., M. not having repaid the money to P.; *held*, that T. might levy the sum upon the property of M., and that, when this was done, he held it in trust for P. *More v. Trumbour*, 3 Cow. 488.

4. A trust in lands (except a resulting trust) must be manifested in writing; but it may be declared either before or after the conveyance to the trustee. *Jackson v. Moore*, 6 Cow. 706.

5. To make out a resulting trust, by the payment of the consideration money by one, the deed being taken in the name of another, the

money must be paid at or before the execution of the deed. *Ibid*.

6. As well since as before the passage of the revised statutes, trusts or equitable titles belong exclusively to the consideration of a Court of Chancery. *Ibid*.

7. Purchasers, for a valuable consideration, with notice of a trust, are deemed guilty of a fraud, and upon that ground are held to be trustees for the persons beneficially interested. *Ibid*.

8. Where a father, in 1819, executed a deed of certain real estate to two persons in trust, to sell and dispose of the same at any time during his lifetime, if they should deem it necessary, and to invest the proceeds for the benefit of his wife and children; and if the property was not sold during his lifetime, on his decease to convey the same to his wife and children, share and share alike; and one of the trustees, after the decease of his co-trustee, in 1823, in the lifetime of the grantor, sold and conveyed the property to a third person for a valuable consideration, reciting the deed of trust; and the children of the grantor brought an action of ejectment to recover the property on the ground that the surviving trustee had not power to convey, and that by the provisions of the revised statutes the legal estate had become vested in them; *it was held*, that the provisions of the revised statutes transmuting in certain cases equitable into legal estates, applying only to cases of express trust, and not to implied and constructive trusts, did not control this case, and that, therefore, the action at law would not lie against the purchaser, who, if to be considered a trustee, was so only by construction. *Johnson v. Plett*, 14 Wend. 176.

9. *It seems*, had the conveyance by the surviving trustee been made since the revised statutes went into effect, that the action at law would have been sustained; but being made previous to those statutes, *it was held*, that the action did not lie. *Ibid*.

10. Whether the sale by the surviving trustee is good and operative? *Quære. Ibid*.

11. A devise and bequest by a testator of all his estate, real and personal, to his brother and to twelve nephews and nieces, in trust to pay over and divide the rents and profits of real estate (after satisfying and paying certain specific legacies and annuities) to and among the same twelve nephews and nieces, during their natural lives, and to the survivors and survivor of them, equally to be divided between them, or such of them as should from time to time be living, share and share alike, is a void trust within the provisions of the revised statutes of this state. *Carter v. Lorillard*, 14 Wend. 265.

12. So the testator having directed that after the death of all his said nephews and nieces, all his estate then remaining should be equally divided among all the children of his said nephews and nieces, and the surviving children of such of them as might then be dead in equal proportions; *per stripes* and not *per capita*, such distribution not to be made until two years after the decease of all his said nephews and nieces; *it was held*, that the limitations over of the ultimate remainder was also void. *Ibid*.

13. The principal trusts created by the will being adjudged void, and thus the main intent and object of the testator defeated, *it was further held*, that certain life estates in particular lands, given by a codicil executed by the testator, to one of his nieces and two of his grand-nephews for whom provision was made under the principal trusts, were also void, and that the whole estate passed to the heirs at law of the testator. *Ibid.*

II. Resulting trust.

14. A resulting trust is a trust raised, by operation of law, in favour of a person who advances the purchase money or consideration for an estate, the conveyance of which is taken in the name of another, and the trust will attach to a gift to one for the benefit of another, which is contained in a grant in which a valuable consideration is expressed to have been received. *Malin v. Malin*, 1 Wend. 625.

15. A declaration of trust need not be made at the time of a purchase; it may be at any subsequent period. *Ibid.*

16. A resulting trust may be rebutted by parol proof that the lands in which the estate is claimed were a gift and advancement to the grantee, and were not purchased for the benefit of the party paying the consideration money. *Jackson v. Feller*, 2 Wend. 465.

17. The fact of the payment of the whole consideration by the alleged *cestui que use*, where a resulting trust is set up, should be distinctly submitted to the consideration of the jury. *Jackson v. Bateman*, 2 Wend. 570.

18. The appropriation of the joint funds of a copartnership by one of the members of a firm to the purchase of real estate conveyed to such partner in his own name, will not create a resulting trust in favour of his copartner, unless the funds were so appropriated in pursuance of an agreement between the parties at the time of the purchase. *Forsyth v. Clark*, 3 Wend. 637.

19. A resulting trust cannot be claimed by a party who pays a part only of the consideration on the purchase of land conveyed to another, unless it be some definite part of the whole consideration, as one-third, or one-half, or the like. *Sayre v. Townsend*, 15 Wend. 647.

20. Whether a party who obtains an equitable interest in lands conveyed to another by paying an aliquot part, or even the whole consideration, can set up the same as a defence at law against the legal title? *Quære. Ibid.*

III. Trustee.

21. A trustee may purchase for the exclusive benefit of his *cestui que trust*. And if he purchase for his own benefit, it is good until set aside by the *cestui que trust*, who alone has a right to object. *Wilson v. Troup*, 2 Cow. 195.

22. One may, by the same conveyance, take an undivided portion of land to himself in his own right; and be a trustee for other portions in the same land; and afterwards he may buy in and take a conveyance to himself from any or all of his *cestuis que trust*; in which case he ceases to be a trustee, and becomes the absolute owner of the share or shares so purchased in by him. *Jackson v. Moore*, 6 Cow. 706.

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23. Whether trustees can lease without express power given them by the instrument creating the trust? *Quære. Sinclair v. Jackson*, 8 Cow. 66.

24. Whether trustees can act by attorney? *Quære. Ibid.*

25. *It seems*, they may act by attorney, if they restrict him to the conditions imposed upon themselves. *Ibid.*

26. But they must all join, if alive, in executing the trust, whether this be in person, or by delegation to an attorney. *Ibid.*

27. Where two out of three trustees demised by attorney; *held*, that no interest passed, not even the moiety of the lessors. *Ibid.*

28. Where several persons are appointed trustees, or have power to act for a mere private (not a public) purpose, they must all join in executing the trust or power. *Ibid.*

29. This rule applies as well to trusts coupled with an interest or surviving trusts, as to naked powers. *Ibid.*

30. And if this rule be not complied with, the act is merely void, not voidable only; and a stranger may object the defective execution. *Ibid.*

31. A stranger may object to a void instrument. *Ibid.*

32. Though a lease or conveyance by one who is joint tenant in his right may operate on his moiety, the rule does not apply to joint tenants who are trustees. *Ibid.*

33. They cannot act separately, unless specially authorized by the instrument creating the trust. *Ibid.*

34. Trustees constitute in law but one person, and must necessarily join in the bringing of an action. *Brinckerhoff v. Wemple*, 1 Wend. 470.

35. A trustee is not permitted to put the income of an estate into his own pocket, to be accounted for at the termination of the trust, and in the mean time appropriate the capital to the payment of the annual expenses of the trust. The interest or income should first be applied and exhausted in the support of the *cestuis que trust*, if infants, and to answer the other exigencies of the trust, before the principal is encroached upon. *De Peyster v. Clarkson et al.* 2 Wend. 77.

36. Where annual disbursements are required, and they are equal to the whole income of an estate, and the trustee is charged with interest on the income used by him and not invested, he will have to pay the interest as it falls due; but if the disbursements or investments that he makes are less than the income, then he will not be required to pay the interest which he may owe as it falls due, but it will be carried into the disbursement fund which bears no interest. *Ibid.*

37. A trustee of real estate, appointed by a will, may assert his interest in the estate and execute the trust at any time, although he has previously refused to accept the trust, if he has not released his estate and interest to the other trustees, or executed a deed of disclaimer. *Judson v. Gibbons*, 5 Wend. 224.

38. A conveyance of lands by a trustee, professing to convey the whole and absolute title, is a good foundation for an adverse possession,

and it is immaterial for that purpose whether or not the trustee have the requisite authority to convey. *Bradstreet v. Clarke*, 12 Wend. 169.

39. A purchaser does not take his possession in subseverancy to the title of his grantor; he holds for himself, and adversely to his grantor. *Ibid.*

40. In an action under the common school act, against a trustee for the neglect of the duties of his office, a declaration in very general terms would be sufficient, or a general demurrer. *Fitch v. Miller*, 13 Wend. 66.

TRUSTEES OF RELIGIOUS SOCIETIES.

1. At elections of trustees of churches, (in all the churches of this state, except the Protestant Episcopal and the Reformed Protestant Dutch Church,) two of the elders or churchwardens must preside; if there be no such officers, then two of the members of the church may preside. *The People v. Peck et al.* 11 Wend. 604.

2. A clergyman or preacher in the Baptist church, though ordinarily called an elder, is not an elder within the meaning of this statute. *Ibid.*

3. Parol evidence is admissible of the number of persons entitled to vote at such elections, although a register of the names of the stated hearers in such church is kept by the clerk of the trustees. *Ibid.*

4. A certificate of the election of trustees may be received in evidence, in a suit testing the validity of their election, although the same be not granted until months after the election. *Ibid.*

5. An election of trustees of a church is good, although the requirements of the statute in respect to the notice of such election have not been complied with, provided that the election was fairly conducted, and there is no complaint of want of notice. *Ibid.*

TURNPIKES AND TURNPIKE COMPANIES.

1. In an action for the penalty of \$10 imposed upon a toll-gatherer by the third section of the turnpike act, for demanding toll after the gate is ordered open, the circumstances of his shutting the gate and demanding toll of the plaintiff are *prima facie* evidence of his being toll-gatherer for the company; and throws the burden of proving that he is not so upon him. *Troubridge v. Baker*, 1 Cow. 251.

2. After a turnpike gate has once been opened by order of the commissioners of inspection, because the road is out of repair, it cannot be lawfully shut, and toll demanded, until one of the commissioners certifies that the road is in sufficient repair. And where the certificate stated that the road was still out of repair, but that the contractors had given assurance that it should be repaired, and directed the gatekeeper to shut

the gate, and he did so, and demanded and received toll; *held*, that he was liable to the penalty of \$10, within the sixteenth section of the act relative to turnpike companies. (1 R. L. 236.) *Williams v. Smith*, 6 Cow. 166.

3. The certificate of a commissioner is due form is conclusive, and will protect the toll-gatherer. *Ibid.*

4. Under the "act relative to turnpike companies," any two of the appraisers appointed to assess the damages of the owners of land over which the road is laid, have power to perform the duties specified by the act; and it is not necessary that all should meet, view the premises, and make inquiry. *Van Steenberg v. Bigelow*, 3 Wend. 42.

5. An inquisition made by appraisers under this act is conclusive as to the facts stated in it relating to their own proceedings; and if enough appears to show that they had jurisdiction of the subject-matter, the Court will not collaterally, in an action of trespass wherein it is alleged that the proceedings of the appraisers are irregular, inquire into the regularity of such proceedings. Nor in such an action is evidence admissible that one of the appraisers has not the qualification required by the act, to wit, that he is a freeholder. Such errors, if any, must be corrected by *certiorari*. *Ibid.*

6. The president and directors of the Mohawk Turnpike Company are personally liable to punishment as for a misdemeanor for every neglect to keep the road in good repair. *Kane v. The People*, 3 Wend. 363.

7. The offence is joint and several, and on an indictment, some may be acquitted and others convicted. *Ibid.*

8. Where, by an act of incorporation of a turnpike road and bridge company, it was made the duty of the president and directors to keep the road in repair, and the neglect to do so was declared a misdemeanor in the president and individual directors for the time being; it was *held*, that an individual director might be indicted for such neglect, either separately or jointly with his co-directors, and on conviction might be punished separately, although the board of directors consisted of seven members, and the concurrence of a majority was necessary to the doing of a corporate act. *Ibid.* 8 Wend. 203.

9. When the road is out of repair, *prima facie*, all the directors are liable; those however who have done their duty, and were prevented from complying with the act by the omission of others to do their duty, may show the facts of the case in exoneration of themselves. *Ibid.*

10. Under such an act, the offence is set forth with sufficient certainty by reciting the substance of the statute imposing the duty, averring the company to be in existence as a body corporate, and that they have erected gates and exacted toll, without formally alleging the road to have been made and completed, that the defendant was a director, that he had notice of the road being out of repair, and had been guilty of a neglect of duty in the premises. *Ibid.*

11. Although two statutes are set forth in the indictment, it is not necessary to allege that the offence was committed *contra formam statutorum*, where it is wholly created by one of the

statutes, and the second merely makes some alterations in the first, without affecting the offence. *Ibid.*

12. The fact that a corporation, incorporated as a *road and bridge company*, was by a subsequent act of the Legislature permitted to form itself into two distinct companies, one designated as a *turnpike road company*, and the other as a *bridge company*; was held, not to exonerate the officers of the road company from the penalties imposed by the original act, it being manifest that the Legislature did not intend to relieve them from their liabilities. Nor does an act of the Legislature permitting a turnpike company to *abandon* a part of their road, discharge the directors from a penalty incurred in reference to such part of the road previous to the act authorizing the abandonment. *Ibid.*

13. The making and filing of the map of the route of a turnpike road required to be made and filed, is not a condition precedent to the right to enter upon lands for the purpose of making the road. *Edes v. Kelsey*, 8 Wend. 555.

14. The map is but evidence of the route of the road, and should be received as testimony whenever made. *Ibid.*

15. Nor is it material that the commissioners appointed to lay out the road should be together at the time of their certifying the map, provided they acted together in the designation of the route of the road. *Ibid.*

16. A turnpike company have a right to remove fences or other encroachments upon their road, and are not compelled to resort to a remedy by action. *Ibid.*

17. The mode of enforcing the penalty given by statute against turnpike companies, for permitting their roads to be out of repair, after notice from a turnpike inspector, is by indictment, and not by a civil suit. *The People v. Goshen Turnpike Road*, 11 Wend. 597.

18. A turnpike road company is liable to an indictment at common law for suffering their road to be out of repair, notwithstanding that by the terms of the charter a specific penalty is provided, if the charter contains no negative words, nor any thing from which it can be inferred that the Legislature intended to take away the common law remedy. *President &c. of the Susquehanna and Bath Turnpike Road Company v. The People*, 15 Wend. 367.

19. So when the indictment is at common law, the Court before whom the conviction is had may impose a fine of \$250, notwithstanding that the general act relative to turnpike companies limits the fine to \$300 in case of a conviction on an indictment had under that act. *Ibid.*

UNITED STATES.

1. The recitals in a collector's deed for lands sold for taxes under the statute of the United States, for the assessment and collection of the direct tax, passed July 29d, 1813, (4 U. S. Laws, 546, ch. 554.) of the various steps preliminary to a sale required by the 21st and 22d sections of that act, are not even *prima facie* evidence, but must be proved independent of the deed. *Jackson v. Shepard*, 7 Cow. 88.

2. *E. g.* that the tax was demanded at the dwelling-house of the man against whom it was assessed, and that sufficient goods to satisfy the tax could not be found. *Ibid.*

3. Where one has a special statute authority to convey lands on doing certain previous acts, the purchaser must show that the previous acts have all been performed, independent of the recitals in the deed of conveyance. *Ibid.*

USAGE.

1. At the trial of an action upon a policy of insurance, the plaintiffs were permitted, by the presiding judge, to prove that it was the usage of commission merchants in the city of New York to effect insurance on goods consigned to them for sale on commission, without express orders from their consignors; and it was held, that the proof of such usage was rightly admitted. *De Forest v. The Fullon Insurance Company*, 1 Hall, 84.

2. Usage of trade cannot be set up, either to contravene an established rule of law, or to vary the terms of an express contract. But all contracts made in the ordinary course of business, without particular stipulation, expressed or implied, are presumed to be made in reference to any existing usage or custom relating to such trade; and it is always competent for a party to resort to such usage, to ascertain and fix the terms of the contract. *Sewall v. Gibbs and Jenny*, 1 Hall, 602.

3. The defendants purchased of the plaintiff a seroon of indigo, at public auction. Notice was given at the time of sale, that the indigo would be sold subject to the usual tare of ten per cent. The tare, in point of fact, amounted to upwards of seventeen per cent. At the trial, the defendants were permitted to prove that the indigo had been fraudulently packed, and that, in all cases of fraudulent packing, it is the custom of the trade to allow the purchaser the actual tare. *Held*, that this evidence was properly set up under the general issue, and that the defendants could claim a deduction of the actual tare, without offering to return the indigo. *Ibid.*

4. The defendants, some time after the purchase, paid into Court a sum sufficient to cover the amount of the indigo, after deducting the actual tare. *Held*, that as the sale in this case was for cash, the plaintiff was also entitled to interest from the day of sale to the day of payment, and, therefore, that the amount paid into Court was not sufficient to cover the plaintiff's demand. *Ibid.*

5. Although usage may be resorted to, to fix the sense of particular terms in a policy of insurance, where they have acquired a peculiar meaning, as between assurers and assured, yet it can never be set up to affect or vary an express agreement, nor to contradict a rule of law. *Rankin and Rankin v. The American Insurance Company*, 1 Hall, 619.

6. Therefore, in an action upon a policy of insurance, where the claim was for damages sustained by the perils of the sea, and on the arrival of the goods at New York, they were

landed before the wardens of the port had held a survey upon them, the defendants were not allowed to prove, either as an objection to the preliminary process, or in bar of the action, that "by the usage of trade, in the port of New York, the master of the vessel is responsible for damages sustained by goods, delivered by him to the owner, or consignee, unless there has been an actual survey on board the vessel by the port-wardens, by which it shall have been found that the goods were properly stowed, and were damaged on the voyage by the perils of the sea; and that, by a similar usage, as between assurers and assured, the survey so made is a document indispensable to be produced, in order to charge the underwriters, and that the preliminary proof is deemed insufficient, unless such a document is exhibited as a part of it." *Ibid.*

USE.

1. A conveyance without a valuable consideration cannot operate as a bargain and sale under the statute of uses. *Jackson v. Cadwell*, 1 Cow. 622.

2. And to give it the effect of a covenant to stand seised to uses, it must be made on the consideration of blood or marriage. *Ibid.*

3. A., by writing sealed and endorsed on a lease for three lives, declared as follows: I do, as my own free will and gift, assign and set over all my right, title, and interest in and to this lease, with all the conditions and reservations therein contained, unto E. C. S., my grandson, an infant child, this day eight months and five days old, to be his property and real estate, which is to be in the following conditions, namely: to remain in the hands of his mother M. S., for the use, benefit, and support of the said E. C. S., till he shall arrive at the age of twenty-one, which will be, &c., on which day he is to come into possession of this lease, and all the benefit therein contained; *held*, that this was not operative by way of bargain and sale for want of a valuable consideration; nor as a covenant to stand for want of relation by blood between the assignor and M. S., she being his daughter-in-law; and not being accompanied with livery of seisin, it was inoperative for any purpose. *Ibid.*

4. Whether an instrument in this form would be valid as a devise? *Quære. Ibid.*

5. In an action of ejectment by the assignor and E. C. S. junior; *held*, that M. S. was a competent witness; for as the conveyance was void, she had no interest. *Ibid.*

USE AND OCCUPATION.

1. In an action for use and occupation, where there has been a tenancy at a specific annual rent, and there is a holding over, the tenant will be deemed to hold upon the terms under which he entered; but he is not precluded, by an agreement to pay a fixed sum for a term less than a year, from proving the actual annual value of the premises. *Escoffier v. Sawyer*, 2 Wend. 507.

USURY.

1. The Hudson Insurance Company of the city of New York, on the 22d of October, 1835, through Mr. Spencer, their president, made a temporary loan of \$14,000 to the firm of Keeler and Rogers. As collateral security for this loan, the borrowers put into the hands of Spencer two promissory notes, one for \$15,000, and the other for \$10,000, each of which was signed by the defendants, (among others,) and payable twelve months after date to the order of Keeler and Rogers, and which notes were made, as the defendant alleged, for their accommodation. K. and R. at the same time owed the company about \$32,000 for other and anterior loans, made upon bills and notes which had been discounted by the company for their benefit. The terms upon which the Hudson Company usually made their discounts were these: The borrower took the amount of his notes in bonds of the company, bearing an interest of six per cent., which were made payable at a day more distant than that on which the loan would fall due; and at the same time, the borrower paid to the company in cash a discount of six per cent. on the note, together with a premium, at the rate of six per cent. per annum, on an insurance of a life or lives, during the running of the note; which life insurance the borrower was supposed to apply for; but no policy, in fact, was ever issued, and the rate of insurance was uniformly the same, without regard to the condition of the life to be insured. When the aforesaid loan of \$14,000 was made, it was agreed between Spencer and Keeler, that the two notes which were put into the hands of the former, should remain as a security for that sum, until a certain arrangement, which was then pending between other parties for a loan of \$50,000, in favour of Keeler and Rogers, should be completed, and then the \$14,000 were to be returned, and the notes given up. And it was also further agreed, that in case the loan of \$50,000 should not be raised, and the house of K. and R. should stop payment, the Hudson Company should hold the notes as security, not only for the \$14,000, but also for any other debts then due, or which might become due from K. and R. to the company. The loan for \$50,000 was not effected; and on the 29th of October, the house of Keeler and Rogers stopped payment. Before this period, however, (to wit, on the 26th of October,) the two notes above mentioned were exchanged by the company for two other notes executed by the same parties; one of which (the note in controversy) was for \$15,000, and the other for \$5000; but at the time of this exchange, nothing was said relative to the terms on which the new note should be held. Subsequently to this, (in the month of June, 1836,) the note for \$15,000 was transferred by Spencer to the Fulton Bank, under circumstances somewhat peculiar, and they instituted this suit thereon against the defendant, (one of the makers,) who set up usury (among other things) as a defence. The judge at the trial (for the purpose of bringing up the question of law) charged the jury, that the note, although it might have been negotiated to the Hudson Com-

pany to secure the payment of pre-existing usurious paper, was not, therefore, usurious in their hands. The jury having found a general verdict for the plaintiffs under this charge, the defendant tendered a bill of exceptions, and upon the argument, it was held, that if on the discounting of the accommodation notes and drafts held by the company on the 29d of October, the premium of six per cent. on life insurance was taken as a cover for exacting more than legal interest on those loans, these notes and drafts were usurious. *Held*, also, that if the note on which the action was founded was made solely for the accommodation of Keeler and Rogers, and was negotiated by them to the Hudson Company as security in whole or in part for such usurious paper, then the note itself was usurious and void. That these were questions of fact, nevertheless, to be submitted to the jury; and however strong the evidence might be, the Court had no right to determine them. A new trial, therefore, was granted upon these points, for the purpose of causing the questions of fact to be determined by a jury. *The Fullon Bank v. Benedict*, 1 Hall, 480.

2. It seems, that the note in question having been given to, or negotiated by a company, which, by its charter, had no banking powers, was void under the restraining act. But if not void by that act, as it was taken by the Hudson Company in a transaction not authorized by their charter, no action could be sustained on it by the company. If the plaintiffs had notice, when they took the note, that it had been negotiated to the Hudson Company contrary to its charter, the illegality of the transaction could be set up against them as a defence. *Ibid*.

See INTEREST.

UTICA INSURANCE COMPANY.

1. The Utica Insurance Company, incorporated by the statute, (sess. 39, ch. 52, p. 47.) may lend money on personal security. *Utica Insurance Company v. Kip*, 8 Cow. 20.

2. The restraining act (2 R. L. 234.) avoids merely the security, not the contract of loan. *Ibid*.

3. The Utica Insurance Company may lend their surplus funds on bond, note, or mortgage. Per *Spencer*, Senator. *Utica Insurance Company v. Scott*, 8 Cow. 709.

VENDOR AND PURCHASER.

1. A transfer of bank stock is valid as between the vendor and vendee, though the act of incorporation provide that no such transfer shall be valid or effectual till registered in a book to be kept by the bank for that purpose, and the debts due from the vendor to the bank, &c., shall be first paid. *Bank of Utica v. Smalley*, 2 Cow. 770.

2. This clause in bank charters is intended merely for the protection of the bank; i. e. to give them a lien on the stockholder for what he

owes the bank, and enable them to ascertain the persons to whom dividends are due. *Ibid*.

3. Till registry, therefore, it seems, they would be protected in a payment of dividends to the person in whose name the stock stands upon the bank books, without regard to any secret transfer. *Ibid*.

4. One who has assigned his stock is a competent witness for the bank having this clause in its charter, without registry, or showing that he has paid, or is not indebted to the bank. *Ibid*.

5. Whatever is sufficient to put a purchaser on inquiry is, in equity, considered as conveying notice. *Hauley v. Cramer*, 4 Cow. 717.

6. Where one enters on land under a contract to purchase, but neglects to pay the consideration money, he, and those claiming under him, are estopped to question the title of the vendor, or his heirs; though more than twenty years have elapsed from the time when the last payment became due; though the vendee and those claiming under him have made permanent and valuable improvements, defended several actions of ejectment, and not been called on by the vendor to pay; and have even acquired title by conveyance from a third person. *Jackson v. Hotchkiss*, 6 Cow. 401.

7. As between vendor and vendee of land, all fixtures pass to the latter, though they were erected by the vendor for the purposes of trade or manufactures. *Miller v. Plumb*, 6 Cow. 665.

8. A balance struck and a promise to pay a sum of money due upon a specialty on a new consideration will sustain an action of *assumpsit*. Thus, where one conveyed land with warranty, and on ejectment against the warrantee, he, at the request of the warrantor, avoided defending, and gave up the possession, and the warrantor struck a balance with him of the consideration money due for the breach of the warranty, and promised to pay it; held, that *assumpsit* lay by the warrantee for the balance so struck. *Miller v. Watson*, 7 Cow. 39.

9. Words used on the sale of personal property, and insisted on by the vendee as amounting to a warranty, should be submitted to the jury, who are to determine whether they were a warranty, especially where the words have no technical meaning. *Duffee v. Mason*, 8 Cow. 95.

10. The criterion is the intention and understanding of the parties. *Ibid*.

11. E. g. where the vendor said on the sale of a colt, he is sound, and will make a fine horse; held, that these words should go to the jury; especially as the vendee had afterwards declared that there were no warranty. *Ibid*.

12. H. sold a church bell to B. and B., with warranty that it should not crack within a year, and that if it did crack within that time he would recast it. It having cracked within the time, held, that he was not liable on his warranty without notice and neglect to recast. *Hills v. Bannister*, 8 Cow. 31.

13. Obtaining goods by a fraudulent purchase, the vendor delivering them with an intent to part with the property of the goods, in no case constitutes a larceny. *Mowry v. Walsh*, 8 Cow. 238.

14. Though one obtains goods by a fraudulent

purchase, void as to himself, yet if he afterwards sells them to a *bona fide* purchaser, without notice of the fraud, the property passed to the latter. *Ibid.*

15. Yet they are not subject to be seized and sold on execution against the fraudulent vendee. *Ibid.*

16. There is no such thing as a market overt in this state. *Ibid.*

17. A vendor of land has a lien upon it for the purchase money while the land remains in the hands of the vendee, unless the circumstances show an intention not to reserve the lien. *Stafford v. Van Benschoten*, 9 Cow. 216.

18. A *bona fide* vendor, believing that he has title, covenanting to convey land, and discovering, before any part of the consideration money is paid, a defect in his title, is not liable but to nominal damages for refusing to convey. *Baldwin v. Allen*, 2 Wend. 399.

19. A vendor of land who has covenanted to convey by a day certain, is not in default until the party who is to receive the conveyance, being entitled thereto, has demanded it, and having waited a reasonable time to have it drawn and executed, has made a second demand. *Connelly v. Pierce*, 7 Wend. 129.

20. A vendor, bound to give a deed by a day certain, must be at the expense of having it drawn, but is not obliged to have it prepared until it is demanded. *Ibid.*

21. Where a bill in Chancery is filed by a creditor to avoid a conveyance of land as fraudulent, and while the suit is pending and in a course of active prosecution, a purchase is made by a third person from the grantee of the alleged fraudulent deed, if the deed sought to be avoided is adjudged fraudulent, the deed of the purchaser is a nullity as to the title established by the pending suit. *Jackson v. Anderson*, 7 Wend. 152.

22. The purchase of land, *pendente lite* concerning it, is champerty; the conveyance is absolutely void, even when the purchase is *bona fide*. *Ibid.*

23. Where a written contract would be valid if made by parol, the time of performance may be enlarged by parol; but this cannot be done where the contract is for the conveyance of land, or is of such a nature that it would not be valid if made by parol. *Blood v. Goodrich*, 9 Wend. 68.

24. A vendee of land to whom a deed is to be executed by a certain day, must make demand of the deed, and after allowing a reasonable time for the draught and execution thereof, must present himself again to receive it; if, however, on the first demand the vendor refuses to execute the deed, a second demand is not necessary. *Ibid.*

25. Where there are several persons jointly bound to execute a deed, and the deed is demanded of one of them and refused, a demand of the others is not necessary; the refusal of one subjects all to an action. *Ibid.*

26. Where a vendee brought an action against a vendor for the nondelivery of a large quantity of wheat which the latter had contracted to sell to the former at a stipulated price, and a recovery had for the full value of the wheat, although but a nominal sum to bind the bargain had been paid, and the vendor subsequently brought his

action to recover the price of the wheat as stipulated in the contract; it was held, that the action would not lie; that the plaintiff ought in the former action to have insisted that he was only liable for the difference between the contract price and the value of the article, and having omitted to do so, he could not now bring a cross suit. *Dey v. Doe*, 9 Wend. 129.

27. Where a vendor, required to give a written indemnity against any claims that might be made upon the property sold, refused to do so, but told the purchaser "that he would see him out with it;" it was held, that these expressions were equivalent to an agreement to indemnify. *Brewster v. Countryman*, 12 Wend. 446.

28. A purchaser who defends in a Justice's Court against a claim upon the property sold to him, is not bound to carry up the cause by appeal, if judgment passes against him. *Ibid.*

29. Where there is a mutual misunderstanding between the vendor and purchaser as to the terms of a sale, neither party is bound by the supposed agreement, there being, in such a case, no assent to the contract. *Mildeberger v. Baldwin and Forbes*, 2 Hall, 176.

30. The plaintiff's factor sold goods to the defendants, to be paid for, as he understood the arrangement, in the note of a third person, payable at a future day, endorsed by the defendants, but as the defendants supposed, by the same note, endorsed without recourse to them. The goods being delivered, the defendants offered the note proposed to the factor, endorsed without recourse, which he refused to receive. The defendants kept the goods, and declined to make payment in any thing but the note thus offered, and thereupon this action was brought to recover the value of the goods. The judge charged the jury, that if there was a mistake between the parties in the first concoction of the contract, the one expecting to receive a note endorsed by the defendants absolutely, and the other to give it without recourse to them, as the defendants, instead of returning the goods, had appropriated them to their own use, they were bound to pay for them. A verdict having been found for the plaintiffs, this charge was held to be correct, and the factor was held to be a competent witness for the plaintiff. *Ibid.*

WAGER.

1. All wagers on the event of an election are illegal and void, though made after the poll of the election is closed, if before the canvass is complete. *Rust v. Gott*, 7 Cow. 169.

2. The state canvass of an election is not conclusive, but may be inquired into by a Court of law on its coming collaterally in question. *Ibid.*

3. On the validity of wagers generally, and bets on elections particularly, and the moral tendency of each, note (a), subjoined to the case. *Ibid.*

4. It would seem, from the reasoning of the principal case, and that referred to and quoted at large in note, that all wagers made on the event of an election before, during, or after

the election, are illegal and voidable, at any time before the money or thing staked is paid over or delivered. *Ibid.*

WASHINGTON AND WARREN BANK.

1. Insolvency and refusal to pay bills, &c., in specie or other lawful money, on demand, &c., are not of themselves, within the act (sess. 40, ch. 185.) incorporating The President, Directors, and Company of the Washington and Warren Bank, a ground for an information in nature of a *quo warranto* or other proceeding, to oust them in their corporate rights. *People v. Washington and Warren Bank*, 6 Cow. 211.

2. To work such forfeiture, there must be a total nonuser. *Per Woodward, J. Ibid.*

3. The statute (sess. 48, ch. 325, sec. 6.) passed April 1, 1825, is prospective in its operation as to the causes of forfeiture, but not exclusively as to the remedy. *Ibid.*

WASTE.

1. Waste implies the idea of detriment to the landlord or reversioner, and in an action of ejectment founded on an alleged forfeiture for waste, it should be left to the jury to determine whether the acts complained of, being done without the permission of the plaintiff, were in fact prejudicial to the plaintiff's property in the premises. *Jackson v. Tibbitts*, 3 Wend. 341.

2. An order to stay waste will be granted after the commencement of an action of ejectment on a proper affidavit. *Bush v. Phillips*, 3 Wend. 428.

3. Whether notice of the application should be given to the defendant? *Quære. Ibid.*

4. An order to stay waste will not be granted without notice to the party to be affected by it, where it is not shown that the party is a trespasser. *Denning v. Corwin et al.* 4 Wend. 208.

5. An order to stay waste will be granted on an *ex parte* application. *People v. Alberty et al.* 11 Wend. 160.

6. An order to stay waste applies only to future commissions of waste. Where, therefore, such an order is granted on the application of a plaintiff in an ejectment suit, brought for the recovery of land, the principal value of which consists in hemlock timber growing upon it, the removal from the premises of hemlock bark, peeled previous to the commencement of the suit, is not a violation of the order. *Ibid.*

7. An action of trespass or trover will not lie for property severed from the realty before ejectment brought, when the land in dispute has been in possession of the defendant, until the plaintiff recovers possession of the land; but in the event of such recovery an action lies. *Ibid.*

8. An order for an attachment obtained *ex parte*, for an alleged violation of an order to stay waste, being taken at the peril of the party, will be vacated if unadvisedly made. *Ibid.*

9. Where the conduct of the plaintiff in obtaining an attachment, which has been set aside

with costs, under which the defendant was imprisoned, appears not to have been oppressive, the Court, in directing the rule to set aside the order granting the attachment and all subsequent proceedings, will order the defendant to enter into a stipulation not to prosecute for false imprisonment. *Ibid.*

10. A defendant arrested on an attachment issued upon an order for that purpose, is entitled to enter into a bond for his appearance at the return of the process. *Ibid.*

11. In an action of waste against a tenant for life or years, it is not necessary to recite or refer to the statute giving the action, either in the summons or declaration; but the plaintiff must allege in the latter a seisin in fee in himself, as well as a demise to the tenant; and the omission to do so is not cured by the verdict. *Carris v. Ingalls*, 12 Wend. 70.

12. In determining the question whether trees appurtenant to a dwelling house are ornamental trees, so as to make it waste in a tenant to cut them down, it is important to ascertain the fact whether they have been considered and treated as ornamental trees by the former owners and proprietors of the premises. *Harvey v. Wolberton*, 5 Paige, 522.

WATER AND WATER RIGHTS.

1. Where one has had the use of water at a given height for twenty years, a grant will be presumed of the privilege of using it at that height, but nothing more. And if he repairs his dam which has kept the water at that height, so as to raise the water still higher, and flow it back upon his neighbour's mill, an action lies, though the dam itself remain at its ancient height. The question is not upon the height of the dam, but of the water. *Stiles v. Hooker*, 7 Cow. 266.

2. It is no defence to an action for flowing back water so as to injure the plaintiff's mill, that his mill was built on a stream which is a public highway, and is therefore a public nuisance. That question lies between the people and the owner. *Ibid.*

3. Twenty years' occupation of the land of another by flowing it with water, affords a presumption of a grant of the use of it in that particular manner, and for the damage sustained thereafter, no action lies; but if after flowing the land of another for ten years by means of a dam of a particular height, the party by a new constructed dam raises the water higher and flows more land than he originally did, although he will be justified after twenty years in flowing the land to the extent originally covered, he will be answerable in damages for the increased quantity overflowed. *Baldwin v. Calkins et al.* 10 Wend. 167.

See HIGHWAYS.

WAY.

1. A license to enter on land is not an interest; it is a mere authority, personal to the

grantee, and revocable at the will of the grantor. *Ex parte Coburn*, 1 Cow. 568.

2. It is not a way which is a real or chattel interest according to its duration. *Ibid.*

3. B. owned an alley, twenty-four feet wide, between two lots, one owned by A., and the other by H. A. built a large brick house on his lot, which extended twelve feet across the alley at one end, and B. built a fence lengthwise of the alley, on a line corresponding with A.'s house, so as to narrow the whole alley one-half or more, which alley, thus narrowed, B. used as a way. Then B. gave a lease in fee to A. of the whole twenty-four feet, describing it as a lot on which A.'s house partly stood, at a rent of \$15, reserving a way though the alley for himself, his teams, carts, &c.; and the lease was declared to be upon condition that A. should leave B. in the unobstructed enjoyment of the way. *Held*, that a continuance of the fence, as B. had himself made it, was not an obstruction of the way, within the words of the condition: that a reasonable way, for the purposes expressed, was all that B. could exact, and that his acts in making the fence, and leasing with the house partly across the alley, were facts from which a jury would be bound to consider the alley, as it was narrowed by the house and fence, the full extent of the way intended by the parties to be reserved; the lessee having a right to reduce all the residue of the alley to his exclusive possession. *Jackson v. Allen*, 3 Cow. 290.

WHARF.

1. The owner of a wharf may distrain for wharfage on any goods on board a vessel which has used his wharf, although the vessel have removed from the wharf. *Nicoll v. Gardner*, 13 Wend. 288.

2. Whether if the vessel be removed, and the property comes to the hands of a *bona fide* purchaser for a valuable consideration previously to the levy by the distress, the owner of the wharf loses his right to distrain? *Quære. Ibid.*

WILL.

I. Witness to a will.

II. Revocation of a will.

III. Construction of a will.

IV. Proof of a will.

I. Witness to a will.

1. One of the subscribing witnesses to a will of lands may prove its execution on a trial at law. *Dan v. Brown*, 4 Cow. 483.

2. And this, though the will be lost, or not produced in Court. *Ibid.*

3. And where a witness to a lost will proved its due attestation by three witnesses, but had forgotten the name of one of them, having no doubt, however, that he was a competent witness; *this was holden sufficient. Ibid.*

II. Revocation of a will.

4. The parol declaration of a deviser will not amount to a revocation of a will of lands; nor can they be received upon a question, unless they relate to the *res gestæ. Ibid.*

5. They are then evidence to show the intent with which the act was done. *Ibid.*

6. To revoke a will by cancellation, this must be done *animo revocandi*. The slightest degree of cancellation, &c., with intent to revoke, will operate as a revocation. *Ibid.*

7. If a will be once duly executed, and once an existing will in the hands of the testator, unless there be evidence of its having been cancelled or otherwise revoked by the testator, the law presumes its continued existence to the time of his death. *Jackson v. Betts*, 9 Cow. 308.

8. Where the execution of a will is established, there must, in order to revoke it, be some outward and visible sign of revocation or cancelling *animo revocandi. Ibid.*

9. If a man let his will stand till his death, it is his will; otherwise, not. It is ambulatory till his death. *Ibid.*

10. A man when he makes his will may disregard the claims of his children, and will his property to a stranger, if he be so disposed. *Ibid.*

11. The situation of any of his children or grandchildren as to property, and the comparative inadequacy or inequality of a provision for them in his will, are inadmissible to show an express or implied revocation. *Ibid.*

12. Where a will was duly executed, and in the custody of the testator for five years afterwards, and within *ten months* previous to his decease, and it appeared that within a fortnight before his death he applied to a scrivener, who had before drawn a codicil to the will, to draw another codicil to the same, which the scrivener however did not do, nor was the will produced to him at the time, which will could not be found after the decease of the testator; *it was held*, that the legal presumption was that the testator had destroyed it *animo revocandi*. This will was made in 1816, and hence is not affected by the revised statutes. *Betts v. Jackson*, 6 Wend. 173.

13. A. B. made a will in 1816, which he altered by a codicil in 1821. Ten months afterwards, he called on the person who had written the codicil for him in 1821, and requested him to draw another codicil to his will, but did not produce the will, nor was the second codicil drawn. The next day he became ill, and in about two weeks died. The will could not be found after his decease. *Held*, that the legal presumption was, that the testator had destroyed the will *animo revocandi. Ibid.*

14. A will duly executed and left in possession of the testator, and not found after his decease, is to be presumed to have been destroyed by him *animo revocandi. Ibid.*

15. Evidence of the relative situation in point of property of the children of the testator, is inadmissible in support of the presumption of a revocation of a will, where there is no change in the circumstances of the children between making the will and the time of the alleged revocation. *Ibid.*

16. The destruction of a will by the direction and in the presence of the testator, or even by his own hand, will not amount to a revocation in judgment of law, unless he had at that time sufficient capacity to understand the nature and effect of the act, and performed it or directed it to be performed freely and voluntarily, with the intent to effect a revocation; and although the instrument is not in being, its contents having been satisfactorily shown, there is no difficulty in establishing it as a will, if it is shown to have been improperly destroyed. *Idley v. Bowen*, 11 Wend. 227.

III. Construction of a will.

17. E. died in September, 1798, having by his last will, dated August 29, 1798, devised lands to his son Joseph in fee; and other lands to his son Medcof in fee; and added, "It is my will, and I do order and appoint that if either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor; and in case of both their deaths, without lawful issue, then I give all the property, &c., to my brother John F., of, &c., and sister Hannah J., of, &c., and their heirs." Joseph, one of the sons, died in August, 1812, without lawful issue, leaving his brother M. surviving, who afterwards died on the 26th of July, 1819, without lawful issue; *held*, that on the death of the testator's son Joseph, the limitation over, which was good as an executory devise, vested in M., the surviving son. *Wilkes v. Lion*, 2 Cow. 333.

18. And per *Sanford*, Chancellor, concurring with the Court below, the devise in his favour, having taken effect, ceased to be executory, and he became seised in fee tail, by necessary implication of law, with a remainder expectant in favour of John H. and Hannah J., the brother and sister of the testator; and by virtue of the statute of the 23d of February, 1786, abolishing estates tail, M. became seised in fee simple absolute of all the estate devised to his brother Joseph. *Ibid*.

19. And per *Cramer*, Senator, the devise to John E. and Hannah J. was originally limited upon too remote a contingency, to wit, an indefinite failure of issue in the two previous devisees. This not being qualified like the devise over to Medcof, by the word survivor, the last devise was void for this reason. *Ibid*.

20. No division of the Court was taken as to the ground upon which they denied operation to the last devise; but they voted generally to affirm the judgment below. *Ibid*.

21. A person holding land by deforcement merely cannot levy a fine so as to affect or bar a stranger to it. *Ibid*.

22. And accordingly, B. having purchased Joseph's interest in his lifetime, and levied a fine thereof; *held*, that this would not bar the right of Medcof. *Ibid*.

23. When the first of several executory devisees vests in possession, those which follow vest in interest at the same time, and ceasing to be executory, become vested remainders, subject to all the incidents of remainders. Per *Sanford*, Chancellor. *Ibid*.

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24. No remainder can exist without a preceding estate to support it. *Ibid*.

25. Whenever a devise of a future interest can take effect as a remainder, it shall be so considered, and not as an executory devise. *Ibid*.

26. Our laws allow the owner of lands to devise them according to his affections or his pleasure. *Ibid*.

27. B. devised his real estate to his four children, in fee, in four separate parcels; and provided that if any of them should die without issue of their body or bodies, lawfully begotten, the share of the deceased should be equally divided between the survivors. Two having died with, and one without issue, leaving one surviving; *held*, that the latter took the whole of the deceased child's share, in exclusion of the grandchildren of the testator. *Jackson v. Thompson*, 6 Cow. 178.

28. Such a limitation is good by way of executory devise. *Ibid*.

29. J., being seised of real estate, devised that if at his death he should have a child living, the rents and profits should be received by his executors, and applied for the support, &c. of the child, the surplus to be invested in stock, to accumulate and be paid over to the child at twenty-one or marriage. He gave all the residue of his real and personal estate, after payment of all legacies and other bequests, to a corporation company, (The Orphan Asylum Society in the city of New York,) the bequest to take effect immediately after debts and legacies paid, if he should leave no child; or if he should leave a child, then upon the child's death, intermarriage, or attaining twenty-one. The will then gave to the executors all his real estate, subject to the trusts aforesaid; and declared his will to be, that when such child should attain twenty-one, or marry, his real estate should be sold by his executors, and one-half of the proceeds paid to the child, if it should attain twenty-one, or marry. The testator died seised, and a posthumous child was born to him, which died before twenty-one, and unmarried; *held*, that the devise to the corporation was direct on the death of the child, and not a trust for the corporation; and so the will was in this respect void as to the real estate within the statute of wills. (See, 36, ch. 23, sec. 1, 1 R. L. 364.) *McCarlee v. Orphans' Asylum Society*, 9 Cow. 437.

30. Otherwise, it seems, had there been a trust; insisted on at large in the dissenting opinion of *Stebbins*, Senator, and supported by *Jones*, Chancellor, *arguendo* for his decree. *Ibid*.

31. The act incorporating the company (sess. 30, ch. 179.) authorized them to take by purchase, (sec. 1.); *held*, that the terra purchase should be taken in its popular, and not in its broadest legal sense, so as to include a devise. *Ibid*.

32. Dissenting view of this question, per *Crary*, Senator. *Ibid*.

33. Where a testator, after devising all his estate, real and personal, to his children, to be taken possession of by them on their severally coming of age, added a clause declaring his will to be, that his wife should hold the whole

estate until his children severally came of age; and that they severally, before they took possession of his estate, should give security according to their several proportions of the estate, for and towards a competent maintenance of his wife during her natural life; *it was held*, that the wife of the testator was entitled to retain possession of the estate, until provision was made for her by her children in the manner directed by the will. *Jackson v. Wight et al.* 3 Wend. 109.

34. Where a testator, in disposing of his property by will, gives three portions of his estate to three of his children in fee, and a fourth portion to a fourth child for life, with remainder to her issue in fee, and then adds a clause in these words: "*Item.* I do further will, order, and direct, that if any of my children named Jacob, Catharine, and Helena, or if the issue of my said daughter Maria should happen to die without lawful issue, that such part of my said estate before devised to such deceased, shall descend to the survivors or survivor of the devisees above named, in equal parts; or in case of the death of any of them leaving lawful issue, to the representative or representatives of such deceased, such share as would have descended to such deceased, in equal parts;" *it was held*, that the estates devised to Catharine and Helena, on their decease, went to the issue of Maria, and not to Maria herself, although a specific devise in fee was made to her, besides the devise for life. *Jackson v. Elmendorf*, 3 Wend. 293.

35. Where a testamentary paper was found in an iron chest among valuable papers of a person deceased without signature, having an attestation clause without witnesses, written by the deceased with his name in the beginning, in a fair hand, engrossed on conveyancing paper, with a seal attached thereto, evincing much deliberation and foresight in its provisions, and disposing of both real and personal property to a large amount according to the common law; and the decedent died in 1827; *it was held*, that the paper was a good will of the personal estate therein mentioned. *Wells et al. v. The Public Administrator*, 4 Wend. 168.

36. A legacy given by a debtor to his creditor will not be deemed a satisfaction of a pre-existing debt, unless it appears to have been the intention of the testator that it should so operate. *Williams v. Crary*, 4 Wend. 443.

37. Parol proof of the intention of the testator may in such cases be resorted to, not to give a construction to the language of the will, but to prove circumstances and presumptions whereon to found inferences or presumptions. *Ibid.*

38. A testator directed that immediately after his decease the sum of \$20,000 should be placed at interest in the name of his infant daughter E. E., and that such interest should be received by the executors or the guardians of the estate of his daughter during her minority; \$500 of the income was to be annually paid to his wife, for the purpose of educating and maintaining such daughter during her minority; unless she should marry before her arrival at full age, in which case the whole of the interest or income was to be paid to her. He also directed the balance of the unappropriated interest to be

invested, and the principal sum and accumulation of the interest thereof should be at the free and absolute disposal of his daughter after she should attain the age of twenty-one. He also directed that if his daughter should die during her minority, leaving lawful issue, such issue should be entitled to that portion of his estate intended for his daughter, provided she should attain the age of twenty-one; but in case his daughter should die during her minority, without leaving lawful issue, then he directed that the said sum of \$20,000, with the accumulations thereto, should be distributed as directed respecting the residue of his estate. On appeal from a decree of Chancery, *it was held*, that the legacy of \$20,000, with the interest thereof, was a vested legacy, and that the limitation over in favour of the residuary legatees was void, as repugnant to the former provisions of the will; and *it was further held*, that if the terms of the will could be considered as conferring only a life interest in E. E., the subsequent limitation over, being upon an indefinite failure of issue, was too remote, and, therefore, void as an executory devise. *Patterson v. Ellis*, 11 Wend. 261.

39. The intention of the testator is always sought for in the construction of wills, and when that intention is ascertained, it will be executed, provided it is consistent with the laws of the land. *Ibid.*

40. Where a gift of the principal is made in a last will and testament, unconnected with the time of payment, as where the sum of \$1000 is given to A., to be paid when he shall attain the age of twenty-one; then the legacy vests, and if the legatee die before the period specified, his representatives are entitled to the money. But if there is no gift, except at the time of payment, as where the legacy is given when the legatee shall attain, or provided he does attain the age of twenty-one, then it does not vest until the time arrives, and if it never arrives the legacy is lapsed. *Ibid.*

41. Where the intention of a testator is unlawful, it is as much the duty of Courts to defeat it, as it is to effectuate it when the intention is lawful. *Ibid.*

42. Previous to the revised statutes of New York, the terms failure of issue, or dying without issue, meant an indefinite failure of issue. Consequently an executory devise limited upon a general failure of issue is void, because limited upon an event which may not happen within the compass of a life or lives in being and twenty-one years and nine months afterwards, a period beyond which an executory devise cannot extend; and as the event may exceed the prescribed limits, it is void at its commencement, let the fact turn out as it may. *Ibid.*

43. The words dying without leaving issue are of the same import as the words dying without issue; in either case they mean an indefinite failure of issue. *Ibid.*

44. If, however, there be any additional clause, word, or circumstance, which clearly and plainly denotes an intention to restrict the dying without issue to the death of the first taker, the technical sense will not be adhered to, but the intention will prevail, as where the

limitation over is to the survivor, to children, to executors, or where the words are, dying without issue in the lifetime of the brother of the first taker, in whose favour the limitation is created. *Ibid.*

45. Where a testator, after expressing in his last will and testament his intent to dispose of all his worldly property, gave to his wife all his estate, real and personal, so long as she should remain his widow, and in case she married again, directed that the one-half of all his lands and tenements should go to an adopted son, and by a subsequent clause gave to the same son, at the decease of his wife, the remaining part of his landed property, and after the death of the testator, his widow married again, and the son entered into possession of the moiety of the lands; *it was held*, that the son acquired a vested remainder in the remaining moiety of the premises. *Chapin et al. v. Marvin*, 12 Wend. 538.

46. Where a party renders services to another with the hope of a legacy, and with the sole reliance upon the testator's generosity, without any contract express or implied that compensation should be provided for him by will, and the party for whom the services were rendered dies without making such a provision, no action lies; but where, from the circumstances of the case, it is manifest that it was understood by both parties that compensation should be made by will, and none be made, an action will lie to recover the value of such services. *Martin v. Wright's Administrators*, 13 Wend. 460.

47. Where an estate was given by will to A., with a limitation over to B., upon condition that C. should by will or otherwise give to A. the one equal moiety, or moiety in value of a certain tract of land; and C. did in fact devise a moiety of such tract to A., but charged the same contingently with the payment of certain annuities and legacies, and absolutely with the payment of one specific annuity; *it was held*, that C. having by his will, independent of the devise to A., created a fund for the payment of annuities and legacies, and it appearing that such fund was amply sufficient for the purpose, that the condition had been performed in substance and effect, and that the estate of A. in the premises first devised had ceased. In relation to the annuity absolutely charged, *it was further held*, that if not included in the annuities and legacies for the payment of which the fund was created, the condition must still be held to have been performed in substance and effect; it appearing that by the will of C., other property, both real and personal, to an amount greatly exceeding what would be sufficient to satisfy such annuity, had been given to A. *Livingston v. Livingston*, 15 Wend. 290.

48. Where a testator devised certain real estate in these words: "Unto the heirs of my son Joel W. deceased, viz., Nathan, William, Henry, and Nehemiah, sons, and Lucinda and Mary, in a proportion of three shares to the sons, and one share to the daughters;" *it was held*, that each son was entitled to take under the will three parts, and each daughter was entitled to one part of the premises devised. *Thompson v. Wheeler*, 15 Wend. 340.

49. A testator by his will, dated April, 1798, devised as follows: "I give and bequeath to my wife Sarah, all my estate, real and personal, during her life: the house and lot No. 37, situate in Mulberry street, to my heirs Maria and Eliza in fee simple for ever: if one of them should die, the property to descend to the other: in case both should die, the property to descend to my wife; only she is to pay my brother, A. G., one shilling, if demanded." *Jackson*, ex dem. *Garfield*, v. *Strang*, 1 Hall, 1.

50. The testator died in 1798, Maria died in her childhood, Eliza married, but died in the lifetime of her mother, without leaving or ever having had any issue, and without making any distribution of her property. The widow shortly after the testator's death married, and had issue, five children, who were her heirs at law; and continued in possession of the premises until her death, in 1827; after her death, A. G., the brother of the testator and his heir at law, brought an action of ejectment, for the recovery of the house and lot described in the writ: *Held*, that he was not entitled to recover. *Ibid.*

51. That the words, "if one of them should die, and in case both should die," should be taken to mean a dying without lawful issue; that the Court were at liberty to supply the words, in order to carry the testator's intention into effect: and that upon the death of the daughters without issue, the whole estate in the house and lot became vested in their mother. *Ibid.*

IV. Proof of a will.

52. To warrant giving parol evidence of a will not shown to be destroyed, it must be first proved that diligent search for it has been made, by, or at the request of the party interested, at the place where it is most likely it would be found, as among the papers of the deviser at his residence, if the will do not appear to have been deposited in any public office. *Dan v. Brown*, 4 Cow. 483.

53. This search may be proved by a party in the cause who made the search, though he be interested; as it is merely addressed to the Court in order to let in secondary proof. *Ibid.*

54. *It seems*, that a mere stranger may file a caveat against the proof of a will; but this act is merely advisory, and he has no power to litigate concerning the will. *Reid v. Vanderheyden*, 5 Cow. 719.

55. Proof by a subscribing witness, that he, with two others, saw executed, and that they witnessed a will of land which he had seen in the surrogate's office, which was identified with the one produced on the trial; though the witness was too dim of sight to see it at the trial. *Held*, sufficient proof of the will on a trial at law. *Jackson v. Thompson*, 6 Cow. 178.

56. A will of lands, with a corresponding possession of forty years under it, need not be proved by the subscribing witness. It is proper evidence as an ancient deed. *Ibid.*

57. One claiming through deeds which recite a will is estopped to question its genuineness. *Ibid.*

58. The declarations of a testator, as to the existence of his will, and the place where it

may be found, are inadmissible in evidence, though made in *articulo mortis*. *Jackson v. Bells*, 6 Cow. 377.

59. A party in a cause (e. g. a lessor in ejectment) is admissible as a witness, to show the loss of a will under which he claims, in order to let in secondary evidence of its contents. *Ibid.*

60. If a subscribing witness to a will show it duly executed, though he has forgotten who one of the witnesses was, this is sufficient proof of the execution. *Ibid.*

61. Diligent search for a will at the last place of abode of the testator, in a desk where he usually kept his papers, and failure to find his will there; *held*, a sufficient ground for letting in parol proof of its contents, though he died abroad. *Ibid.*

62. In ejectment, the plaintiff claimed under a will which could not be found. He proved that the testator made a will several years before his death, and deposited it with M. for safe keeping. The testator afterwards took it back, for the avowed purpose of adding a codicil, which he did about the 7th of July, 1829. On the first day of March, 1832, his daughter saw a paper in his desk drawer, which she had no doubt was his will. Between that day and his going a journey to visit his son, which was in the April next following, she saw him take some papers from the desk and burn them; but did not know, and could not say they resemble the will. She saw him also several times engaged at the desk in arranging his papers, a bundle of which he placed in his trunk. She perused the paper but partially and hastily, &c. She was, however, satisfied that it was her father's will, and stated several circumstances calculated to identify it with the will and codicil proved to have been executed; and she stated other circumstances which had a contrary tendency. The testator died in May, 1832. The judge at the trial, deeming it necessary to show the existence of the will subsequent to the execution of the codicil, and that this was not satisfactorily done by the daughter's testimony, nonsuited the plaintiff. *Held*, (without deciding whether the judge was correct in holding it necessary to show the existence of the will at any time after adding the codicil,) that there was sufficient evidence upon this point to go to the jury; and that it should have been submitted to them, as well upon this question as that of revocation; that the plaintiff, therefore, should not have been nonsuited. *Ibid.*

63. Proof that a testator, after having made his will, took certain papers out of his desk where he kept all his valuable papers, and burnt the papers taken out, without showing that the will was among them, is not sufficient evidence to go to the jury, upon the question of revocation, even in connexion with the fact that the will could not be found at the testator's death. Nor should counsel be allowed to urge these matters to the jury as evidence from which they may infer a revocation. *Ibid.* 9 Cow. 208.

64. To warrant the proof by parol of a lost will, not shown to be destroyed by parol, it must be shown that diligent search was made

for it at the place where it is most likely to be found; as in the desk where the testator usually kept his most valuable papers. *Ibid.*

65. Proof of search for, or loss of a paper, to warrant secondary evidence of its contents, may be made by the oath of a party in the case, though he be interested. *Ibid.*

66. In the proof of a will, a written petition to take the proof is not necessary. *In the matter of Lawrence*, 2 Wend. 297.

67. Written affidavits of the interest of the parties and of the service of notice on them may be received. *Ibid.*

68. Where a witness testified that he was called upon to witness the execution of a will, that the testator signed it in the presence of herself, her husband, and a third person, that she and her husband witnessed it, but that she did not recollect that the other person signed it as a witness; *it was held*, in the case of a lost will thirty-six years old, that the evidence was competent to submit to the jury, and that it would authorize the finding of the due execution of the will. *Featherly et al. v. Waggoner*, 11 Wend. 599.

69. Where the existence, due execution, and loss of a will are proved, its contents may be shown by parol; and the proof of the loss, being addressed to the Court, need not be as strict and technical as when submitted to a jury. *Ibid.*

70. Where executors prove the will and a codicil thereto, and undertake the execution of the same, they cannot afterwards object that the codicil was not properly executed. *Pritchard v. Hicks*, 42 N. H. 1 Paige, 279.

WITNESS.

1. Any attempt by a witness to influence a jury in any other way than by the open delivery of his testimony is improper, and in judgment of law corrupt. *Gibbs v. Dewey*, 5 Cow. 503.

2. The Circuit Court may grant an attachment, and bring a witness before them to testify, after he has disobeyed a subpoena. *The People v. Vermilyea*, 7 Cow. 108.

3. A witness may in Court inspect memoranda to refresh his memory, provided that after so doing he distinctly recollects the facts to which he is called to testify, independent of the memoranda or documents examined by him. *Fetter v. Heath*, 11 Wend. 478.

4. An exception to the whole of the testimony of a witness is unavailing when a part of such testimony is unexceptionable. *Reese v. Bull*, 12 Wend. 504.

5. A witness is entitled to take a reasonable time to travel to Court according to the usual modes of public conveyance, without being required to travel on the Sabbath, but he is not entitled to time at the rate of thirty miles per day. *Wilkie v. Chadwick*, 13 Wend. 49.

6. In an action against a witness for the penalty given by statute for nonattendance, the venue is local, and must be laid in the county in which the subpoena has been served. *Ibid.*

WRIT.

1. Proceedings in a writ of right; the writ; return; the right and mode of amending; *præcipe* for appearance; count and manner of counting; special imparlance and minutes of the Court. *Malcom v. Roger*, 1 Cow. 1.

2. The appearance for the purpose of objecting to the return of a writ is not a waiver of the defect. *Ibid.*

3. In a writ of right, on an *alias* summons returned served, the demandant appears on the first day of term. His appearance being entered, the tenant has till the *quarto die post* to appear. He then appears; the demandant counts; and the tenant has a special imparlance to the next term. *Malcom v. Gardner*, 1 Cow. 137.

4. When the tenant may be called; and how he is to put the demandant out of Court. 1 Cow. 9; note (f).

5. Of amendment in a writ of right. *Ibid.* Note (j).

6. *Præcipe* for appearance. 1 Cow. 10; note (i).

7. Declaration in a writ of right. 1 Cow. 11; note (m).

8. Entry of special imparlance. 1 Cow. 12; note (n).

9. Proceedings in an English writ of right, referred to in Holt's N. P. Rep. 657 to 675. 1 Cow. 137, 8; note (b).

10. The sheriff having erred upon the merits in executing a writ of inquiry, under the third section of the act to prevent delays of executions, &c., (1 R. L. 143.) the inquisition was set aside on motion. *Jackson v. Hathbone*, 3 Cow. 296.

11. But the Court refused to appoint elisors to execute the writ; though it appeared that both the sheriff and coroner were members of a corporation which was interested in, and had defended another cause, at the suit of the plaintiff in the writ of inquiry, that depended upon the same questions as those upon which the suit in which the writ issued were determined. *Ibid.*

12. It seems, that upon such a writ of inquiry, the plaintiff is entitled to recover nominal damages, at all events; and that an inquest which finds for the defendant will be set aside on that ground alone. *Ibid.*

13. On judgment for plaintiff in ejectment, the sheriff and coroner being members of a corporation which claimed to own the premises in question, and had demised them to the defendant, and defended the action at their own expense through their tenant, the Court appointed

elisors to execute the writ of possession. *Jackson v. Chew*, 3 Cow. 298.

14. The sheriff sells land on execution in favour of K. against S., having at the same time some executions on older, and some on younger judgments, against the same defendant, which are paid, excepting the fees. He may retain his fees upon those executions which are on judgments older than K.'s, but not so as to those which are younger. *Knickerbacker v. Shipherd*, 3 Cow. 383.

15. Record in a writ of right, from the end of the count, to demurrer and joinder inclusive, upon a plea in abatement of nonjoinder of demandants. *Malcolm v. Rogers*, 5 Cow. 188; note (b).

16. A plaintiff who is a constable may serve a summons in his own favour, issued by a justice of the peace; and his return cannot be impeached in an action of trespass for an arrest under an execution, issued on a judgment rendered on the return of such summons. *Putnam v. Man*, 3 Wend. 203.

17. A writ of right cannot be sustained by a devisee upon the seisin of his testator; accordingly, a count by a devisee, claiming the premises upon the seisin of the deviser, was adjudged bad on demurrer. *Williams v. Woodard*, 7 Wend. 250.

18. Leave to amend was given on the usual terms. *Ibid.*

19. A writ of prohibition will not be allowed when the subject-matter is within the jurisdiction of the subordinate tribunal; if error intervenes, the remedy is by *certiorari*. *The People v. Seward*, 7 Wend. 518.

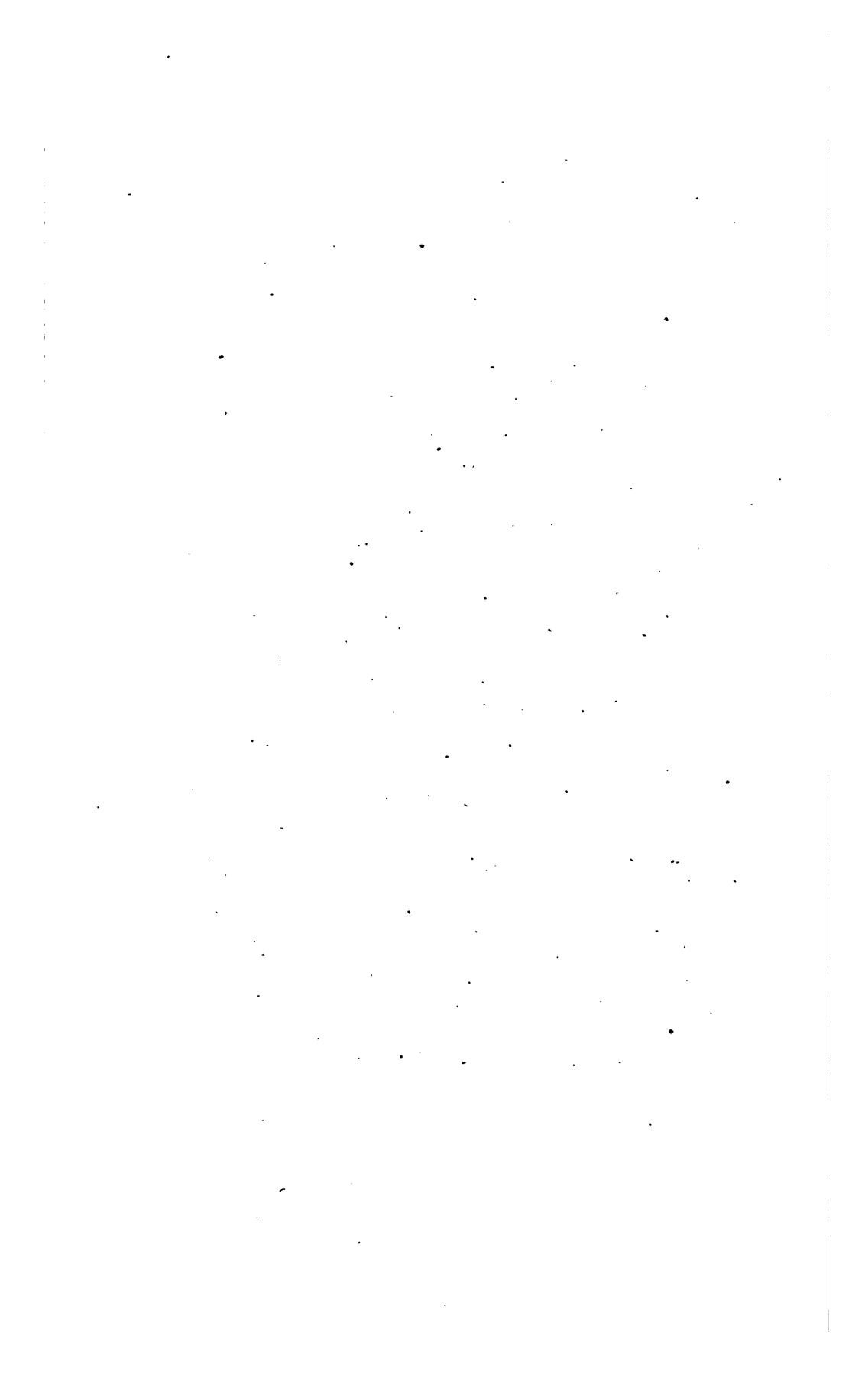
20. The suing out of a writ of error does not excuse the officer to whom the execution is issued from proceeding, unless bail is duly put in. *The People v. Allen*, 9 Wend. 224.

21. An order to hold to bail need not be endorsed on the writ; it is enough if the authority to hold to bail exists, and is in the possession or under the control of the officer. *Carler v. Drake*, 10 Wend. 618.

22. Where a plaintiff in error has been irregular in the prosecution of his writ, as, for instance, omitting to give notice of bail in due time, and it is manifest that the writ was not sued out within the two years, the Court will dismiss the writ on motion, and will not drive the defendant in error to his plea of the statute of limitations. *Fleet v. Youngs*, 11 Wend. 522.

23. The omission of the addition of junior to the name of the defendant in the writ of error is no cause for quashing the writ, where there is any other *descriptio persone* by which the real party can be ascertained. *Ibid.*

See ACTIONS, REAL. ERROR. PRACTICE, I.



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